MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

February 1, 2022 through July 26, 2022

KATHRYN L. LOOMIS
REPORTER OF DECISIONS

VOL. 509
FIRST EDITION

Thomson Reuters™

2024

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
BRIDGET M. McCORMACK	2029
Justices	
BRIAN K. ZAHRA	2023
DAVID F. VIVIANO	2025
RICHARD H. BERNSTEIN	2023
ELIZABETH T. CLEMENT	2027
MEGAN K. CAVANAGH	2027
ELIZABETH M. WELCH	2029

Commissioners

DANIEL C. BRUBAKER, Chief Commissioner

TIMOTHY J. RAUBINGER	REGINA T. DELMASTRO
SHARI M. OBERG	CHRISTOPHER M. THOMPSON
DEBRA A. GUTIERREZ-McGUIRE	CHRISTOPHER M. SMITH
MICHAEL S. WELLMAN	JONATHAN S. LUDWIG
GARY L. ROGERS	LIZA C. MOORE
STACI STODDARD	KAREN A. KOSTBADE
MARK E. PLAZA	CHERYL L. NOWAK

State Court Administrator
THOMAS P. BOYD

Clerk: LARRY S. ROYSTER
Reporter of Decisions: KATHRYN L. LOOMIS
Crier: JEFFREY A. MILLS

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
ELIZABETH L. GLEICHER	2025
Chief Judge Pro Tem	
MICHAEL F. GADOLA	2023
Judges	
DAVID SAWYER	2023
MARK J. CAVANAGH	2027
KATHLEEN JANSEN	2025
JANE E. MARKEY	2027
KIRSTEN FRANK KELLY	2025
CHRISTOPHER M. MURRAY	2027
STEPHEN L. BORRELLO	2025
DEBORAH A. SERVITTO	2025
ELIZABETH L. GLEICHER	2025
CYNTHIA DIANE STEPHENS	2023[1]
MICHAEL J. KELLY	2027
DOUGLAS B. SHAPIRO	2025
AMY RONAYNE KRAUSE	2027
MARK T. BOONSTRA	2027
MICHAEL J. RIORDAN	2025
MICHAEL F. GADOLA	2023
COLLEEN A. O'BRIEN	2023
BROCK A. SWARTZLE	2023
THOMAS C. CAMERON	2023
ANICA LETICA	2027
JAMES R. REDFORD	2023
MICHELLE M. RICK	2027
SIMA G. PATEL	2027[2]
NOAH P. HOOD	2027[3]
KRISTINA ROBINSON GARRETT	2029[4]
CHRISTOPHER P. YATES	2025[5]

Chief Clerk: JEROME W. ZIMMER, Jr.

Research Director: JULIE ISOLA RUECKE

[1] To March 31, 2022.

[2] From February 28, 2022.

[3] From March 7, 2022.

[4] From April 4, 2022.

[5] From April 18, 2022.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	SARA S. LISZNYAI	2027
2.	DONNA B. HOWARD	2023
	CHARLES T. LaSATA	2023
	ANGELA PASULA	2025
	JENNIFER L. SMITH	2027
3.	YVONNA C. ABRAHAM	2023
	DAVID J. ALLEN	2027
	CHANDRA W. BAKER	2027
	MARIAM BAZZI	2027
	ANNETTE J. BERRY	2025
	GREGORY D. BILL	2025
	CHRISTOPHER MICHAEL BLOUNT	2023[1]
	KAREN Y. BRAXTON	2025
	JEROME C. CAVANAGH	2025
	ERIC WILLIAM CHOLACK	2023
	JAMES R. CHYLINSKI	2023
	KEVIN J. COX	2025
	MELISSA ANNE COX	2023
	PAUL JOHN CUSICK	2025
	SUSAN A. DABAJA	2023[2]
	CHRISTOPHER D. DINGELL	2027
	PRENTIS EDWARDS, Jr.	2025
	CHARLENE M. ELDER	2027
	WANDA EVANS	2023
	EDWARD EWELL, Jr.	2025
	HELAL A. FARHAT	2027
	PATRICIA SUSAN FRESARD	2023
	SHEILA ANN GIBSON	2023
	JOHN H. GILLIS, Jr.	2027
	ALEXIS GLENDENING	2023
	TRACY E. GREEN	2025
	DAVID ALAN GRONER	2023
	ADEL A. HARB	2025
	BRIDGET MARY HATHAWAY	2025
	DANA MARGARET HATHAWAY	2025
	THOMAS M.J. HATHAWAY	2023
	CHARLES S. HEGARTY	2025
	CATHERINE HEISE	2025

[1] From April 18, 2022.

[2] From April 18, 2022.

		Term Expires January 1 of
	NOAH P. HOOD	2027[3]
	SUSAN L. HUBBARD	2023
	MURIEL D. HUGHES	2023
	EDWARD JOSEPH	2027
	MARY BETH KELLY	2027
	TIMOTHY M. KENNY	2023
	DONALD KNAPP	2027
	QIANA D. LILLARD	2025
	KATHLEEN M. McCARTHY	2025
	CYLENTHIA LaTOYE MILLER	2027
	JOHN A. MURPHY	2023
	LYNNE A. PIERCE	2027
	KELLY RAMSEY	2023
	MARK T. SLAVENS	2023
	LESLIE KIM SMITH	2025
	MARTHA M. SNOW	2023
	BRIAN R. SULLIVAN	2023
	LAWRENCE S. TALON	2027[4]
	CARLA TESTANI	2027
	DEBORAH A. THOMAS	2025
	REGINA DANIELS THOMAS	2025
	MARGARET M. VAN HOUTEN	2027
	SHANNON N. WALKER	2027
	DARNELLA DENISE WILLIAMS-CLAYBOURN	2023
4.	SUSAN BEEBE JORDAN	2023
	RICHARD N. LaFLAMME	2023
	JOHN G. McBAIN, JR.	2027
	THOMAS D. WILSON	2025
5.	VICKY ALSPAUGH	2027
6.	MARTHA ANDERSON	2027
	MARY ELLEN BRENNAN	2027
	RAE LEE CHABOT	2023
	DAVID M. COHEN	2023[5]
	JACOB JAMES CUNNINGHAM	2025
	KAMESHIA D. GANT	2025
	LISA ORTLIEB GORCYCA	2027
	NANCI J. GRANT	2027

[3] To March 4, 2022.

[4] To April 15, 2022.

[5] From February 28, 2022.

		Term Expires January 1 of
	MAUREEN H. KINSELLA	2025[6]
	DENISE LANGFORD-MORRIS	2025[7]
	LISA LANGTON	2023
	JEFFREY S. MATIS	2027
	CHERYL A. MATTHEWS	2023
	JULIE A. McDONALD	2025
	PHYLLIS C. McMILLEN	2025
	DANIEL PATRICK O'BRIEN	2023
	YASMINE ISSHAK POLES	2023
	KWAME' LeROY ROWE	2025
	LORIE N. SAVIN	2027
	VICTORIA ANN VALENTINE	2023
	MICHAEL D. WARREN, Jr.	2025
7.	DUNCAN M. BEAGLE	2023
	CELESTE D. BELL	2025
	B. CHRIS CHRISTENSON	2027
	JOSEPH J. FARAH	2023
	JOHN A. GADOLA	2027
	ELIZABETH ANNE KELLY	2025
	MARK W. LATCHANA	2027
	DAVID J. NEWBLATT	2023
	BRIAN S. PICKELL	2025
8.	SUZANNE KREEGER	2027
	RONALD J. SCHAFER	2023
9.	PAUL J. BRIDENSTINE	2025
	GARY C. GIGUERE, Jr.	2027
	STEPHEN D. GORSALITZ	2023
	PAMELA L. LIGHTVOET	2025
	ALEXANDER C. LIPSEY	2023
10.	JANET M. BOES	2025
	JAMES T. BORCHARD	2023
	ANDRÉ R. BORRELLO	2023
	DARNELL JACKSON	2025
	MANVEL TRICE, III	2027
11.	BRIAN DANIEL RAHILLY	2027
12.	CHARLES R. GOODMAN	2027
13.	KEVIN A. ELSENHEIMER	2027
	THOMAS G. POWER	2023
14.	KATHY L. HOOGSTRA	2027

[6] From May 19, 2022.

[7] To April 15, 2022.

		Term Expires January 1 of
	KENNETH S. HOOPES	2023[8]
	WILLIAM C. MARIETTI	2023
	ANNETTE ROSE SMEDLEY	2025
15.	P. WILLIAM O'GRADY	2027
16.	JAMES M. BIERNAT, Jr.	2025
	RICHARD L. CARETTI	2023
	TERI L. DENNINGS	2025
	DIANE M. DRUZINSKI	2027
	JENNIFER FAUNCE	2025
	JULIE GATTI	2027
	JAMES M. MACERONI	2027
	CARL J. MARLINGA	2023[9]
	RACHEL RANCILIO	2023
	MATTHEW P. SABAUGH.	2023[10]
	EDWARD A. SERVITTO, Jr.	2025
	MICHAEL E. SERVITTO	2023
	MATTHEW S. SWITALSKI	2027
	JOSEPH TOIA	2027
	KATHRYN A. VIVIANO	2023
	TRACEY A. YOKICH	2025
17.	CURT A. BENSON	2025
	PAUL J. DENENFELD	2023
	CHRISTINA ELMORE	2025
	KATHLEEN A. FEENEY	2027
	MAUREEN GOTTLIEB	2027
	DEBORAH McNABB	2023
	SCOTT A. NOTO	2027
	GEORGE JAY QUIST	2023
	J. JOSEPH ROSSI	2023
	MARK A. TRUSOCK	2025
	CHRISTOPHER P. YATES	2025[11]
18.	HARRY P. GILL	2023
	JOSEPH K. SHEERAN	2027
19.	DAVID A. THOMPSON	2027
20.	KENT D. ENGLE	2023
	JON H. HULSING	2027
	KAREN J. MIEDEMA	2023

[8] From March 7, 2022.

[9] To February 25, 2022.

[10] From April 13, 2022.

[11] To April 15, 2022.

		Term Expires January 1 of
	JON VAN ALLSBURG	2025
21.	MARK H. DUTHIE	2025
	SARA SPENCER-NOGGLE	2023
22.	ARCHIE CAMERON BROWN	2023
	PATRICK J. CONLIN, JR.	2027
	TIMOTHY P. CONNORS	2025
	CAROL A. KUHNKE	2025
	TRACY ELISABETH VAN DEN BERGH	2027
23.	DAVID C. RIFFEL	2023
24.	TIMOTHY C. WRATHELL	2027
25.	JENNIFER A. MAZZUCHI	2027
26.	KEITH EDWARD BLACK	2027
27.	ROBERT D. SPRINGSTEAD	2025
28.	JASON J. ELMORE	2027
29.	CORI E. BARKMAN	2023
	SHANNON L.W. SCHLEGEL	2027
30.	ROSEMARIE E. AQUILINA	2027
	CLINTON CANADY, III	2023
	JOYCE DRAGANCHUK	2023
	JAMES S. JAMO	2025
	CAROLYN N. KOENIG	2027
	LISA K. MCCORMICK	2025
	WANDA M. STOKES	2027
31.	DANIEL A. DAMMAN	2027
	CYNTHIA A. LANE	2023
	MICHAEL L. WEST	2025
32.	MICHAEL K. POPE	2027
33.	ROY C. HAYES, III	2027
34.	ROBERT BENNETT	2023
35.	MATTHEW J. STEWART	2027
36.	KATHLEEN M. BRICKLEY	2025
	JEFFREY J. DUFON	2027
37.	JOHN A. HALLACY	2025
	TINA YOST JOHNSON	2023
	BRIAN KIRKHAM	2023
	SARAH SOULES LINCOLN	2027
38.	MARK S. BRAUNLICH	2025
	WILLIAM PAUL NICHOLS	2023[12]
	MICHAEL A. WEIPERT	2023[13]
	DANIEL S. WHITE	2027

[12] From April 18, 2022.

[13] To March 3, 2022.

		Term Expires January 1 of
39.	ANNA MARIE ANZALONE	2025
	MICHAEL R. OLSAVER	2027
40.	MICHAEL D. HODGES	2027
	NICK O. HOLOWKA	2023
41.	MARY BROUILLETTE BARGLIND	2023
	CHRISTOPHER S. NINOMIYA	2027
42.	MICHAEL J. BEALE	2027
	STEPHEN P. CARRAS	2025
43.	MARK A. HERMAN	2023
44.	L. SUZANNE GEDDIS	2027
	MICHAEL P. HATTY	2025
	MATTHEW J. McGIVNEY	2023
45.	PAUL E. STUTESMAN	2025
46.	COLIN G. HUNTER	2023
	GEORGE J. MERTZ	2027
47.	JOHN B. ECONOMOPOULOS	2023
48.	MARGARET ZUZICH BAKKER	2023
	ROBERTS KENGIS	2027
49.	KIMBERLY L. BOOHER	2027
	SCOTT P. HILL-KENNEDY	2025[14]
50.	JAMES P. LAMBROS	2025
51.	SUSAN K. SNIEGOWSKI	2027
52.	GERALD M. PRILL	2027
53.	AARON J. GAUTHIER	2027
54.	AMY G. GIERHART	2025
55.	THOMAS R. EVANS	2027[15]
	ROY G. MIENK	2025
56.	JANICE K. CUNNINGHAM	2025
	JOHN DOUGLAS MAURER	2027
57.	JENNIFER E. DEEGAN	2025

[14] To June 10, 2022.

[15] To May 2, 2022.

DISTRICT JUDGES

		Term Expires January 1 of
1.	MICHAEL C. BROWN	2027
	WILLIAM PAUL NICHOLS	2025[1]
	JACK VITALE	2023
2A.	TODD M. MORGAN	2023[2]
	LAURA J. SCHAEDLER	2023
2B.	MEGAN STIVERSON	2027
3A.	BRENT R. WEIGLE	2027
3B.	JEFFREY C. MIDDLETON	2027
	ROBERT PATTISON	2025
4.	STACEY A. RENTFROW	2027
5.	GARY J. BRUCE	2023
	ARTHUR J. COTTER	2027
	GORDON GARY HOSBEIN	2027
	STERLING R. SCHROCK	2025
	DENNIS M. WILEY	2023
7.	ARTHUR H. CLARKE, III	2027
	MICHAEL T. McKAY	2023
8.	CHRISTOPHER T. HAENICKE	2025
	KATHLEEN P. HEMINGWAY	2027
	ALISA L. PARKER-LaGRONE	2025
	RICHARD A. SANTONI	2027
	NAMITA SHARMA	2027
	VINCENT C. WESTRA	2023
10.	PAUL K. BEARDSLEE	2027
	JASON C. BOMIA	2023
	MICHELLE L. RICHARDSON	2027
	TRACIE L. TOMAK	2025
12.	ALLISON BATES	2027
	ROBERT K. GAECKE, Jr	2023[3]
	DANIEL GOOSTREY	2025
	MICHAEL J. KLAEREN	2027
14A.	ANNA M. FRUSHOUR	2027
	J. CEDRIC SIMPSON	2025
	KIRK W. TABBEY	2023
14B.	ERANE C. WASHINGTON	2027
15.	JOSEPH F. BURKE	2025
	MIRIAM A. PERRY	2023
	KAREN Q. VALVO	2027
16.	SEAN P. KAVANAGH	2027
	KATHLEEN J. McCANN	2025

[1] To April 15, 2022.

[2] From April 11, 2022.

[3] From April 11, 2022.

		Term Expires January 1 of
17.	KRISTA LICATA HAROUTUNIAN	2027
	KAREN S. KHALIL	2023
18.	SANDRA A. FERENCE CICIRELLI	2025
	MARK A. McCONNELL	2027
19.	L. EUGENE HUNT, Jr.	2023
	SAM A. SALAMEY	2025
	MARK W. SOMERS	2027
20.	MARK J. PLAWECKI	2027
	DAVID TURFE	2025
21.	RICHARD L. HAMMER, Jr.	2027
22.	SABRINA L. JOHNSON	2025
23.	VICTORIA IRENE SHACKELFORD	2023
	JOSEPH D. SLAVEN	2027
24.	JOHN T. COURTRIGHT	2027
	RICHARD A. PAGE	2023
25.	GREGORY A. CLIFTON	2027
	DAVID J. ZELENAK	2023
27.	ELIZABETH L. DiSANTO	2025
28.	ELISABETH MIMI MULLINS	2027
29.	BREEDA K. O'LEARY	2025
30.	BRIGETTE OFFICER HOLLEY	2023
31.	ALEXIS G. KROT	2027
32A.	REBEKAH RUTH COLEMAN	2027
33.	JENNIFER COLEMAN HESSON	2023
	MICHAEL K. McNALLY	2025
34.	TINA BROOKS GREEN	2025
	LISA MARIE ROBINSON MARTIN	2027
	BRIAN A. OAKLEY	2023
35.	MICHAEL J. GEROU	2023
	RONALD W. LOWE	2025
	JAMES A. PLAKAS	2027
36.	LYDIA NANCE ADAMS	2023
	ROBERTA C. ARCHER	2025
	CHRISTOPHER MICHAEL BLOUNT	2025[4]
	DEMETRIA BRUE	2027
	ESTHER LYNISE BRYANT	2027
	DONALD COLEMAN	2025
	KAHLILIA YVETTE DAVIS	2023
	RAEIGEN L. EVANS	2023[5]
	DEBORAH GERALDINE FORD	2023
	RUTH ANN GARRETT	2025
	KRISTINA ROBINSON GARRETT	2023[6]

[4] To April 15, 2022.

[5] From April 18, 2022.

[6] To April 3, 2022.

		Term Expires January 1 of
	AUSTIN WILLIAM GARRETT	2023
	RONALD GILES	2027
	ADRIENNE HINNANT-JOHNSON	2027
	SHANNON A. HOLMES	2027
	PATRICIA L. JEFFERSON	2027
	KENYETTA STANFORD JONES	2023
	ALICIA A. JONES-COLEMAN	2025
	KENNETH J. KING	2027
	JACQUELYN A. McCLINTON	2023
	WILLIAM C. McCONICO	2025
	DONNA R. MILHOUSE	2025
	SEAN B. PERKINS	2023
	KEVIN F. ROBBINS	2025
	DAVID S. ROBINSON, Jr.	2025
	ALIYAH SABREE	2025
	MILLICENT D. SHERMAN	2027
	MARLENA E. TAYLOR	2025
	MICHAEL E. WAGNER	2027
	LARRY D. WILLIAMS, Jr.	2023
37.	JOHN M. CHMURA	2025
	MICHAEL CHUPA	2027
	SUZANNE M. FAUNCE	2023
	MATTHEW P. SABAUGH	2025[7]
38.	KATHLEEN G. GALEN	2027
39.	JOSEPH F. BOEDEKER	2027
	ALYIA MARIE HAKIM	2023
	KATHLEEN E. TOCCO	2025
40.	MARK A. FRATARCANGELI	2025
	JOSEPH CRAIGEN OSTER	2027
41A.	ANNEMARIE M. LEPORE	2027
	DOUGLAS P. SHEPHERD	2025
	STEPHEN S. SIERAWSKI	2023
	KIMBERLEY A. WIEGAND	2025
41B.	JACOB M. FEMMININEO, Jr.	2027
	CARRIE LYNN FUCA	2023
	SEBASTIAN LUCIDO	2025
42-1.	JENNIFER ANDARY	2027
42-2.	WILLIAM H. HACKEL, III	2025
43.	BRIAN C. HARTWELL	2027
	KEITH P. HUNT	2025
	JOSEPH LONGO	2023
44.	DEREK W. MEINECKE	2025
	JAMES L. WITTENBERG	2023

[7] To April 12, 2022.

		Term Expires January 1 of
45.	MICHELLE FRIEDMAN APPEL	2023
	JAIMIE POWELL HOROWITZ	2027
46.	CYNTHIA ARVANT	2023
	SHEILA R. JOHNSON	2027
	DEBRA NANCE	2025
47.	JAMES B. BRADY	2027
	MARLA E. PARKER	2023
48.	MARC BARRON	2023
	DIANE D'AGOSTINI	2025
	KIMBERLY F. SMALL	2027
50.	RONDA FOWLKES GROSS	2025
	MICHAEL C. MARTINEZ	2027
	CYNTHIA THOMAS WALKER	2027
51.	TODD A. FOX	2025
	RICHARD D. KUHN, JR.	2027
52-1.	ROBERT BONDY	2025
	THOMAS DAVID LAW	2023
	TRAVIS REEDS	2027
52-2.	JOSEPH G. FABRIZIO	2027
	KELLEY RENAE KOSTIN	2023
52-3.	LISA L. ASADOORIAN	2025
	NANCY TOLWIN CARNIAK	2023
	JULIE A. NICHOLSON	2027
52-4.	KIRSTEN NIELSEN HARTIG	2023
	MAUREEN M. MCGINNIS	2027
53.	DANIEL B. BAIN	2027
	SHAUNA MURPHY	2023
54A.	STACIA J. BUCHANAN	2027
	MICHAEL ANTHONY FLORES	2023[8]
	KRISTEN D. SIMMONS	2023
	CYNTHIA M. WARD	2025
54B.	RICHARD D. BALL	2023
	MOLLY HENNESSEY GREENWALT	2025
55.	DONALD L. ALLEN	2023
	RICHARD L. HILLMAN	2027
56A.	KELLY E. MORTON	2027
	JULIE O'NEILL	2023
56B.	MICHAEL LEE SCHIPPER	2025
57.	WILLIAM A. BAILLARGEON	2025
	JOSEPH S. SKOCELAS	2027
58.	JUANITA F. BOCANEGRA	2027
	CRAIG E. BUNCE	2025
	BRADLEY S. KNOLL	2027
	JUDITH K. MULDER	2023
59.	PETER P. VERSLUIS	2023
60.	MARIA LADAS HOOPES	2027

[8] From April 18, 2022.

		Term Expires January 1 of
	RAYMOND J. KOSTRZEWA JR.	2025
	PAULA BAKER MATHES	2027
	GEOFFREY THOMAS NOLAN	2023
61.	NICHOLAS S. AYOUB	2023
	DAVID J. BUTER	2027[9]
	MICHAEL J. DISTEL	2025
	JENNIFER FABER	2023
	JEANINE NEMESI LAVILLE	2025
	ANGELA T. ROSS	2023[10]
	KIMBERLY A. SCHAEFER	2027
62A.	PABLO CORTES	2027
	STEVEN M. TIMMERS	2025
62B.	AMANDA J. STERKENBURG	2027
63.	JEFFREY J. O'HARA	2027
	SARA J. SMOLENSKI	2027
64A.	RAYMOND P. VOET	2027
64B.	ADAM EGGLESTON	2027
65A.	MICHAEL E. CLARIZIO	2027
65B.	STEWART D. MCDONALD	2027
66.	WARD L. CLARKSON	2025
67-1.	DAVID J. GOGGINS	2027
67-2.	JESSICA J. HAMMON	2023
	JENNIFER J. MANLEY	2027
67-3.	VIKKI BAYEH HALEY	2027
67-4.	MARK C. MCCABE	2027
	CHRISTOPHER R. ODETTE	2025
67-5.	WILLIAM H. CRAWFORD, II	2025
	G. DAVID GUINN	2027
	HERMAN MARABLE, JR.	2025
	TABITHA M. MARSH	2027
70-1.	TERRY L. CLARK	2025
	M. RANDALL JURRENS	2023
70-2.	ELIAN FICHTNER	2027
	ALFRED T. FRANK	2027
	DAVID D. HOFFMAN	2025
71A.	LAURA CHEGER BARNARD	2027
71B.	JASON ERIC BITZER	2027
72.	MONA S. ARMSTRONG	2027
	MICHAEL L. HULEWICZ	2023
	JOHN D. MONAGHAN	2025
74.	MARK E. JANER	2023
	TIMOTHY J. KELLY	2025
	DAWN A. KLIDA	2027
75.	MICHAEL CARPENTER	2027

[9] To April 1, 2022.

[10] From April 18, 2022.

		Term Expires January 1 of
76.	ERIC R. JANES	2027
77.	PETER M. JAKLEVIC	2027
78.	H. KEVIN DRAKE	2027
79.	JOHN DAVID MIDDLEBROOK	2027
80.	JOSHUA M. FARRELL	2027
82.	TROY B. DANIEL	2023[11]
84.	AUDREY D. Van ALST	2027
86.	ROBERT A. COONEY	2025
	MICHAEL S. STEPKA	2023
89.	MARIA I. BARTON	2027
90.	ANGELA LASHER	2027
92.	BETH A. GIBSON	2027
94.	STEVE PARKS	2027
95A.	ROBERT J. JAMO	2027
95B.	JULIE A. LaCOST	2027
96.	ROGER W. KANGAS	2027
	KARL WEBER	2023
97.	NICHOLAS J. DAAVETTILA	2027

[11] From April 11, 2022.

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2024
CARL F. JARBOE	2026
THEODORE A. METRY	2024
CHARLES T. BERSCHBACK	2026

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2025
Alger/Schoolcraft	CHARLES C. NEBEL	2025
Allegan	MICHAEL L. BUCK	2025
Alpena	ALAN MICHAEL CURTIS	2023
Antrim	NORMAN R. HAYES	2025
Arenac	RICHARD E. VOLLBACH, Jr.	2025
Baraga	TIMOTHY S. BRENNAN	2025
Barry	WILLIAM M. DOHERTY	2025
Bay	JAN A. MINER	2025
Benzie	JOHN D. MEAD	2025
Berrien	BRIAN BERGER	2025
Berrien	MABEL JOHNSON MAYFIELD	2027
Branch	KIRK A. KASHIAN	2025
Calhoun	MICHAEL L. JACONETTE	2023
Cass	CAROL M. BEALOR	2025
Cheboygan	DARYL P. VIZINA	2025
Chippewa	ERIC BLUBAUGH	2027
Clare/Gladwin	MARCY A. KLAUS	2025
Clinton	LISA SULLIVAN	2025
Crawford	MONTE J. BURMEISTER	2025
Delta	PERRY R. LUND	2025
Dickinson	THOMAS D. SLAGLE	2025
Eaton	THOMAS K. BYERLEY	2025
Emmet/Charlevoix	VALERIE K. SNYDER	2025
Genesee	JENNIE E. BARKEY	2027
Genesee	F. KAY BEHM	2025
Gogebic	ANNA ROSE TALASKA	2025
Grand Traverse	JENNIFER L. WHITTEN	2023[1]
Gratiot	KRISTIN M. BAKKER	2025
Hillsdale	MICHELLE SNELL BIANCHI	2025
Houghton	FRASER T. STROME	2025
Huron	DAVID L. CLABUESCH	2025[2]
Huron	DAVID B. HERRINGTON	2027
Ingham	SHAUNA DUNNINGS	2025
Ingham	RICHARD J. GARCIA	2027
Ionia	ROBERT S. SYKES, Jr.	2025
Iosco	CHRISTOPHER P. MARTIN	2025
Iron	DONALD S. POWELL	2025

[1] From March 7, 2022.

[2] To May 20, 2022.

County		Term Expires January 1 of
Isabella	STUART BLACK	2025
Jackson	DIANE M. RAPPLEYE	2025
Kalamazoo	TIFFANY ANKLEY	2027
Kalamazoo	CURTIS J. BELL	2025
Kalamazoo	G. SCOTT PIERANGELI	2023
Kalkaska	LYNNE M. BUDAY	2025
Kent	TERENCE ACKERT	2023
Kent	PATRICIA D. GARDNER	2025
Kent	G. PATRICK HILLARY	2025
Kent	DAVID M. MURKOWSKI	2027
Keweenaw	KEITH WAREN DEFORGE	2025
Lake	MARK S. WICKENS	2025
Lapeer	JUSTUS C. SCOTT	2025
Leelanau	MARIAN F. KROMKOWSKI	2025
Lenawee	CATHERINE ANN SALA	2025
Livingston	MIRIAM A. CAVANAUGH	2025
Luce/Mackinac	W. CLAYTON GRAHAM	2025
Macomb	SARA ANN SCHIMKE	2023[3]
Macomb	SANDRA A. HARRISON	2025
Manistee	THOMAS N. BRUNNER	2025
Marquette	CHERYL L. HILL	2025
Mason	JEFFREY C. NELLIS	2025
Mecosta/Osceola	TYLER O. THOMPSON	2025
Menominee	DANIEL E. HASS	2025
Midland	DORENE S. ALLEN	2025
Missaukee	MELISSA J. RANSOM	2025
Monroe	FRANK L. ARNOLD	2027
Monroe	CHERYL E. LOHMEYER	2025
Montcalm	CHARLES W. SIMON, III	2025
Montmorency	LORA E. GREENE	2025
Muskegon	GREGORY C. PITTMAN	2025
Muskegon	BRENDA E. SPRADER	2023
Newaygo	MELISSA K. DYKMAN	2025
Oakland	JENNIFER S. CALLAGHAN	2023
Oakland	LINDA S. HALLMARK	2025
Oakland	DANIEL A. O'BRIEN	2027
Oakland	KATHLEEN A. RYAN	2023
Oceana	BRADLEY G. LAMBRIX	2025
Ogemaw	SCOTT M. WILLIAMS	2023
Ontonagon	JANIS M. BURGESS	2025
Oscoda	CASSANDRA L. MORSE-BILLS	2025

[3] From April 11, 2022.

County		Term Expires January 1 of
Otsego	MICHAEL K. COOPER	2025
Ottawa	MARK A. FEYEN	2025
Presque Isle	ERIK J. STONE	2025
Roscommon	MARK JERNIGAN	2025
Saginaw	PATRICK J. McGRAW	2025
Saginaw	BARBARA L. METER	2027
St. Clair	ELWOOD L. BROWN	2027
St. Clair	JOHN D. TOMLINSON	2025
St. Joseph	DAVID C. TOMLINSON	2025
Sanilac	GREGORY S. ROSS	2027
Shiawassee	THOMAS J. DIGNAN	2025
Tuscola	NANCY THANE	2025
Van Buren	DAVID DiSTEFANO	2025
Washtenaw	DARLENE A. O'BRIEN	2025
Washtenaw	JULIA OWDZIEJ	2027
Wayne	DAVID BRAXTON	2027
Wayne	FREDDIE G. BURTON, Jr.	2025
Wayne	JUDY A. HARTSFIELD	2027
Wayne	TERRANCE A. KEITH	2027
Wayne	LISA MARIE NEILSON	2023[4]
Wayne	LAWRENCE PAOLUCCI	2023
Wayne	DAVID PERKINS	2025
Wayne	FRANK S. SZYMANSKI	2025
Wexford	EDWARD VAN ALST	2025

[4] To May 3, 2022.

JUDICIAL CIRCUITS

County	Seat	Circuit
Alcona	Harrisville	23
Alger	Munising	11
Allegan	Allegan	48
Alpena	Alpena	26
Antrim	Bellaire	13
Arenac	Standish	23
Baraga	L'Anse	12
Barry	Hastings	5
Bay	Bay City	18
Benzie	Beulah	19
Berrien	St. Joseph	2
Branch	Coldwater	15
Calhoun	Marshall, Battle Creek	37
Cass	Cassopolis	43
Charlevoix	Charlevoix	33
Cheboygan	Cheboygan	53
Chippewa	Sault Ste. Marie	50
Clare	Harrison	55
Clinton	St. Johns	29
Crawford	Grayling	46
Delta	Escanaba	47
Dickinson	Iron Mountain	41
Eaton	Charlotte	56
Emmet	Petoskey	57
Genesee	Flint	7
Gladwin	Gladwin	55
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	52
Ingham	Mason, Lansing	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	46
Kent	Grand Rapids	17
Keweenaw	Eagle River	12
Lake	Baldwin	51
Lapeer	Lapeer	40
Leelanau	Suttons Bay	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	11
Macomb	Mount Clemens	16
Manistee	Manistee	19
Marquette	Marquette	25
Mason	Ludington	51
Mecosta	Big Rapids	49
Menominee	Menominee	41
Midland	Midland	42
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
Montmorency	Atlanta	26
Muskegon	Muskegon	14
Newaygo	White Cloud	27
Oakland	Pontiac	6
Oceana	Hart	27
Ogemaw	West Branch	34
Ontonagon	Ontonagon	32
Osceola	Reed City	49
Oscoda	Mio	23
Otsego	Gaylord	46
Ottawa	Grand Haven	20
Presque Isle	Rogers City	53
Roscommon	Roscommon	34
Saginaw	Saginaw	10
St. Clair	Port Huron	31
St. Joseph	Centreville	45
Sanilac	Sandusky	24
Schoolcraft	Manistique	11
Shiawassee	Corunna	35
Tuscola	Caro	54
Van Buren	Paw Paw	36
Washtenaw	Ann Arbor	22
Wayne	Detroit	3
Wexford	Cadillac	28

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Amended Administrative Orders

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RULES RETAINED

AMENDED ADMINISTRATIVE ORDER No. 1997-10

AMENDMENT OF ADMINISTRATIVE ORDER NO. 1997-10

Entered March 16, 2022, effective July 1, 2022 (File No. 2021-33)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Administrative Order No. 1997-10 is adopted, effective July 1, 2022.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Administrative Order No. 1997-10 — Access to Judicial Branch Administrative Information.

(A) [Unchanged.]

(B) Access to Information Regarding Supreme Court Administrative, Financial, and Employee Records.

(1)-(9) [Unchanged.]

(10) Employee records are not open to public access, except for a list of employees that includes the position title, salary, and general benefits information. The list must not include a name, initials, electronic mail address, Social Security number, phone number, residential address, or other information that could be

used to identify an employee or an employee's beneficiary. This information shall be available on the Court's website at no cost.~~the following information:~~

~~(a) The full name of the employee.~~

~~(b) The date of employment.~~

~~(c) The current and previous job titles and descriptions within the judicial branch, and effective dates of employment for previous employment within the judicial branch.~~

~~(d) The name, location, and telephone number of the court or agency of the employee.~~

~~(e) The name of the employee's current supervisor.~~

~~(f) Any information authorized by the employee to be released to the public or to a named individual, unless otherwise prohibited by law.~~

~~(g) The current salary of the employee. A request for salary information pursuant to this order must be in writing. The individual who provides the information must immediately notify the employee that a request for salary information has been made, and that the information has been provided.~~

(11) [Unchanged.]

Staff Comment: The amendment of Administrative Order No. 1997-10 clarifies which information about jobs within the judiciary would be available to the public.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

AMENDED ADMINISTRATIVE ORDER No. 2022-1

COMMISSION ON DIVERSITY, EQUITY, AND INCLUSION IN THE MICHIGAN JUDICIARY

Entered May 12, 2022, effective immediately (File No. 2021-38)— REPORTER.

On order of the Court, the following amendment of Administrative Order No. 2022-1 is adopted, effective immediately.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Administrative Order No. 2022-1 — Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary.

In January 2021, the Michigan Supreme Court and the State Court Administrative Office created a Diversity, Equity, and Inclusion Committee with the initial goal of exploring issues related to the demographics of the workforce that support our judiciary and training within the judicial branches. The Committee's work grew to include exploration of other topics that impact our communities. On October 1, 2021, the Committee presented a report to the Supreme Court that included a recommendation that the Court create an ongoing interdisciplinary Commission to continue and build on the work that has been done to date. Therefore, on

order of the Court, the Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary is created, effective immediately.

I.-III. [Unchanged.]

IV. Commission Membership

A. Membership shall be comprised of 25~~24~~ members from the following groups:

1.-4. [Unchanged.]

5. One member each, recommended by the following:

a.-g. [Unchanged.]

h. The Michigan Tribal State Federal Judicial Forum.

6. [Unchanged.]

B.-D. [Unchanged.]

V.-VIII. [Unchanged.]

ADMINISTRATIVE ORDER No. 2022-3

INCREASE IN ATTORNEY DUES FOR THE STATE BAR OF MICHIGAN OPERATIONS AND THE ATTORNEY DISCIPLINE SYSTEM

Entered June 8, 2022, effective October 1, 2022 (File Nos. 2021-26 and 2021-42)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, Administrative Order No. 2022-3 is adopted, effective October 1, 2022.

Administrative Order No. 2022-3 — Increase in Attorney Dues for State Bar of Michigan Operations and the Attorney Discipline System.

Under Rule 4 of the Rules Concerning the State Bar of Michigan, dues for active members of the State Bar of Michigan are "to be set by the Supreme Court to fund: (1) the Attorney Grievance Commission and the Attorney Discipline Board, (2) the client security fund administered by the State Bar, and (3) other State Bar expenses." The State Bar of Michigan Representative Assembly and the Attorney Discipline System (comprising the Attorney Grievance Commission and the

Attorney Discipline Board) have submitted requests for dues increases for the fiscal year beginning October 1, 2022.

In light of the fact that the State Bar has not had a dues increase since 2003, and to continue the valuable services and resources the Bar provides for its members, the Court hereby establishes the State Bar portion of annual bar dues at $260, an increase of $80. In addition, the Court establishes the ADS portion of annual bar dues at $140, an increase of $20. Dues for the client protection fund remain at the level of $15 per year.

This change will be reflected in the dues notice for the 2022-23 fiscal year that is distributed to all bar members under Rule 4 of the Rules Concerning the State Bar.

Staff Comment: This administrative order increases the State Bar's dues for most members by $100 for a total of $415 per year.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

WELCH, J. (*concurring*). I write to explain my reasons for supporting the State Bar of Michigan (SBM) dues increase approved by this Court. While Justice VIVIANO's statement posits that the lack of a dues increase for 18 years supports the notion of a more gradual increase, that result would punish the SBM for being an excellent steward of its resources. I suspect it is a rarity that a membership organization has maintained the same dues level for 18 years. The SBM provides excellent resources for its members. These include free access to online research, an ethics hotline, a lawyer referral service, and the Lawyers & Judges Assistance Program. The SBM is continually exploring new offerings to benefit its membership and the public. And, like all

organizations, the SBM is affected by inflationary pressure and increased overall costs to provide necessary services to its member attorneys. Although Justice VIVIANO suggests that today's dues increase will be burdensome for solo practitioners and attorneys at small firms, many solo and small-firm attorneys testified during our public hearing about the benefit the SBM provides them, making repeated reference to the online journal, ethics hotline, and the lawyer referral program. While larger firms have in-house resources to support their attorneys, solo attorneys and small firms can rely upon the SBM to assist them with ethics concerns. The SBM has historically used a long-term budgeting process. In keeping with this practice, the SBM projects that this increase will allow it to sustain current programming and plan for future programming through at least fiscal year 2030–2031. It also bears noting that this dues increase will not bring Michigan out of step with other state bar dues rates. According to data from the American Bar Association's 2021 State and Local Bar Benchmarks Survey, Michigan was ranked thirty-first among the 50 states and Washington, D.C., for licensing costs. This dues increase would bring Michigan to the twenty-first slot, still within the middle tier nationwide, with this ranking expected to fall as other states raise their own bar dues. For these reasons, I join the majority in supporting the approved increase in dues.

ZAHRA, J. (*concurring in part and dissenting in part*). I agree with the $20 increase in the portion of bar dues dedicated to the Attorney Discipline System, but I do not believe that the Court should increase the portion of the dues dedicated to the State Bar of Michigan by $80 at this time. Given the current state of the economy, including the high inflation rates, I would increase the State Bar's dues for the 2022-2023 fiscal

year by only $50, which is the amount required for it to maintain its existent operational expenses. I would subsequently increase the State Bar's dues by $10 for each of the next three years, reaching the requested $80 dues increase by the 2025-2026 fiscal year. This more gradual increase in dues should be sufficient to adequately fund the State Bar, while partially easing the sting of the significant dues increase for its members.

VIVIANO, J. (*concurring in part and dissenting in part*). The Court today increases the annual bar dues that Michigan attorneys must pay by $100, a 32% increase. I agree with the $20 increase dedicated to the Attorney Discipline System, but I believe the $80 increase for the portion of dues dedicated to the State Bar of Michigan (SBM) is too high. Because bar dues have not been increased for many years, I believe a modest increase in bar dues is appropriate. But I would not impose such a dramatic increase in the current economic climate, when historically high inflation rates are affecting every household and business.[1] The increase will be particularly burdensome on solo practitioners and other attorneys who pay their own bar dues—as opposed to those who are fortunate enough to have their bar dues paid by their employers.[2] The SBM performs many important functions, some of which are

[1] See Smialek, *Consumer Prices Are Still Climbing Rapidly*, New York Times (May 11, 2022) <https://www.nytimes.com/2022/05/11/business/economy/april-2022-cpi.html> (accessed June 1, 2022) [https://perma.cc/D58U-QVL6].

[2] The number of solo practitioners and firms with limited resources is not insignificant. As of 2021, just over 32% of active SBM members who reside in Michigan were either solo practitioners or working in a small firm (defined as 2 to 10 attorneys). State Bar of Michigan, *State & County Demographics: 2021-2022*, p 8 <https://www.michbar.org/file/opinions/statewidedemographics2021.pdf> (accessed May 27, 2022).

mandatory (i.e., required by statute or court rule) and some of which are discretionary. It undoubtedly needs sufficient funding to perform the tasks assigned to it. But I would require it to do more belt-tightening before increasing its dues by the full amount it has requested.

ADMINISTRATIVE ORDER

APPOINTMENTS TO THE COMMISSION ON DIVERSITY, EQUITY, AND INCLUSION IN THE MICHIGAN JUDICIARY

Entered June 16, 2022, effective immediately (File No. 2022-01)—REPORTER.

On order of the Court, pursuant to Administrative Order No. 2022-1, the following individuals are appointed to the Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary, effective immediately.

Executive Members:

Justice Elizabeth Welch (Supreme Court Justice/Co-Chair)
Judge Cynthia Stephens (Ret.) (Co-Chair)
Elizabeth Rios (SCA Designee)
Peter Cunningham (SBM Director)
Jennifer Bentley (MSBF Director)

For terms ending December 31, 2023:

Josh Hilgart (Michigan State Planning Body)
J. Dee Brooks (Prosecuting Attorneys Association of Michigan)
Erika Bryant (State Bar of Michigan Board of Commissioners)

Zenell Brown (Michigan Court Administrators Association)
Jacqueline Freeman (Michigan ABA-Accredited Law School)
Angie Martell (Affinity Bar Association)
Belem Morales (Affinity Bar Association)

For terms ending December 31, 2024:

Nicole Huddleston (Justice for All Commission)
Chief Judge Kenneth Akini (Michigan Tribal State-Federal Judicial Forum)
Judge Kathleen Brickley (Michigan Judges Association)
Judge Juanita Bocanegra (Michigan District Judges Association)
Michelle Crockett (Affinity Bar Association)
Syeda Davidson (Affinity Bar Association)
Alanna Lahey (Community Member)

For terms ending December 31, 2025:

Judge Kristina Robinson Garrett (Michigan Indigent Defense Commission)
Robyn Afrik (Michigan Association of Counties)
Judge Austin Garrett (Association of Black Judges of Michigan)
Judge Sima Patel (Court of Appeals)
Judge Shauna Dunnings (Michigan Probate Judges Association)
Louisa Wills (Community Member)
Siham Awada Jaafar (Community Member)

VIVIANO, J. (*dissenting*). I continue to object to the creation of the Commission on Diversity, Equity, and Inclusion for the reasons I previously stated. See Administrative Order No. 2022-1, 508 Mich civ (January 5, 2022) (VIVIANO, J., dissenting). While I have no

objection to the individuals appointed to the Commission (indeed, they all appear to be well-intentioned and I appreciate their willingness to serve), it is difficult to assess the merits of their applications because, as I noted before, this Court has not defined the key terms "diversity," "equity," and "inclusion." Without such definitions to establish the Commission's purview, I do not know how to determine whether the applicants are qualified for the task before them. The applicants, in their written submissions, have put forward starkly different views of the Commission's role and purposes. Some have emphasized the need to remove obstacles to full participation in our courts, to create equal opportunity for all, and to cultivate a broad-based diversity of views and experiences. Others, by contrast, have suggested that inveterate prejudice runs through society and that reeducation is necessary to extirpate hidden but omnipresent biases. The first vision represents the promise of our ideals and founding documents, while the second, I fear, will only foster division and perpetuate the very problems it purports to solve. Until we have more clarity regarding the aims of the Commission, I cannot support it. Accordingly, I dissent.

MICHIGAN RULE CHANGES

Adopted February 2, 2022, effective May 1, 2022 (File No. 2018-25) —REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.312 of the Michigan Court Rules is adopted, effective May 1, 2022.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.312. BRIEFS AND APPENDIXES IN CALENDAR CASES AND CASES ARGUED ON THE APPLICATION.

(A) Form and Length. Briefs in calendar cases and cases to be argued on the application must be prepared in conformity with MCR 7.212(B), (C), (D), and (G) as to form and length. If filed in hard copy, ~~B~~briefs shall be printed on only the front side of the page of good quality, white unglazed paper by any printing, duplicating, or copying process that provides a clear image. Typewritten, handwritten, or carbon copy pages may be used so long as the printing is legible.

(B)-(D) [Unchanged.]

(E) Time for Filing. Unless the Court directs a different time for filing,

(1) the appellant's brief and appendixes, if any, are due

(a) within 56 days ~~after~~of the order granting the application for leave to appeal ~~is granted~~;, or

(b) within 42 days of the order directing the clerk to schedule oral argument on the application;

(2) the appellee's brief and appendixes, if any, are due

(a) within 35 days after the appellant's brief is served on the appellee in a calendar case, or

(b) within 21 days after the appellant's brief is served on the appellee in a case being argued on the application; and

(3) the reply brief is due

(a) within 21 days after the appellee's brief is served on the appellant in a calendar case, or

(b) within 14 days after the appellee's brief is served on the appellant in a case being argued on the application.

(F) [Unchanged.]

(G) Cross-Appeal Briefs. The filing and service of cross-appeal briefs are governed by subrule (F). An appellee/cross-appellant may file a combined brief for the primary appeal and the cross-appeal within 35 days after service of the appellant's brief in the primary appeal for both calendar cases and cases being argued on the application. An appellant/cross-appellee may file a combined reply brief for the primary appeal and a responsive brief for the cross-appeal within 35 days after service of the cross-appellant's brief for both calendar cases and cases being argued on the application. A reply to the cross-appeal may be filed within 21 days after service of the responsive brief in a calendar

case and within 14 days after service of the responsive brief in a case being argued on the application.

(H) Amicus Curiae Briefs and Argument.

(1) An amicus curiae brief may be filed only on motion granted by the Court except as provided in subsection (2) or as directed by the Court.

(2) A motion for leave to file an amicus curiae brief (in both calendar cases and cases being argued on the application) is not required if the brief is presented by the Attorney General on behalf of the people of the state of Michigan, the state of Michigan, or an agency or official of the state of Michigan; on behalf of any political subdivision of the state when submitted by its authorized legal officer, its authorized agent, or an association representing a political subdivision; or on behalf of the Prosecuting Attorneys Association of Michigan or the Criminal Defense Attorneys of Michigan.

(3) An amicus curiae brief must conform to subrules (A), (B), (C) and (F), and,

(4) Unless the Court directs a different time for filing, an amicus brief must be filed

(a) within 21 days after the brief of the appellee has been filed or the time for filing such brief has expired in a calendar case, or

(b) within 14 days after the brief of the appellee has been filed or the time for filing such brief has expired in a case being argued on the application, ~~or at any other time the Court directs~~.

(4)-(5) [Renumbered (5)-(6) but otherwise unchanged.]

(I)-(J) [Unchanged.]

(K) For cases argued on the application, parties should focus their argument on the merits of the case, and not just on whether the Court should grant leave.

Staff Comment: The amendment of MCR 7.312 incorporates into the Supreme Court rules the procedure to be followed for cases being argued on the application. These rules have been previously included in orders granting argument on the application. A new subrule (K) alerts parties to the fact that they should argue the merits of the case even for motions being heard on the application.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

MCCORMACK, C.J. (*concurring*). I concur in the order amending MCR 7.312 to incorporate our "mini oral argument on the application" (MOAA) process into the court rules. I write separately to explain why I believe retaining the MOAA procedure improves our administration of justice.

The Court first adopted the MOAA process in 2003, and we have greatly increased its use in recent years. Despite that fact, until today we had not amended our court rules to provide uniform timelines for filing briefs in MOAAs; rather, the Court set such timelines in individual MOAA orders. Today's amendments simplify that process.

The MOAA procedure serves an important purpose independent of granting leave to appeal—it allows the Court to hear oral argument in more cases, including cases that might not otherwise receive closer attention. Or to hear oral argument in a case where the Court of Appeals' decision appears erroneous, but is not so clearly erroneous as to warrant peremptory reversal. It thus broadens the scope of the Court's docket in a way that the grant leave/take peremptory action/deny leave framework did not allow.

I believe the MOAA procedure has served this Court well and will continue to do so in the future. Others think so too. After we published this proposal for public comment, the Court received positive feedback about the MOAA procedure. For example, the State Appellate Defender Office, which represents indigent criminal defendants in their appeals regularly in this Court, had this to say:

> An extraordinary number of leave applications the Court receives are from criminal appellants. Having a simpler, less time-consuming avenue of review available gives those parties—most of whom are incarcerated and poor—a better chance at having their cases examined at a level beyond the commissioners' reports or the Court's weekly conferences than the all-or-nothing scenario that previously existed. It gives the Court greater flexibility to order peremptory and more discre[te] forms of relief in individual cases, despite that the Court is not an error-correcting body. And it provides counsel better and more opportunities to educate and enlighten the justices regarding recurring problems and trends within the system. On balance, the Court, the parties, and the system have benefited from the MOAA procedure.

I respectfully disagree with Justice VIVIANO's view that the MOAA process has "diminished" or "devalued" oral argument. In recent years, we have limited most full grants to 20 minutes of argument per side, rather than the traditional 30. Thus, the grant and MOAA processes effectively now allow for roughly the same amount of argument. And we have lots of company in limiting oral arguments to less than 30 minutes. See, e.g., Supreme Court of Ohio, *Jurisdiction & Authority* <https://www.supremecourt.ohio.gov/SCO/jurisdiction/> (accessed January 27, 2022) [https://perma.cc/JY37-A6LF] (providing for 15 minutes of oral argument per side except in death penalty cases); Texas Judicial Branch, *Supreme Court Oral Arguments*

<https://www.txcourts.gov/supreme/oral-arguments/> (accessed January 27, 2022) [https://perma.cc/AA2X-4QMV] (providing for 20 minutes of oral argument per side); Florida Supreme Court, *A Visitor Guide to Oral Argument* <https://www.floridasupremecourt.org/Oral-Arguments/Visitor-Guide-to-Oral-Arguments> (accessed January 27, 2022) [https://perma.cc/N6AK-BFPA] (same). Some courts offer even less. See, e.g., State of Nebraska Judicial Branch, *Supreme Court Call* <https://supremecourt.nebraska.gov/courts/supreme-court/call> (accessed January 27, 2022) [https://perma.cc/6WES-PDMX] (providing for 10 minutes of oral argument per side). I know of no evidence that our sister courts' processes are diminished or their advocates frustrated by their shorter oral argument times.[1]

Finally, that other state supreme courts don't have a MOAA process isn't a reason to assume it is a vice rather than a virtue. Merit isn't measured by popularity. I believe that our MOAA procedure, while not without its imperfections, has proven to be a helpful tool in this Court's administration of justice. For these reasons, I am pleased to concur with the Court's amendment of MCR 7.312.

VIVIANO, J. (*dissenting*). When we published for comment the present changes to MCR 7.312, I suggested that the time had come to reconsider hearing cases argued on the application, or "mini oral argu-

[1] Moreover, our court rules allow for the Chief Justice to extend the time for oral argument. MCR 7.314(B)(2). And arguments frequently stretch beyond the time allotted when the Court believes additional time is needed to fully engage all the issues presented. For just one recent example, see Michigan Supreme Court, Oral Arguments in *Detroit Caucus v Independent Citizens Redistricting Comm*, <https://www.youtube.com/watch?v=HwG2A9ajayU&t=58s> (accessed January 27, 2022).

ments on the application" (MOAAs).[1] After receiving thoughtful comments on this topic, I now conclude that we should eliminate our MOAA procedure and return to the traditional practice of either granting or denying leave to appeal and occasionally resolving cases on a peremptory basis.

As I explained in my earlier statement, the MOAA procedure began in 2003 as a way to expand our consideration of cases. The four justices supporting the procedure envisioned it as a supplementary process that would not detract from our ability to hear and decide cases in which we granted leave to appeal.[2] But this prediction has not turned out to be true—at least not in recent years. Beginning in our 2014–2015 term, the number of cases in which we have granted leave to appeal has plunged, and starting with our 2015–2016 term, we began to hear many more cases as MOAAs than grants. In the 2016–2017 term, for example, we heard 41 MOAAs as compared to 17 grants. The following term, it was 53 MOAAs to 17 grants. The gap has remained about the same since that time.[3]

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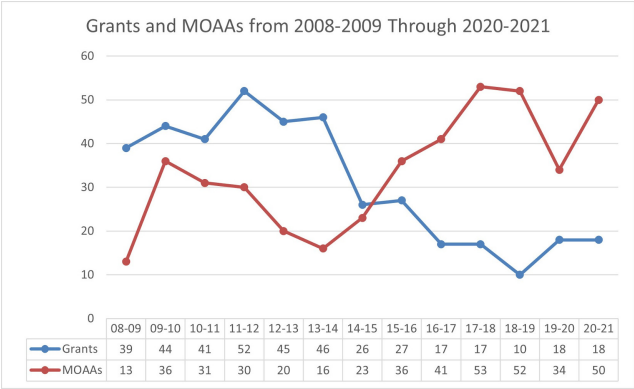
[1] Proposed Amendment of MCR 7.312, 503 Mich 1303, 1305 (VIVIANO, J., concurring).

[2] MCR 7.302, 469 Mich cxlv, cxlvi (MARKMAN, J., concurring) (predicting that allowing oral argument on the application would "not come at the expense of fuller oral argument, but as an alternative to no oral argument at all").

[3] In the 2018–2019 term, there were 52 MOAAs and 10 grants; in the 2019–2020 term, there were 34 MOAAs and 18 grants; and in the 2020–2021 term, we heard 50 MOAAs and 18 grants. Thus, during the past five terms, we averaged 46 MOAAs and 16 grants per term. By comparison, during the five terms before that, we averaged 25 MOAAs and slightly over 39 grants per term.



	08-09	09-10	10-11	11-12	12-13	13-14	14-15	15-16	16-17	17-18	18-19	19-20	20-21
Grants	39	44	41	52	45	46	26	27	17	17	10	18	18
MOAAs	13	36	31	30	20	16	23	36	41	53	52	34	50

The results have not been good. One of the most significant problems is that we end up denying leave in a substantial portion of cases heard on MOAAs. A MOAA "give[s] the Court the option of disposing of a case after arguments without a decision on the merits by simply denying leave, instead of our traditional practice following a grant of leave to appeal, i.e., entry of an order vacating the grant order and denying leave . . . ."[4] As Timothy Baughman, one of the commenters on the present proposal, noted, vacating a grant order on the ground that leave was improvidently granted (LIG) "is essentially viewed as an error in case selection, absent some change in circumstances that causes the LIG." Perhaps because of the perception that a LIG amounts to an admission of error, the prospect of a LIG is generally viewed as less appealing than a simple denial. But our LIG orders do not say that leave was improvidently granted—as noted, we simply vacate the order granting leave and then deny

[4] Proposed Amendment of MCR 7.312, 503 Mich at 1306 (VIVIANO, J., concurring).

the application. Consequently, the results and even the labels are the same in cases denying leave after MOAAs and initial grants.

Nonetheless, the apparent belief that MOAAs offer an easier exit ramp has unfortunate side effects. It decreases the cost of poor case selection and thereby diminishes the incentive for our Court to be more careful in our initial case selection. This creates a feedback loop in which the ease of denying leave after oral argument leads to us investing more time on cases that will eventually result in denials (and, consequently, less time on those that do not). It should come as no surprise that we deny leave in MOAAs much more frequently than we LIG in grant cases.[5] And as we have heard more cases as MOAAs and denied leave in many of them, our opinion output has plummeted.[6]

A related issue is the predicament MOAAs cause for practitioners. For one thing, there has been some understandable confusion about whether the briefing in MOAA cases should focus on the substantive merits of the case or on convincing the Court to hear the case

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[5] In my last statement, I noted that "by one account, the Court has issued denials in 50 of the 150 MOAAs it has considered during the past five terms." *Id*. at 1306 n 6. In the 2018–2019 term, we denied leave in 17 of the 52 MOAAs and did not issue LIGs in any of the 10 grant cases. In our 2019–2020 term, we denied leave in 10 of the 34 MOAAs, and we issued LIGs in 2 of the 18 grants. Last term, in 2020–2021, we denied leave in 12 of 50 MOAAs and issued one LIG in our 18 grants.

[6] In the 1960s, we issued 194 opinions per year; in the 1980s, we issued 99 opinions per year. Boyle, *Michigan Supreme Court: Are We Dancing as Fast as We Can?*, 74 Mich B J 24, 27-28 (1995). As Mr. Baughman observes, over roughly the past decade, we have averaged 36 opinions per term. Although there are also other reasons for the diminishing output, see *id*. at 28, the MOAA procedure undoubtedly is a contributing factor. While more opinions might not always be better, I fear that our limited numbers fail to provide sufficient guidance in all the areas of the law that need our attention.

as a grant. The current order attempts to clear that up. Yet ambiguity persists, as there are no standards for determining whether a case deserves a MOAA or a grant order and whether opting for one path over the other reveals the scope of the Court's ambition in a case. Practitioners might well believe that a MOAA order, as opposed to a grant, means we hope not to change or disturb the law in a particular area. Nothing, however, prevents the Court from doing so. For example, the mere fact that we have chosen to hear a case as a MOAA does not necessarily signal that we are unwilling to reexamine our precedent applicable to that case.

With so many MOAAs resulting in denials, the side that won below will, even after the present changes, retain the incentive to argue that we should simply deny leave and let the lower court decision remain in place. Such arguments are often successful. But they do not help us articulate the law in a manner that offers the guidance and finality that only this Court, as the last word on Michigan law, can provide. MOAAs require practitioners and parties to commit considerable resources to a case that has a more than fair chance of simply being denied. The practitioners who come before our Court are dedicated and able, and it does neither them, their clients, nor the Court a service to ask for such an investment when it bears a diminished prospect of advancing the law.

Lastly, the MOAA process has diminished oral argument in our Court. As I noted in my earlier statement, "MOAAs give us the option of hearing a case but limiting oral argument to 15 minutes per side, as opposed to the traditional 30 minutes per side in cases

where leave to appeal is granted."[7] Thus, we are giving the parties half the time to cover not only how we should rule on the merits of the case, but also whether we should do so at all or simply deny leave. This, in my view, devalues oral argument in our Court and frustrates practitioners who do not and cannot know where they should focus their argument in this truncated time frame.[8]

No other state supreme court has a MOAA process. While ours may have started as an admirable experiment to increase productivity and give more cases the opportunity for full argument before we resolve them, the MOAA has not achieved these objectives. It has, instead, led to fewer opinions and much seemingly wasted effort. Our reliance on the procedure has nonetheless become an unhealthy addiction, one with seemingly little benefit but substantial costs. I would rip off the band-aid and end the MOAA process today. For these reasons, I dissent.

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[7] Proposed Amendment of MCR 7.312, 503 Mich at 1306 (VIVIANO, J., concurring).

[8] A majority of this Court has further devalued oral argument over the past two years by choosing to hold our regular case calls by Zoom rather than by traditional in-person oral arguments in our vast courtroom at the Hall of Justice. Our poor example in this area has made oral argument during the compressed time we allow for MOAAs even less engaging, less substantive, and more frustrating for practitioners and the members of this Court who believe in-person proceedings are essential to the administration of justice. See generally Administrative Order, Rescission of Administrative Orders, ADM No 2020-08 (July 26, 2021) (VIVIANO and BERNSTEIN, JJ., concurring in part and dissenting in part) (discussing the problems with virtual court proceedings).

Adopted March 9, 2022, effective April 1, 2022 (File No. 2020-26)—REPORTER.

On order of the Court, the following amendments of Rules 1.109 and 8.119 of the Michigan Court Rules are adopted, effective April 1, 2022.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1)-(8) [Unchanged.]

(9) Personal Identifying Information.

(a) The following personal identifying information is protected and shall not be included in any public document or attachment filed with the court on or after April~~July~~ 1, 2022~~1~~, except as provided by these rules:

(i)-(v) [Unchanged.]

(b)-(e) [Unchanged.]

(10) Request for Copy of Public Document with Protected Personal Identifying Information; Redacting Personal Identifying Information; Responsibility; Certifying Original Record; Other.

(a) The responsibility for excluding or redacting personal identifying information listed in subrule (9) from all documents filed with or offered to the court rests solely with the parties and their attorneys. The clerk of the court is not required to review, redact, or screen documents at time of filing for personal identifying information, protected or otherwise, whether filed electronically or on paper. For a document filed

with or offered to the court, except as otherwise provided in these rules, the clerk of the court is not required to redact protected personal identifying information from that document, regardless of whether filed before or after AprilJuly 1, 2022, before providing a requested copy of the document (whether requested in person or via the internet) or before providing direct access to the document via a publicly accessible computer at the courthouse.

(b)-(e) [Unchanged.]

(E)-(H) [Unchanged.]

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules. The clerk shall not permit any case record to be taken from the court without the order of the court. A court may provide access to the public case history information through a publicly accessible website, and business court opinions may be made available as part of an indexed list as required under MCL 600.8039. If a request is made for a public record that is maintained electronically, the court is required to provide a means for access to that record. However, the documents cannot be provided through a publicly accessible website if protected personal identifying information has not been redacted from those documents. If a public document prepared or issued by the court, on or after AprilJuly 1, 2022, contains protected personal identifying information, the information must be redacted before it can be provided to the public, whether the document is provided upon

request via a paper or electronic copy, or direct access via a publicly accessible computer at the courthouse. The court may provide access to any case record that is not available in paper or digital image, as defined by MCR 1.109(B), if it can reasonably accommodate the request. Any materials filed with the court pursuant to MCR 1.109(D), in a medium for which the court does not have the means to readily access and reproduce those materials, may be made available for public inspection using court equipment only. The court is not required to provide the means to access or reproduce the contents of those materials if the means is not already available.

(1)-(2) [Unchanged.]

(I)-(L) [Unchanged.]

Staff comment: The amendments of MCR 1.109 and MCR 8.119 update references to the effective date of the amendments regarding personal identifying information.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 16, 2022, effective May 1, 2022 (File No. 2021-25)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rule 19 of the Rules Concerning the State Bar of Michigan is adopted, effective May 1, 2022.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 19. CONFIDENTIALITY OF STATE BAR RECORDS.

Sec. 1. [Unchanged.]

Sec. 2. Records and information obtained in the course of reviewing and evaluating candidates for judicial vacancies may not be used for any other purpose or otherwise disclosed without the consent of the applicant and the Governor's Office, or by Order of the Supreme Court. Records and information include, but are not limited to, applicants' name, application, background, qualifications, and interview; communications concerning applicants; and information about the judicial qualification review process.

Sec. 32. Records and information of the Client Protection Fund, Ethics Program, Lawyers and Judges Assistance Program, Practice Management Resource Center Program, and Unauthorized Practice of Law Program that contain identifying information about a person who uses, is a participant in, is subject to, or who inquires about participation in, any of these programs, are confidential and are not subject to disclosure, discovery, or production, except as provided in section (43) and (54).

Sec. 43. Records and information made confidential under section (1) or (32) shall be disclosed: (a) pursuant to a court order; (b) to a law enforcement agency in response to a lawfully issued subpoena or search warrant, or; (c) to the attorney grievance commission or attorney discipline board in connection with an investigation or hearing conducted by the commission or board, or sanction imposed by the board.

Sec. 54. Records and information made confidential under section (1) or (32) may be disclosed: (a) upon request of the state bar and approval by the Michigan Supreme Court where the public interest in disclosure outweighs the public interest in nondisclosure in the

particular instance, or (b) at the discretion of the state bar, upon written permission of all persons who would be identified by the requested information.

Staff comment: The amendment of Rule 19 of the Rules Concerning the State Bar of Michigan creates an explicit provision regarding confidentiality of information.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 16, 2022, effective May 1, 2022 (File No. 2021-34)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 5.125 of the Michigan Court Rules is adopted, effective May 1, 2022.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 5.125. INTERESTED PERSONS DEFINED.

(A)-(B) [Unchanged.]

(C) Specific Proceedings. Subject to subrules (A) and (B) and MCR 5.105(E), the following provisions apply. When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

(1)-(17) [Unchanged.]

(18) The persons interested in a proceeding under the Mental Health Code that may result in an individual receiving involuntary mental health treatment

or judicial admission of an individual with a developmental disability to a center are the

(a)-(e) [Unchanged.]

(f) ~~the~~ individual's spouse, if the spouse's whereabouts are known,

(g) ~~the~~ individual's guardian, if any,

(h) in a proceeding for judicial admission to a center or in a proceeding in which assisted outpatient treatment is ordered, the community mental health program, and

(i) [Unchanged.]

(19)-(33) [Unchanged.]

(D)-(E) [Unchanged.]

Staff Comment: The amendment of MCR 5.125 adds the community mental health program as an interested person to be served a copy of the court's order when assisted outpatient treatment is ordered.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted March 16, 2021, effective immediately (File No. 2021-40)—REPORTER.

On order of the Court, this is to advise that the amendment of Rule 5 of the Rules for the Board of Law Examiners is adopted, effective immediately. Concurrently, individuals are invited to comment on the form or the merits of the amendment during the usual comment period. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 5. ADMISSION WITHOUT EXAMINATION.

(A)-(C) [Unchanged.]

(D) An attorney

(1) [Unchanged.]

(2) practicing law in an institutional setting, e.g., counsel to a corporation or instructor in a law school, may apply to the Board for a special certificate of qualification to practice law. The applicant must satisfy Rule 5(A)(1)-(3), and comply with Rule 5(B). The Board may then issue the special certificate, which will entitle the attorney to continue current employment if the attorney becomes an active member of the State Bar. The special certificate permits attorneys teaching or supervising law students in a clinical program to represent the clients of that clinical program. If the attorney leaves the current employment, the special certificate automatically expires; if the attorney's new employment is also institutional, the attorney may reapply for another special certificate.

(E) [Unchanged.]

Staff Comment: The amendment of Rule 5 of the Rules for the Board of Law Examiners specifically allows attorneys who are teaching in a clinical program to represent individual clients of that program.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by July 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov.

When filing a comment, please refer to ADM File No. 2021-40. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Adopted March 24, 2022, effective May 1, 2022 (File No. 2020-16)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 9.261 of the Michigan Court Rules is adopted, effective May 1, 2022.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 9.261. CONFIDENTIALITY; DISCLOSURE.

(A)-(I) [Unchanged.]

(J) Notwithstanding the prohibition against disclosure in this rule, upon request the commission may disclose some or all of the information in its possession concerning a judge's misconduct in office, mental or physical disability, or some other ground that warrants commission action under Const 1963, art 6, § 30, to the State Bar Judicial Qualifications Committee, or to any other officially authorized state or federal judicial qualifications committee that meets or exceeds the confidentiality requirements established by the State Bar of Michigan in Rule 19, sec. 2 of the Rules Concerning the State Bar.

(K) Notwithstanding the prohibition against disclosure in this rule, either upon request or on its own motion, the commission may disclose some or all of the information concerning a judge's misconduct in office,

mental or physical disability, or some other ground that warrants commission action under Const 1963, art 6, § 30, to the State Bar Lawyers & Judges Assistance Program.

Staff comment: The amendment of MCR 9.261 allows the JTC to share information with the State Bar of Michigan's Judicial Qualifications Committee and the Lawyers & Judges Assistance Program, as well as other judicial qualification committees in certain circumstances.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted April 13, 2022, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, this is to advise that the amendment of Rule 1.109 of the Michigan Court Rules is adopted, effective immediately. Concurrently, individuals are invited to comment on the form or the merits of the amendments during the usual comment period. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted at the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(F) [Unchanged.]

(G) Electronic Filing and Service.

(1)-(2) [Unchanged.]

(3) Scope and Applicability.

(a)-(d) [Unchanged.]

(e) A court may electronically~~If a party or attorney in a case is registered as an authorized user in the electronic-filing system, a court must electronically~~ send ~~to that authorized user~~ any notice, order, opinion, or other document issued by the court in that case by means of the electronic-filing system. This rule shall not be construed to eliminate any responsibility of a party, under these rules, to serve documents that have been issued by the court.

(f)-(l) [Unchanged.]

(4)-(7) [Unchanged.]

(H) [Unchanged.]

Staff comment: The amendment of MCR 1.109 provides an e-filing court with the authority to determine the most appropriate means of sending notices and other court-issued documents that are generated from its case management or local document management system.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by August 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-37. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Adopted May 11, 2022, effective immediately (File Nos. 2002-37 and 2017-28)—REPORTER.

On order of the Court, this is to advise that the amendments of Rules 1.109 and 8.119 of the Michigan

Court Rules are adopted, effective immediately. Concurrently, individuals are invited to comment on the form or the merits of the amendments during the usual comment period. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for each public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1)-(8) [Unchanged.]

(9) Personal Identifying Information.

(a) [Unchanged.]

(b) Filing, Accessing, and Serving Personal Identifying Information

(i)-(ii) [Unchanged.]

(iii) Except as otherwise provided by these rules, iIf a party is required to include protected personal identifying information in a public document filed with the court, the party shall file the document with the protected personal identifying information redacted, along with a personal identifying information form approved by the State Court Administrative Office under subrule (i). The personal identifying information form must identify each item of redacted information and specify an appropriate reference that uniquely

corresponds to each item of redacted information listed. All references in the case to the redacted identifiers listed in the personal identifying information form will be understood to refer to the corresponding complete identifier. A party may amend the personal identifying information form as of right. Fields for protected personal identifying information may be included in SCAO-approved court forms, and the information will be protected, in the form and manner established by the State Court Administrative Office.

Unredacted protected personal identifying information may be included on Uniform Law Citations filed with the court and on proposed orders presented to the court.

(iv)-(vii) [Unchanged.]

(c)-(e) [Unchanged.]

(10) [Unchanged.]

(E)-(H) [Unchanged.]

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules.

(1) The clerk shall not permit any case record to be taken from the court without the order of the court.

(2) A court may provide access to the public case history information through a publicly accessible website, and business court opinions may be made available as part of an indexed list as required under MCL 600.8039.

(3) Public access to all electronic documents imported from an electronic document management system maintained by a court or its funding unit to the state-owned electronic document management system maintained by the State Court Administrative Office will be automatically restricted until protected personal identifying information is redacted from all documents with a filed date or issued date that precedes April 1, 2022.

(4) If a request is made for a public record that is maintained electronically, the court is required to provide a means for access to that record. However, the recordsdocuments cannot be provided through a publicly accessible website if protected personal identifying information has not been redacted from those recordsdocuments.

(5) If a public document prepared or issued by the court, on or after April 1, 2022, or a Uniform Law Citation filed with the court on or after April 1, 2022, contains protected personal identifying information, the information must be redacted before it can be provided to the public, whether the document is provided upon request via a paper or electronic copy, or direct access via a publicly accessible computer at the courthouse. Upon receipt by the court on or after April 1, 2022, protected personal identifying information included in a proposed order shall be protected by the court as required under MCR 8.119(H) as if the document was prepared or issued by the court.

(6) The court may provide access to any case record that is not available in paper or digital image, as defined by MCR 1.109(B), if it can reasonably accommodate the request. Any materials filed with the court pursuant to MCR 1.109(D), in a medium for which the court does not have the means to readily access and

reproduce those materials, may be made available for public inspection using court equipment only. The court is not required to provide the means to access or reproduce the contents of those materials if the means is not already available.

(1)-(2) [Renumbered (7)-(8) but otherwise unchanged.]

(I)-(L) [Unchanged.]

Staff comment: The amendments of MCR 1.109 and MCR 8.119 aid in protecting personal identifying information included in Uniform Law Citations, proposed orders, and public documents filed with or submitted to the court.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by September 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-37/2017-28. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Adopted May 18, 2022, effective September 1, 2022 (File No. 2021-41)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 6.001, 6.003, 6.102, 6.103, 6.106, 6.445, 6.615, and 6.933 and additions of Rules 6.105, 6.441, and 6.450 of the Michigan Court Rules are adopted, effective September 1, 2022.

[Rules 6.105, 6.441, and 6.450 are new rules and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.001. SCOPE; APPLICABILITY OF CIVIL RULES; SUPERSEDED RULES AND STATUTES.

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.101~~-, 6.102(D) and (F),~~ 6.103, 6.104(A), 6.105-6.106, 6.125, 6.202, 6.425(D)(3), 6.427, 6.430, 6.435, 6.440, 6.441, 6.445~~(A)-(G)~~, 6.450, and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district court.

(C)-(E) [Unchanged.]

RULE 6.003. DEFINITIONS.

For purposes of subchapters 6.000-6.800:

(1)-(6) [Unchanged.]

(7) "Technical probation violation" means any violation of the terms of a probation order, including missing or failing a drug test, excluding the following:

(a) A violation of an order of the court requiring that the probationer have no contact with a named individual.

(b) A violation of a law of this state, a political subdivision of this state, another state, or the United States or of tribal law, whether or not a new criminal offense is charged.

(c) The consumption of alcohol by a probationer who is on probation for a felony violation of MCL 257.625.

(d) Absconding, defined as the intentional failure of a probationer to report to his or her supervising

agent or to advise his or her supervising agent of his or her whereabouts for a continuous period of not less than 60 days.

RULE 6.102. ~~ARREST ON A~~ WARRANTS AND SUMMONSES.

(A) Issuance of Summons; Warrant. A court must issue an arrest warrant~~,~~ or a summons as provided in this rule~~in accordance with MCR 6.103~~, if presented with a proper complaint and if the court finds probable cause to believe that the accused committed the alleged offense.

(B) [Unchanged.]

(C) Summons. A court must issue a summons unless otherwise provided in subrule (D).

(1) Form. A summons must contain the same information as an arrest warrant, except that it should summon the accused to appear before a designated court at a stated time and place.

(2) Service and Return of Summons. A summons may be served by the court or prosecuting attorney by

(a) delivering a copy to the named individual; or

(b) leaving a copy with a person of suitable age and discretion at the individual's home or usual place of abode; or

(c) mailing a copy to the individual's last known address.

Service should be made promptly to give the accused adequate notice of the appearance date. Unless service is made by the court, the person serving the summons must make a return to the court before the person is summoned to appear.

(3) If the accused fails to appear in response to a summons, the court may issue a bench warrant pursuant to MCR 6.103.

(D) Arrest Warrant. A court may issue an arrest warrant, rather than a summons, if any of the following circumstance apply

(1) the complaint is for an assaultive crime or an offense involving domestic violence, as defined in MCL 764.1a.

(2) there is reason to believe from the complaint that the person against whom the complaint is made will not appear upon a summons.

(3) the issuance of a summons poses a risk to public safety.

(4) the prosecutor has requested an arrest warrant.

(C)-(F) [Relettered (E)-(H) but otherwise unchanged.]

RULE 6.103. FAILURE TO APPEAR~~SUMMONS INSTEAD OF ARREST~~.

(A) In General. Except as provided in MCR 6.615(B), if a defendant fails to appear in court, the court must wait 48 hours, excluding weekends and holidays if the court is closed to the public, before issuing a bench warrant to allow the defendant an opportunity to voluntarily appear before the court.

(1) This rule does not apply if the case is for an assaultive crime or domestic violence offense, as defined in MCL 764.3, or if the defendant previously failed to appear in the case.

(2) If this rule does apply, the court may immediately issue a bench warrant only if the court has a specific articulable reason, stated on the record, to suspect any of the following apply:

(a) the defendant has committed a new crime.

(b) a person or property will be endangered if a bench warrant is not issued.

(c) prosecution witnesses have been summoned and are present for the proceeding.

(d) the proceeding is to impose a sentence for the crime.

(e) there are other compelling circumstances that require the immediate issuance of a bench warrant.

(3) If the defendant does not appear within 48 hours, the court must issue a bench warrant unless the court believes there is good reason to instead schedule the case for further hearing.

(B) Show Cause. This rule does not abridge a court's authority to issue an order to show cause, instead of a bench warrant, if a defendant fails to appear in court.

(C) Release Order. The court must not revoke a defendant's release order or forfeit bond during the 48-hour period of delay before a warrant is issued.

~~(A) Issuance of Summons. If the prosecutor so requests, the court may issue a summons instead of an arrest warrant. If an accused fails to appear in response to a summons, the court, on request, must issue an arrest warrant.~~

~~(B) Form. A summons must contain the same information as an arrest warrant, except that it should summon the accused to appear before a designated court at a stated time and place.~~

~~(C) Service and Return of Summons. A summons may be served by~~

~~(1) delivering a copy to the named individual; or~~

~~(2) leaving a copy with a person of suitable age and discretion at the individual's home or usual place of abode; or~~

~~(3) mailing a copy to the individual's last known address. Service should be made promptly to give the accused adequate notice of the appearance date. The person serving the summons must make a return to the court before which the person is summoned to appear.~~

RULE 6.105. VOLUNTARY APPEARANCE.

(A) In General. If a defendant, wanted on a bench or arrest warrant, voluntarily presents himself or herself to the court that issued the warrant within one year of the warrant issuance, the court must either

(1) arraign the defendant, if the court is available to do so within two hours of the defendant presenting himself or herself to the court; or

(2) recall the warrant and schedule the case for a future appearance.

It is presumed the defendant is not a flight risk when the court sets bond or other conditions of release at an arraignment under this rule.

(B) Exceptions. This rule does not apply to assaultive crimes or domestic violence offenses, as defined in MCL 762.10d, or to defendants who have previously benefited from this rule on any pending criminal charge.

RULE 6.106. PRETRIAL RELEASE.

(A)-(H) [Unchanged.]

(I) Termination of Release Order.

(1) [Unchanged.]

(2) If the defendant has failed to comply with the conditions of release, the court may, pursuant to MCR 6.103, issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.

(a)-(c) [Unchanged.]

(3) [Unchanged.]

RULE 6.441. EARLY PROBATION DISCHARGE.

(A) Eligibility. Except as otherwise provided in statute, a probationer is eligible for early discharge from probation when the probationer has completed half of the original probationary period and all required programming. The court must notify the probationer at the time of sentencing, either orally or in writing, about the probationer's early probation discharge eligibility and the notice process contained in this rule.

(B) Notice of Eligibility. The probation department may file notice with the sentencing court when a probationer becomes eligible for early probation discharge. The notice must be served on the prosecuting attorney and probationer. If the probation department does not file the notice, and the probationer has not violated probation within the last 3 months, the probationer may file the notice with the sentencing court and serve copies to the prosecuting attorney and probation department. The prosecuting attorney must file any written objection to early probation discharge within 14 days of receiving service of the notice.

(C) Case Review. Upon receiving notice under subrule (B), the court must conduct a preliminary review of the case to determine whether the probationer's behavior warrants a reduction in the original proba-

tionary term. A court must not deny early discharge because of outstanding court-ordered fines, fees, or costs, if the probationer has an inability to pay and has made good-faith efforts to make payments. Before granting early discharge to a probationer who owes outstanding restitution, the court must consider the impact of early discharge on the victim and the payment of outstanding restitution.

(D) Discharge Without a Hearing. Except as provided in subrule (E), the court must discharge a probationer from probation, without a hearing, if the prosecutor does not submit a timely objection and the court's review in subrule (C) determines the probationer

(1) is eligible for early probation discharge;

(2) achieved all the rehabilitation goals of probation; and

(3) is not a specific, articulable, and ongoing risk of harm to a victim that can only be mitigated with continued probation supervision.

If the probationer owes outstanding restitution but has made a good-faith effort to make payments, the court may retain the probationer on probation up to the maximum allowable probation term with the sole condition of continuing restitution payments.

(E) Hearing Requirement. The court must hold a hearing after conducting the review in subrule (C) if

(1) the prosecutor submits a timely objection, or

(2) a circumstance identified in MCL 771.2(7) is applicable, or

(3) the court reviewed the case and does not grant an early discharge or retain the probationer on probation with the sole condition of continuing restitution payment.

If the hearing is held pursuant to MCL 771.2(7), the prosecuting attorney shall notify the victim of the date and time of the hearing. Both the probationer and victim, if applicable, must be given an opportunity to be heard at the hearing.

(F) Discharge After Hearing. Upon the conclusion of the hearing, the court must either grant early discharge or, if applicable, retain the probationer on probation with the sole condition of continuing restitution payments, if the probationer proves by a preponderance of the evidence that he or she

(1) is eligible for early probation discharge;

(2) achieved all the rehabilitation goals of probation; and

(3) is not a specific, articulable, and ongoing risk of harm to a victim that can only be mitigated with continued probation supervision.

(G) Impact on Sentencing. The eligibility for early probation discharge under this rule must not influence the court's sentencing decision regarding the length of the original probationary period.

(H) Motions. This rule does not prohibit a defendant from motioning, a probation officer from recommending, or the court from considering, a probationer for early discharge from probation at the court's discretion at any time during the duration of the probation term.

RULE 6.445. PROBATION VIOLATION AND REVOCATION.

(A) Issuance of Summons; Warrant. The court may issue a bench warrant or summons upon~~On~~ finding probable cause to believe that a probationer has committed a non-technical violation~~violated a condition~~ of probation~~, the court may~~. The court must issue a summons, rather than a bench warrant, upon finding

probable cause to believe a probationer has committed a technical violation of probation unless the court states on the record a specific reason to suspect that one or more of the following apply:

(1) The probationer presents an immediate danger to himself or herself, another person, or the public.~~issue a summons in accordance with MCR 6.103(B) and (C) for the probationer to appear for arraignment on the alleged violation, or~~

(2) The probationer has left court-ordered inpatient treatment without the court's or the treatment facility's permission.~~issue a warrant for the arrest of the probationer.~~

(3) A summons has already been issued for the technical probation violation and the probationer failed to appear as ordered.

An arrested probationer must promptly be brought before the court for arraignment on the alleged violation.

(B) Arraignment on the Charge. At the arraignment on the alleged probation violation, the court must

(1) [Unchanged.]

(2) inform the probationer whether the alleged violation is charged as a technical or non-technical violation of probation, and the maximum possible jail or prison sentence,

(2)-(5) [Renumbered (3)-(6) but otherwise unchanged.]

(C) Scheduling or Postponement of Hearing. The hearing of a probationer being held in custody for an alleged probation violation must be held within the permissible jail sentence for the probation violation, but in no event longer than 14 days after the arrest~~arraignment~~ or the court must order the probationer

released from that custody pending the hearing. If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution, the court may postpone the hearing for the outcome of that prosecution.

(D) [Unchanged.]

(E) The Violation Hearing.

(1) [Unchanged.]

(2) Judicial Findings. At the conclusion of the hearing, the court must make findings in accordance with MCR 6.403 and, if the violation is proven, whether the violation is a technical or non-technical violation of probation.

(F) Pleas of Guilty. The probationer may, at the arraignment or afterward, plead guilty to the violation. Before accepting a guilty plea, the court, speaking directly to the probationer and receiving the probationer's response, must

(1) advise the probationer that by pleading guilty the probationer is giving up the right to a contested hearing and, if the probationer is proceeding without legal representation, the right to a lawyer's assistance as set forth in subrule (B)(3~~2~~)(b),

(2)-(3) [Unchanged.]

(4) establish factual support for a finding that the probationer is guilty of the alleged violation and whether the violation is a technical or non-technical violation of probation.

(G) Sentencing. If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration pursuant to law.

The court may not sentence the probationer to prison without having considered a current presentence report and may not sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) and (D).

(H) [Unchanged.]

RULE 6.450. TECHNICAL PROBATION VIOLATION ACKNOWLEDGMENT.

(A) Acknowledgment. In lieu of initiating a probation violation proceeding under MCR 6.445, the court may allow a probationer to acknowledge a technical probation violation without a hearing. The acknowledgment must be in writing and advise the probationer of the following information

(1) the probationer has a right to contest the alleged technical probation violation at a formal probation violation hearing;

(2) the probationer is entitled to a lawyer's assistance at the probation violation hearing and at all subsequent court proceedings, and that the court will appoint a lawyer at public expense if the probationer wants one and is financially unable to retain one;

(3) the court will not revoke probation or sentence the probationer to incarceration as a result of the acknowledgment, but the court may continue probation, modify the conditions of probation, or extend probation;

(4) if the probationer violates probation again, the court may consider the acknowledgment a prior technical probation violation conviction for the purposes of

determining the maximum jail or prison sentence and probation revocation eligibility authorized by law;

(5) acknowledging a technical probation violation may delay the probationer's eligibility for an early discharge from probation.

(B) Review. Upon acknowledgment of a technical probation violation by a probationer, the court may continue probation, modify the conditions of probation, or extend the term of probation. The court may not impose a sentence of incarceration or revoke probation for acknowledging a technical probation violation under this rule, but the court may count the acknowledgment for the purpose of identifying the number of technical probation violations under MCL 771.4b.

RULE 6.615. MISDEMEANOR ~~TRAFFIC~~ CASES.

(A) Citation; Complaint; Summons; Warrant.

(1) A misdemeanor ~~traffic~~ case may be initiated by one of the following procedures:

(a) Subject to the exceptions in MCL 764.9c, s~~S~~ervice of a written citation by a law enforcement officer on the defendant, and the filing of the citation in the district court. The citation may be prepared electronically or on paper. The citation must be signed by the officer in accordance with MCR 1.109(E)(4); if a citation is prepared electronically and filed with a court as data, the name of the officer that is associated with the issuance of the citation satisfies this requirement.

(b) The filing of a sworn complaint in the district court and the issuance of a summons or an arrest warrant. ~~A citation may serve as the sworn complaint and as the basis for a misdemeanor warrant.~~

(c) [Unchanged.]

(2) The citation may serves as a sworn complaint and as a summons to command

(a) [Unchanged.]

(b) for misdemeanor traffic cases, a response from the defendant as to his or her guilt of the violation alleged.

(B) Appearances; Failure to Appear. If a defendant fails to appear or otherwise to respond to any matter pending relative to a misdemeanor traffic citation issued under MCL 764.9c, the court shall issue an order to show causeproceed as provided in this subrule.

(1) The court may immediately issue a bench warrant, rather than an order to show cause, if the court has a specific articulable reason to suspect that any of the following apply and states it on the record:

(a) the defendant has committed a new crime.

(b) the defendant's failure to appear is the result of a willful intent to avoid or delay the adjudication of the case.

(c) another person or property will be endangered if a warrant is not issued.

(2) If a defendant fails to appear or otherwise respond to any matter pending relative to a misdemeanor traffic citation, the court must also initiate the procedures required by MCL 257.321a.

(1) If the defendant is a Michigan resident, the court

(a) must initiate the procedures required by MCL 257.321a for the failure to answer a citation; and

(b) may issue a warrant for the defendant's arrest.

(2) If the defendant is not a Michigan resident,

(a) the court may mail a notice to appear to the defendant at the address in the citation;

~~(b) the court may issue a warrant for the defendant's arrest; and~~

~~(c) if the court has received the driver's license of a nonresident, pursuant to statute, it may retain the license as allowed by statute. The court need not retain the license past its expiration date.~~

(C) Arraignment. An arraignment in a misdemeanor ~~traffic~~ case may be conducted by

(1)-(2) [Unchanged.]

(D) Contested Cases. A misdemeanor ~~traffic~~ case must be conducted in compliance with the constitutional and statutory procedures and safeguards applicable to misdemeanors cognizable by the district court.

RULE 6.933. JUVENILE PROBATION REVOCATION.

(A) ~~General Procedure. When a juvenile, who was placed on juvenile probation and committed to an institution as a state ward, is alleged to have violated juvenile probation, the court shall proceed as provided in MCR 6.445(A)-(F).~~Issuance of Summons; Warrant. When a juvenile, who was placed on juvenile probation and committed to an institution as a state ward, is alleged to have violated juvenile probation, on finding probable cause to believe that a probationer has violated a condition of probation, the court may

(1) issue a summons in accordance with MCR 6.102 for the probationer to appear for arraignment on the alleged violation, or

(2) issue a warrant for the arrest of the probationer.

An arrested probationer must promptly be brought before the court for arraignment on the alleged violation.

(B) Arraignment on the Charge. At the arraignment on the alleged probation violation, the court must

(1) ensure that the probationer receives written notice of the alleged violation,

(2) advise the probationer that

(a) the probationer has a right to contest the charge at a hearing, and

(b) the probationer is entitled to a lawyer's assistance at the hearing and at all subsequent court proceedings, and that the court will appoint a lawyer at public expense if the probationer wants one and is financially unable to retain one,

(3) if requested and appropriate, appoint a lawyer,

(4) determine what form of release, if any, is appropriate, and

(5) subject to subrule (C), set a reasonably prompt hearing date or postpone the hearing.

(C) Scheduling or Postponement of Hearing. The hearing of a probationer being held in custody for an alleged probation violation must be held within 14 days after the arraignment or the court must order the probationer released from that custody pending the hearing. If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution, the court may postpone the hearing for the outcome of that prosecution.

(D) Continuing Duty to Advise of Right to Assistance of Lawyer. Even though a probationer charged with probation violation has waived the assistance of a lawyer, at each subsequent proceeding the court must comply with the advice and waiver procedure in MCR 6.005(E).

(E) The Violation Hearing.

(1) Conduct of the Hearing. The evidence against the probationer must be disclosed to the probationer. The probationer has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. The court may consider only evidence that is relevant to the violation alleged, but it need not apply the rules of evidence except those pertaining to privileges. The state has the burden of proving a violation by a preponderance of the evidence.

(2) Judicial Findings. At the conclusion of the hearing, the court must make findings in accordance with MCR 6.403.

(F) Pleas of Guilty. The probationer may, at the arraignment or afterward, plead guilty to the violation. Before accepting a guilty plea, the court, speaking directly to the probationer and receiving the probationer's response, must

(1) advise the probationer that by pleading guilty the probationer is giving up the right to a contested hearing and, if the probationer is proceeding without legal representation, the right to a lawyer's assistance as set forth in subrule (B)(2)(b),

(2) advise the probationer of the maximum possible jail or prison sentence for the offense,

(3) ascertain that the plea is understandingly, voluntarily, and accurately made, and

(4) establish factual support for a finding that the probationer is guilty of the alleged violation.

(G~~B~~) Disposition In General.

(1) Certain Criminal Offense Violations.

(a) [Unchanged.]

(b) The court may not revoke probation and impose sentence under subrule (G)~~(B)~~(1) unless at the original

sentencing the court gave the advice, as required by MCR 6.931(F)(2), that subsequent conviction of a felony or a misdemeanor punishable by more than one year's imprisonment would result in the revocation of juvenile probation and in the imposition of a sentence of imprisonment.

(2)-(3) [Unchanged.]

(C)-(E) [Relettered (H)-(J) but otherwise unchanged.]

Staff Comment: The amendments make the rules consistent with recent statutory revisions that resulted from recommendations of the Michigan Joint Task Force on Jail and Pretrial Incarceration.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 18, 2022, effective immediately (File No. 2021-45)—REPORTER.

On order of the Court, notice and an opportunity for comment at a public hearing having been provided, the October 27, 2021 amendment of Rule 7.306 of the Michigan Court Rules is retained and, effective immediately, is amended further as indicated below. Administrative Order No. 2021-5 is rescinded, effective immediately.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.306. ORIGINAL PROCEEDINGS.

(A)-(C) [Unchanged.]

(D) Answer.

(1) A defendant in an action filed under Const 1963, art 4, § 6(19) must file the following with the

clerk within 7 days after service of the complaint and supporting brief, unless the Court directs otherwise:

(a)-(c) [Unchanged.]

(2) In all other original actions, the defendant must file the following with the clerk within 28 days after service of the complaint and supporting brief, unless the Court directs otherwise:

(a)-(b) [Unchanged.]

(E)-(I) [Unchanged.]

(J) Decision. The Court may set the case for argument as a calendar case~~as on leave granted~~, grant or deny the relief requested, or provide other relief that it deems appropriate, including an order to show cause why the relief sought in the complaint should not be granted.

Staff Comment: The additional amendment of MCR 7.306 refines the previous amendment by clarifying the timeframe for filing a supporting brief and makes subsection (J) consistent with MCR 7.313(A).

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 18, 2022, effective immediately (File No. 2021-47)—REPORTER.

On order of the Court, notice and an opportunity for comment having been provided, the December 29, 2021 amendment of Rule 3.950 of the Michigan Court Rules is retained.

Adopted June 1, 2022, effective immediately (File No. 2021-31)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and

consideration having been given to the comments received, the following amendments of Rule 8.110 of the Michigan Court Rules is adopted, effective immediately.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 8.110. CHIEF JUDGE RULE.

(A)-(C) [Unchanged.]

(D) Court Hours; Court Holidays; Judicial Absences.

(1) [Unchanged.]

(2) Court Holidays; Local Modification.

(a) The following holidays are to be observed by all state courts, except those courts which have adopted modifying administrative orders pursuant to MCR 8.112(B):

New Year's Day, January 1;

Martin Luther King, Jr., Day, the third Monday in January in conjunction with the federal holiday;

Presidents' Day, the third Monday in February;

Memorial Day, the last Monday in May;

Juneteenth, June 19;

Independence Day, July 4;

Labor Day, the first Monday in September;

Veterans' Day, November 11;

Thanksgiving Day, the fourth Thursday in November;

Friday after Thanksgiving;

Christmas Eve, December 24;

Christmas Day, December 25;

New Year's Eve, December 31;

(b) When New Year's Day, Juneteenth, Independence Day, Veterans' Day, or Christmas Day falls on Saturday, the preceding Friday shall be a holiday. When New Year's Day, Juneteenth, Independence Day, Veterans' Day, or Christmas Day falls on Sunday, the following Monday shall be a holiday. When Christmas Eve or New Year's Eve falls on Friday, the preceding Thursday shall be a holiday. When Christmas Eve or New Year's Eve falls on Saturday or Sunday, the preceding Friday shall be a holiday.

(c)-(e) [Unchanged.]

(3)-(6) [Unchanged.]

Staff Comment: In light of the federal Act making Juneteenth a federal holiday (PL 117-17), this amendment similarly requires that courts observe Juneteenth as a holiday.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

ZAHRA, J. (*dissenting*). The Michigan court system currently observes 12 paid holidays. This is far more than observed by the private sector. I believe as servants of the people we owe it to them to work diligently and regularly to provide good public service. Accordingly, I would not add an additional day off at the taxpayers' expense. Juneteenth has been a ceremonial holiday in Michigan to be celebrated on the third Saturday of June each year. I would continue to follow this observance. But since it is the will of the Court to make it a paid holiday, I would cease to recognize one of the other holidays typically not observed by the private sector, such as the Friday after Thanksgiving. For these reasons, I dissent.

VIVIANO, J. (*dissenting*). I dissent from the Court's decision to adopt a proposed amendment adding June-

teenth to the long list of weekday holidays that generally must be observed by all state courts under MCR 8.110. As I indicated in my previous statement when this amendment was proposed for comment, Juneteenth commemorates a historically significant date that, pursuant to statute, our state recognizes and celebrates by encouraging individuals and organizations to pause and reflect. MCL 435.361(1); Proposed Amendment of MCR 8.110, 508 Mich 1206, 1208 (2021) (VIVIANO, J., dissenting). The Legislature gave this matter thoughtful consideration less than two decades ago, passing the Juneteenth National Freedom Day legislation unanimously and with broad bipartisan support. I would defer to its judgment rather than trying to upstage the Legislature by creating a new holiday of our own.

The Court's decision to add another holiday comes at a particularly bad time for our courts. As I noted last fall, "[m]any of our trial courts—including some of our largest courts—are confronting a significant backlog of criminal and civil cases resulting from their inability to conduct in-person court proceedings for long stretches of time during the COVID-19 pandemic." Administrative Order No. 2021-7, 508 Mich xli, lvi (2021) (VIVIANO, J., concurring in part and dissenting in part). The backlog will only be exacerbated by today's rule change. And, as if to emphasize that trial court operations are not our primary concern, the Court has decided to give the current amendment immediate effect, meaning it will take effect this June rather than next. The lower courts have undoubtedly already scheduled proceedings for June 20, 2022. See, e.g., MCR 2.501 (requiring 28 days' notice for trial assignments). Any court that wishes to proceed with an already scheduled trial or other judicial matters on this new holiday as permitted under MCR

8.110(D)(2)(d) will need to show that holding the proceeding on that day is "necessary" and obtain the chief judge's approval. Thus, the Court has increased the burden on trial courts at a time when many are already having difficulty catching up on jury trials and disposing of cases.

Our courts handle matters that intimately affect the lives of Michigan's residents. It is therefore imperative that the courts expeditiously process and resolve the cases before them. The rule adopted today adds further delay to an already backlogged system. Because the Court is not acting as a responsible steward of our court system, I respectfully dissent.

Adopted June 8, 2022, effective September 1, 2022 (File No. 2021-07)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, new Rule 1.19 of the Michigan Rules of Professional Conduct and its Official Comment are adopted, effective September 1, 2022.

RULE 1.19. LAWYER-CLIENT REPRESENTATION AGREEMENTS: ARBITRATION PROVISIONS.

A lawyer shall not enter into an agreement for legal services with a client requiring that any dispute between the lawyer and the client be subject to arbitration unless the client provides informed consent in writing to the arbitration provision, which is based on being

(a) reasonably informed in writing regarding the scope and the advantages and disadvantages of the arbitration provision, or

(b) independently represented in making the agreement.

Official Comment:

MRPC 1.19 is designed to ensure that a client entering into an arbitration agreement with a lawyer has sufficient information to make an informed decision or is independently represented by counsel in making the agreement. This paragraph applies to agreements entered into at the onset of an attorney-client relationship as well as to agreements entered into during the course of the attorney-client relationship.

In order to ensure that client consent to an arbitration provision is informed consent, at a minimum the agreement should advise the client of the practical advantages and disadvantages of arbitration. Inclusion of the following information is presumed to be sufficient to enable a client to give informed consent:

(1) By agreeing to arbitration, the client is

(a) waiving the right to a jury trial,

(b) potentially waiving the right to take discovery to the same extent as is available in a case litigated in a court,

(c) waiving or limiting the right to appeal the result of the arbitration proceeding to specific circumstances established by law, and

(d) agreeing to be financially responsible for at least a share of the arbitrator's compensation and the administrative fees associated with the arbitration;

(2) whether the agreement to arbitrate includes arbitration of legal malpractice claims against the lawyer;

(3) identification of the organization or person(s) that will administer the arbitration;

(4) if the client declines to agree to arbitration at the onset of the attorney-client relationship, there is no prohibition against the lawyer and the client agreeing to arbitrate the matter at a later date;

(5) arbitration may be conducted as a private proceeding, unlike litigation in a court;

(6) the parties can select an arbitrator who is experienced in the subject matter of the dispute;

(7) depending on the circumstances, arbitration can be more efficient, expeditious and inexpensive than litigation in a court; and

(8) the client's ability to report unethical conduct by the lawyer is not restricted.

Staff Comment: The addition of new MRPC 1.19 and its Official Comment clarify that a lawyer may only include an arbitration provision in a lawyer-client representation agreement if the client provides informed consent in writing to the provision after being reasonably informed about the scope, advantages, and disadvantages of the provision, or being independently represented.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

VIVIANO, J. (*dissenting*). The majority today adopts MRPC 1.19, which establishes that an attorney-client agreement cannot contain an arbitration clause unless the client is either "reasonably informed" about the provision or is "independently represented in making the agreement." The rule thus tips the scale against arbitration by placing procedural hurdles to entering these agreements. I have no doubt that the rule represents a well-intentioned effort to protect clients. But

good intentions do not justify needless, ineffective, and potentially deleterious rules. I believe the present rule is all of these.

Today's rule change is a classic solution in search of a problem: no evidence has been produced that arbitration agreements between lawyers and clients in Michigan are currently a problem.[1] Even if such a problem did exist, I do not believe this new requirement would be effective in solving it. To be sure, we must be concerned with a lawyer's asymmetrical information advantage over a client, who often lacks the training and knowledge to fully understand legal matters. See Griffith, *Ethical Rules and Collective Action: An Economic Analysis of Legal Ethics*, 63 U Pitt L Rev 347, 365-366 (2002). But informed-consent laws such as the one here are often poor tools for ensuring that the intended beneficiary of the additional information makes better decisions; in fact such rules might lead to worse outcomes for the beneficiary.[2] Even when disclosures are potentially helpful, their form and content must be carefully crafted. See Sunstein, *Nudges.gov:*

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[1] Although we received comments containing generalized statements about clients' unfamiliarity with arbitration agreements, none of the comments identified any particular instances of this confusion or resulting problems for clients.

[2] See generally Ben-Shahar & Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton: Princeton University Press, 2014), pp 43-47 (noting research showing that information-disclosure requirements across subjects are ineffective); Nahmias, *The Limitations of Information: Rethinking Soft Paternalistic Interventions in Copyright Law*, 37 Cardozo Arts & Ent L J 373, 376, 392-407 (2019) (arguing that disclosure requirements often prove ineffective and sometimes even harmful); Klick & Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 Minn L Rev 1620, 1636 (2006) (arguing that ex ante paternalistic measures like disclosure requirements "reduce[] the incentive to search for information, carefully evaluate decision options, or develop good decision-making strategies").

Behaviorally Informed Regulation, in The Oxford Handbook of Behavioral Economics and the Law (New York: Oxford University Press, 2014), p 729. The rule today does nothing to ensure that the disclosures are produced in a comprehensible and useful fashion.

And, lastly, I fear the new rule could be more harmful than helpful for clients. Paying yet another lawyer to review the agreement does not bode much better for the client. What is the client to do if that additional lawyer, too, has an arbitration clause—hire a third lawyer? The probable result of the new rule will not be better-informed clients—more likely, it will be clients who come to court seeking to avoid arbitration by capitalizing on the new rule's vague language. What does it mean for the client to be "reasonably informed"? What are the "advantages" or "disadvantages" of an arbitration provision? Courts and ethics bodies will be busy deciphering these vague standards, without any discernable benefit to the client, who will now be dealing with (and funding) more extensive and time-consuming satellite litigation.

One potential source of litigation will be whether this rule is enforceable at all. Michigan's Uniform Arbitration Act, MCL 691.1686(1), provides that arbitration agreements are "valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract," and the Federal Arbitration Act (FAA), 9 USC 2, echoes this provision almost verbatim. This "establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses,' but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue[.]' " *Kindred Nursing Ctrs Ltd Partnership v Clark*, 581 US 246, 251; 137 S Ct

1421, 1426 (2017) (citation omitted). Accordingly, the FAA "preempts any state rule that discriminates on its face against arbitration" or that "disfavor[s]" such agreements. *Id*. An argument could be made that the new rule violates the statute by creating a potential defense unique to arbitration agreements when the client was not "reasonably informed" or did not have independent representation. Cf. *In re Mardigian Estate*, 502 Mich 154, 199 (2018) (MCCORMACK, J., opinion for reversal) ("[W]e have endorsed the view that it is nonsensical for courts to uphold unethical fee agreements when those agreements will subject the attorney to discipline for violating our professional rules."); but see *Delaney v Dickey*, 244 NJ 466, 495-496 (2020) (holding that an informed-consent requirement for attorney-client arbitration agreements did not violate the FAA or the state arbitration statute); *Snow v Bernstein, Shur, Sawyer & Nelson, PA*, 176 A3d 729 (Me, 2017) (same). Regardless of whether the argument prevails, it will certainly produce litigation, again with little benefit to the client.

The rule adopted today thus promises few benefits and many costs, all to address a nonissue. I therefore would decline to adopt the rule and instead would allow attorneys and their clients to freely enter arbitration agreements without any special requirements. The Court of Appeals has upheld the enforceability of such agreements, and I would not put these decisions in doubt by creating a vague and unnecessary rule of professional conduct. See *Tinsley v Yatooma*, 333 Mich App 257, 264 (2020); *Watts v Polaczyk*, 242 Mich App 600, 604-606 (2000). For these reasons, I dissent.

ZAHRA, J., joins the statement of VIVIANO, J.

Adopted June 15, 2022, effective September 1, 2023 (File No. 2020-15)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following Amendment of Rule 2 and Addition of Rule 21 of the Rules Concerning the State Bar of Michigan and Amendment of Rule 9.119 and Addition of Subchapter 9.300 of the Michigan Court Rules are adopted, effective September 1, 2023.

[Rule 21, Rule 9.301, Rule 9.303, Rule 9.305, Rule 9.307, Rule 9.309, Rule 9.311, Rule 9.313, Rule 9.315, and Rule 9.317 are new rules and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2. MEMBERSHIP.

Those persons who are licensed to practice law in this state shall constitute the membership of the State Bar of Michigan, subject to the provisions of these rules. Law students may become section members of the State Bar Law Student Section. None other than a member's correct name shall be entered upon the official register of attorneys of this state. Each member, upon admission to the State Bar and in the annual licensing statement~~dues notice~~, must provide the State Bar with:

(A) T~~t~~he member's correct name, physical address, and email address, that can be used, among other things, for the annual licensing statement~~dues notice~~ and to effectuate electronic service as authorized by court rule, and such additional information as may be

required. If the physical address provided is a mailing address only, the member also must provide a street or building address for the member's business or residence. No member shall practice law in this state until the information required in this Rule has been provided. Members shall promptly notify~~update~~ the State Bar in writing of~~with~~ any change of name, physical address, or email address. The State Bar shall be entitled to due notice of, and to intervene and be heard in, any proceeding by a member to alter or change the member's name. The name and address on file with the State Bar at the time shall control in any matter arising under these rules involving the sufficiency of notice to a member or the propriety of the name used by the member in the practice of law or in a judicial election or in an election for any other public office.

(B) ~~Every active member shall annually provide a~~A certification as to whether the member is in private practice. The signed certification shall be placed on the annual licensing statement and shall require the member's signature or electronic signature. If the member is in private practice, the certification must also include:

(1) whether the member or the member's law firm has a policy to maintain interest-bearing trust accounts for deposit of client and third-party funds; and

(2) beginning in 2023, a designation of the attorney's Interim Administrator, as required by Rule 21. If the attorney is designating his or her own Interim Administrator, the designation must include the name and address of the active Michigan attorney in good standing or a Michigan law firm that includes at least one other Michigan attorney in good standing, who will serve, if needed, as the member's Interim Administrator.

~~The certification shall be included on the annual dues notice and shall require the member's signature or electronic signature.~~

(C) An indication whether the member is willing to be placed on the State Bar's list of members who agree to serve as Interim Administrator for other members.

RULE 21. MANDATORY INTERIM ADMINISTRATOR PLANNING.

(A) An attorney in private practice must designate an Interim Administrator to protect clients by temporarily managing the attorney's practice if the attorney becomes unexpectedly unable to practice law as set forth in MCR 9.301 and pursuant to Rule 2(B) of the Rules Concerning the State Bar of Michigan. On the State Bar of Michigan annual licensing statement, the attorney shall, beginning in 2023 and annually thereafter,

(1) designate another active Michigan attorney in good standing or law firm with at least one other active Michigan attorney in good standing to serve as the attorney's Interim Administrator, or indicate that he or she wishes to designate an attorney from the list maintained by the State Bar of Michigan; and

(2) identify a person with knowledge of the location of the attorney's professional paper and electronic files and records and knowledge of the location of passwords and other security protocols required to access the attorney's professional electronic records and files. The person so identified may be the same person designated as the Interim Administrator.

The State Bar of Michigan shall create a confirmation process for designated Interim Administrators to confirm that they are willing to serve as Interim Administrator.

(B) A member who indicates in the annual licensing statement that he or she wishes to utilize the list maintained by the State Bar of Michigan must pay a $60 fee to the State Bar of Michigan each time he or she chooses this option on the annual licensing statement. The fees collected under this subrule may only be used to fund activities related to Interim Administrators and Interim Administrator planning.

(C) The State Bar of Michigan shall maintain a list of members who have indicated a willingness to serve as Interim Administrators under Rule 2(C) of the Rules Concerning the State Bar of Michigan. This list must include the member's name, address, and the judicial circuit(s) and practice area(s) in which he or she is willing to be appointed as an Interim Administrator. The State Bar of Michigan will only match an attorney to an Interim Administrator upon notification that the attorney has become an Affected Attorney as defined in MCR 9.301(A).

(D) Every Interim Administrator, as that term is defined in MCR 9.301(E), shall obtain and retain professional liability insurance that covers conduct performed as an Interim Administrator under these rules and the Michigan Court Rules.

(E) The State Bar of Michigan shall submit a written report to the Michigan Supreme Court regarding the implementation of the Interim Administrator Program by January 1, 2024. The report shall contain an accounting of the funds received and expended under subrule (B).

RULE 9.119. CONDUCT OF DISBARRED, SUSPENDED, OR INACTIVE ATTORNEYS.

(A)-(F) [Unchanged.]

~~(G) Receivership.~~

~~(1) Attorney with a firm. If an attorney who is a member of a firm is disbarred, suspended, is transferred to inactive status pursuant to MCR 9.121, or resigns his or her license to practice law, the firm may continue to represent each client with the client's express written consent. Copies of the signed consents shall be maintained with the client file.~~

~~(2) Attorney practicing alone. If an attorney is transferred to inactive status, resigns, or is disbarred or suspended and fails to give notice under the rule, or disappears, is imprisoned, or dies, and there is no partner, executor or other responsible person capable of conducting the attorney's affairs, the administrator may ask the chief judge in the judicial circuit in which the attorney maintained his or her practice to appoint a person to act as a receiver with necessary powers, including:~~

~~(a) to obtain and inventory the attorney's files;~~

~~(b) to take any action necessary to protect the interests of the attorney and the attorney's clients;~~

~~(c) to change the address at which the attorney's mail is delivered and to open the mail; or~~

~~(d) to secure (garner) the lawyer's bank accounts.~~

~~The person appointed is analogous to a receiver operating under the direction of the circuit court.~~

~~(3) Confidentiality. The person appointed may not disclose to any third parties any information protected by MRPC 1.6 without the client's written consent.~~

~~(4) Publication of Notice. Upon receipt of notification from the receiver, the state bar shall publish in the Michigan Bar Journal notice of the receivership, including the name and address of the subject attorney, and the name, address, and telephone number of the receiver.~~

SUBCHAPTER 9.300. INTERIM ADMINISTRATORS.

RULE 9.301. DEFINITIONS.

(A) "Affected Attorney" means an attorney who is either temporarily or permanently unable to practice law because the attorney has:

(1) resigned;

(2) been disbarred or suspended;

(3) disappeared;

(4) been imprisoned;

(5) abandoned the practice of law;

(6) become temporarily or permanently disabled or incapacitated;

(7) been transferred to disability inactive status pursuant to MCR 9.121; or

(8) died.

(B) "Affected Attorney's Clients" are clients to whom the Affected Attorney is the attorney of record, regardless of whether the retainer agreement is with the Affected Attorney or the Affected Attorney's Law Firm.

(C) "Appointed Interim Administrator" means an Interim Administrator who is appointed by the circuit court pursuant to MCR 9.305 to serve on behalf of the Affected Attorney.

(D) "Designated Interim Administrator" means an Interim Administrator that a Private Practice Attorney has designated to serve and who has accepted the designation in the event the Private Practice Attorney should become an Affected Attorney.

(E) "Interim Administrator" means a general term for an active Michigan attorney in good standing who serves on behalf of a Private Practice Attorney who

becomes an Affected Attorney. It also means a law firm with at least one other active Michigan attorney that is designated to serve on behalf of a Private Practice Attorney who becomes an Affected Attorney.

(F) "Law Firm" means the entity in which the Affected Attorney carries out the profession of being a lawyer.

(G) "Private Practice Attorney" means an attorney who is an active Michigan attorney in good standing and who is subject to Rule 21 of the Rules Concerning the State Bar of Michigan, Mandatory Interim Administrator Planning.

RULE 9.303. AFFECTED ATTORNEY WITH A FIRM.

The firm of an attorney who becomes an Affected Attorney may continue to represent each of the Affected Attorney's Clients without a circuit court appointment as Interim Administrator, provided:

(A) the firm is the Affected Attorney's Designated Interim Administrator;

(B) the firm has at least one active Michigan attorney in good standing capable of competently representing the Affected Attorney's Clients; and

(C) each Affected Client gives express written consent to the representation. Copies of the signed consents must be maintained with the client file.

RULE 9.305. APPOINTMENT OF INTERIM ADMINISTRATOR.

(A) Commencement of Proceeding for Appointment of Interim Administrator; Service of Process. A proceeding for the appointment of an Interim Administrator is commenced by the filing of an ex parte petition by the Interim Administrator in the circuit court for the county in which the Affected Attorney

lives, last lived, or maintains or last maintained an office for the practice of law. If an Interim Administrator is unable to serve, he or she must promptly notify the State Bar, and the State Bar must promptly identify a replacement Interim Administrator using the list maintained by the State Bar under Rule 21(C) of the Rules Concerning the State Bar of Michigan or its own staff under attorney supervision as a measure of last resort.

(1) The petition must set forth facts proving that

(a) the attorney is an Affected Attorney as defined in MCR 9.301(A).

(b) the appointment of an Interim Administrator is necessary to protect the interests of the Affected Attorney's Clients or the interests of the Affected Attorney.

(c) the attorney proposed to be appointed as Interim Administrator is qualified under this rule.

(2) The petition must be verified or accompanied by an affidavit or declaration under penalty of perjury of a person having personal knowledge of the facts.

(3) The petition and any supporting documents must be served upon the Affected Attorney if the whereabouts of the Affected Attorney are known, the Affected Attorney's estate if the Affected Attorney has died, and on the fiduciary for the Affected Attorney, if one has been appointed. See MCR 2.103 — 2.108. If the petition is filed by the Designated Interim Administrator, it must also be served upon the State Bar of Michigan by email at an address designated by the State Bar of Michigan pursuant to MCR 2.107(C)(4) or by electronic service pursuant to MCR 1.109(G)(6).

(B) Order of Appointment. If the circuit court determines that the petitioner has proven by a prepon-

derance of the evidence that the attorney is an Affected Attorney as defined in MCR 9.301(A) and the appointment of an Interim Administrator is necessary to protect the interests of the Affected Attorney's Clients or the interests of the Affected Attorney, the circuit court shall appoint one or more Interim Administrators, as follows:

(1) The circuit court must appoint the Designated Interim Administrator or the Interim Administrator proposed by the State Bar under subrule (A), unless good cause exists to appoint a different Interim Administrator.

(2) If good cause exists, the circuit court may appoint additional Interim Administrators.

(3) The order appointing an Interim Administrator shall specifically authorize the Interim Administrator to:

(a) take custody of and act as signatory on any bank or investment accounts, safe deposit boxes, and other depositories maintained by the Affected Attorney in connection with the Law Firm, including all lawyer trust accounts, escrow accounts, payroll accounts, operating accounts, and special accounts;

(b) disburse funds to clients of the Affected Attorney or others entitled thereto; and

(c) take all appropriate actions with respect to the accounts.

(4) The order appointing an Interim Administrator takes effect immediately upon entry unless the circuit court orders otherwise.

(5) The circuit court may order the Interim Administrator to submit interim and final accountings and reports, as it deems appropriate. The circuit court may allow or direct portions of any accounting relating to

the funds and confidential information of the clients of the Affected Attorney to be filed under seal.

(C) Service of Notice of Interim Administrator's Appointment. Upon receipt of an order of appointment of an Interim Administrator, the petitioner must serve the Notice of Appointment of an Interim Administrator's appointment, including the name and address of the Affected Attorney, and the name, business address, business telephone number, business email address, and P number of the Interim Administrator on the Affected Attorney, the Affected Attorney's estate if the Affected Attorney has died, and the Affected Attorney's fiduciary. If the petitioner is the Designated Interim Administrator, service must also be made on the State Bar of Michigan. If the petitioner is the State Bar of Michigan, service must also be made on the Interim Administrator. The State Bar of Michigan must publish the notice in the Michigan Bar Journal and on the State Bar of Michigan website.

(D) Objection to Appointment. Within 14 days after service of the Notice of Appointment, any interested person may file objections to the order of appointment of an Interim Administrator specifying the grounds upon which the objection is based. Although the filing of one or more objections does not automatically stay the order appointing Interim Administrator, the court may order that the appointment be stayed pending resolution of the objection(s).

RULE 9.307. DUTIES AND POWERS OF THE INTERIM ADMINISTRATOR.

(A) The Interim Administrator is not required to expend his or her own resources when exercising the duties and powers identified in this rule. If the Interim

Administrator does expend his or her own resources, the Interim Administrator may request reimbursement under MCR 9.313.

(B) The general duties of the Interim Administrator are to:

(1) take custody of the files and records.

(2) take control of accounts, including lawyer trust accounts and operating accounts.

(3) review the files and other papers to identify any pending matters.

(4) promptly notify all clients represented by the Affected Attorney in pending matters of the appointment of the Interim Administrator. Notification shall be made in writing, where practicable.

(5) promptly notify all courts and counsel involved in any pending matters, to the extent they can be reasonably identified, of the appointment of an Interim Administrator for the Affected Attorney. Notification shall be made in writing, where practicable.

(6) deliver the files, funds, and other property belonging to the Affected Attorney's Clients pursuant to the clients' directions, subject to the right to retain copies of such files or assert a retaining or charging lien against such files, money, or other property to the extent permitted by law.

(7) take steps to protect the interests of the clients, the public, and, to the extent possible and not inconsistent with the protection of the Affected Attorney's Clients, to protect the interests of the Affected Attorney.

(8) comply with the terms of the agreement between the Affected Attorney and the Interim Administrator.

(C) Inventory; Accounting; Reporting.

(1) The Interim Administrator shall file with the court an inventory of the Affected Attorney's interest-bearing trust accounts for deposit of client and third-party funds within 35 days after entry of the order of appointment, unless an inventory has already been filed with the court.

(2) The Interim Administrator shall account for all receipts, disbursements, and distributions of money and property for the Affected Attorney, including its interest-bearing trust accounts for deposit of client and third-party funds.

(3) The Interim Administrator shall file with the court a final written report and final accounting of the administration of the Affected Attorney and serve a copy of each on the State Bar of Michigan.

(4) The State Bar of Michigan may petition the court for an interim accounting if it has reason to believe the Affected Attorney's affairs are being mismanaged.

(D) If the Interim Administrator determines that there is a conflict of interest between the Interim Administrator and an Affected Attorney's Client, the Interim Administrator must notify the client, the State Bar of Michigan, and the circuit court that made the appointment and take all appropriate action under the Michigan Rules of Professional Conduct.

(E) To the extent possible, the Interim Administrator may assist and cooperate with the Affected Attorney and/or the Affected Attorney's fiduciary in the continuance, transition, sale, or winding up of the Law Firm.

(F) The Interim Administrator may purchase the Law Firm only upon the circuit court's approval of the sale.

RULE 9.309. PROTECTION OF CLIENT INFORMATION AND PRIVILEGE.

The appointment of the Interim Administrator does not automatically create an attorney and client relationship between the Interim Administrator and any of the Affected Attorney's Clients. However, the attorney-client privilege applies to all communications by or to the Interim Administrator and the Affected Attorney's Clients to the same extent as it would have applied to any communications by or to the Affected Attorney with those same clients. The Interim Administrator is governed by Michigan Rule of Professional Conduct 1.6 with respect to all information contained in the files of the Affected Attorney's Clients and any information relating to the matters in which the clients were being represented by the Affected Attorney.

RULE 9.311. PROTECTION OF CLIENT FILES AND PROPERTY.

The circuit court has jurisdiction over all of the files, records, and property of clients of the Affected Attorney and may make any appropriate orders to protect the interests of the clients of the Affected Attorney and, to the extent possible and not inconsistent with the protection of clients, the interests of the Affected Attorney, including, but not limited to, orders relating to the delivery, storage, or destruction of the client files of the Affected Attorney. The Interim Administrator may maintain client documents in paper or electronic format. The Interim Administrator may destroy any client document pursuant to the law office file retention

policy or as necessary to meet ethical obligations, whichever is shorter, without returning to the court for permission to do so.

RULE 9.313. COMPENSATION AND REIMBURSABLE EXPENSES OF INTERIM ADMINISTRATOR.

(A) Compensation and Reimbursement Available. The Interim Administrator, except as otherwise provided by an agreement with the Affected Attorney, is entitled to reasonable compensation for the performance of the Interim Administrator's duties and reimbursement for actual and reasonable costs incurred in connection with the performance of the Interim Administrator's duties. Reimbursable expenses include, but are not limited to, the costs incurred in connection with maintaining the staff, offices, and operation of the Law Firm and the employment of attorneys, accountants, and others retained by the Interim Administrator in connection with carrying out the Interim Administrator's duties.

(B) Request for Compensation or Reimbursement.

(1) The Interim Administrator may file a motion with the court that ordered the appointment seeking compensation or reimbursement under this rule. Unless the Interim Administrator and the Affected Attorney or the Affected Attorney's estate have reached an agreement otherwise, the Interim Administrator will be paid from the Law Firm if funds are available; if funds are not available from the practice, the attorney may file a claim against the estate in a probate court. The claim must include an accounting of all receipts, disbursements, and distributions of money and property of the Law Firm.

(2) An Interim Administrator who was matched to an Affected Attorney through the list maintained by

the State Bar of Michigan and who was subsequently appointed by the circuit court may seek payment or reimbursement from the State Bar of Michigan for expenses identified in subrule (A). The State Bar of Michigan will promulgate a process for reimbursement under this subrule.

(C) Award of Compensation or Reimbursement. The circuit court may enter a judgment awarding compensation and expenses to the Interim Administrator against the Law Firm, Affected Attorney, or any other available sources as the court may direct. The judgment will be a lien upon all property of any applicable Law Firm or Affected Attorney retroactive to the date of filing of the petition for the appointment of an Interim Administrator under this Rule. The judgment lien is subordinate to possessory liens and to non-possessory liens and security interests created prior to it taking effect and may be foreclosed upon in the manner prescribed by law.

RULE 9.315. LIABILITY.

Every Interim Administrator, as that term is defined in MCR 9.301(A), shall obtain and retain professional liability insurance that covers conduct performed as an Interim Administrator under these rules and the Rules Concerning the State Bar of Michigan.

RULE 9.317. EMPLOYMENT OF THE INTERIM ADMINISTRATOR AS ATTORNEY FOR AN AFFECTED CLIENT.

An Interim Administrator shall not, without the informed written consent of the Affected Client represent such client in a pending matter in which the client was represented by the Affected Attorney, other than to temporarily protect the interests of the client, or unless and until the Interim Administrator has concluded the

purchase of the Law Firm. Any informed written consent by the Affected Client must include an acknowledgment that the client is not obligated to retain the Interim Administrator.

Staff Comment: Beginning in 2023, these amendments impose new obligations on private practice attorneys and the State Bar of Michigan with regard to identifying, designating, and serving as Interim Administrators when an attorney becomes unable to practice.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted June 29, 2022, effective September 1, 2022 (File No. 2019-16)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 7.212, 7.215, 7.305, 7.311, and 7.312 of the Michigan Court Rules are adopted, effective September 1, 2022.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.212. BRIEFS.

(A) Time for Filing and Service.

(1) Appellant's Brief.

(a) Filing. The appellant must~~shall~~ file ~~5 typewritten, xerographic, or printed copies of~~ a brief with the Court of Appeals within

(i)-(iii) [Unchanged.]

(b) Service. The appellant~~Within the time for filing the appellant's brief, 1 copy~~ must serve the

briefbe served on all other parties to the appeal and file proof of that service filed with the Court of Appeals and served with the brief.

(2) Appellee's Brief.

(a) Filing. The appellee mayshall file 5 typewritten, xerographic, or printed copies of a brief with the Court of Appeals within

(i)-(ii) [Unchanged.]

(b) Service. An appellee's briefWithin the time for filing the appellee's brief, 1 copy must be served on all other parties to the appeal and proof of that service must be filed with the briefCourt of Appeals.

(3) Earlier Filing and Service. The time for filing aand serving the appellant's or the appellee's brief may be shortened by order of the Court of Appeals on motion showing good cause.

(4) Late Filing. Any party failing to timely file and serve a brief underrequired by this rule forfeits the right to oral argument.

(5) [Unchanged.]

(B) Length and Form of Briefs. Except as permitted by order of the Court of Appeals, and except as provided in subrule (G), briefs are limited to 50 pages double-spaced, exclusive of tables, indexes, and appendixes. Quotations and footnotes may be single-spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point type. A motion for leave to file a brief in excess of the page limitations of this subrule must be filed by the due date of the brief and shall accompany the proposed brief. Such motions are disfavored and will be granted only for extraordinary and compelling reasons. If the motion is denied, the movant shall file a conforming brief within 21 days after the date of the order deciding the motion.

(1) Except as otherwise provided in this rule or by court order, briefs are limited to no more than 16,000 words. A self-represented party who does not have access to a word-processing system may file a typewritten or legibly handwritten brief of not more than 50 pages.

(2) The only elements of a brief included in the word or page limit are those elements listed in subrules (C)(6)-(8). Footnotes and text contained in embedded graphics are also included in the word or page limit.

(3) A brief filed under the word limitation of this subrule must include a statement after the signature block stating the number of countable words. The filer may rely on the word count of the word-processing system used to prepare the brief.

(4) A motion for leave to file a brief in excess of the word or page limitations must be filed by the due date of the brief and must accompany the proposed brief. Such motions are disfavored and will be granted only for extraordinary and compelling reasons. If the motion is denied, the movant must file a conforming brief within 21 days after the date of the order deciding the motion.

(5) Briefs must have at least one-inch page margins, 12-point font, and 1.5-line-spaced text, except quotations and footnotes may be single-spaced. If a self-represented party is filing a typewritten brief under the page limitation exception contained in subrule (B)(1), the brief must have page margins of at least one-inch, 12-point font, and double-spaced text, except quotations, headings, and footnotes may be single-spaced.

(C)-(E) [Unchanged.]

(F) Supplemental Authority. Without leave of court, a party may file ~~an original and four copies of~~ a one-page communication, titled "supplemental authority," to call the court's attention to new authority released after the party filed its brief. Such a communication,

(1)-(3) [Unchanged.]

(G) Reply Briefs. ~~An appellant or a cross-appellant may reply to the brief of an appellee or cross-appellee w~~Within 21 days after service of an~~the brief of the~~ appellee's or cross-appellee's brief, appellant or cross-appellant may file a reply brief~~. Reply briefs must be~~ confined to rebuttal of the arguments in the appellee's or cross-appellee's brief~~ and must be limited to 10 pages, exclusive of tables, indexes, and appendices, and must include a table of contents and an index of authorities. No additional or supplemental briefs may be filed except as provided by subrule (F) or by leave of the Court~~. Reply briefs are limited to no more than 3,200 words, but are otherwise governed by subrule (B). A self-represented party who does not have access to a word-processing system may file a typewritten or legibly handwritten reply brief of not more than 10 pages.

(H)-(J) [Unchanged.]

RULE 7.215. OPINIONS, ORDERS, JUDGMENTS, AND FINAL PROCESS FOR COURT OF APPEALS.

(A)-(H) [Unchanged.]

(I) Reconsideration.

(1) A motion for reconsideration may be filed within 21 days after the date of the order or the date stamped on an opinion. The motion shall include all facts, arguments, and citations to authorities in a

single document and shall not exceed 3,200 words or, for self-represented litigants without access to a word-processing system, 10 double-spaced pages. A copy of the order or opinion of which reconsideration is sought must be included with the motion. Motions for reconsideration are subject to the restrictions contained in MCR 2.119(F)(3).

(2) A party may answer a motion for reconsideration within 14 days after the motion is served on the party. An answer to a motion for reconsideration shall be a single document and shall not exceed 2,500 words or, for self-represented litigants without access to a word-processing system, 7 double-spaced pages.

(3)-(4) [Unchanged.]

(J) [Unchanged.]

RULE 7.305. APPLICATION FOR LEAVE TO APPEAL.

(A)-(D) [Unchanged.]

(E) Reply. The appellant may file 1 signed copy of a reply within 21 days after service of the answer, along with proof of its service on all other parties. The reply must:

(1)-(2) [Unchanged.]

(3) be no longer than 3,200 words or, for self-represented litigants without access to a word-processing system, 10 pages, exclusive of tables, indexes, and appendixes.

(F)-(I) [Unchanged.]

RULE 7.311. MOTIONS IN SUPREME COURT.

(A)-(E) [Unchanged.]

(F) Motion for Rehearing.

(1) To move for rehearing, a party must file within 21 days after the opinion was filed:

(a)-(b) [Unchanged.]

The motion for rehearing must include reasons why the Court should modify its opinion and shall not exceed 16,000 words or, for self-represented litigants without access to a word-processing system, 50 double-spaced pages. Motions for rehearing are subject to the restrictions contained in MCR 2.119(F)(3).

(2)-(5) [Unchanged.]

(G) Motion for Reconsideration. To move for reconsideration of a court order, a party must file the items required by subrule (A) within 21 days after the date of certification of the order. The motion shall include all facts, arguments, and citations to authorities in a single document and shall not exceed 3,200 words or, for self-represented litigants without access to a word-processing system, 10 double-spaced pages. A copy of the order for which reconsideration is sought must be included with the motion. Motions for reconsideration are subject to the restrictions contained in MCR 2.119(F)(3). The clerk shall refuse to accept for filing a late-filed motion or a motion for reconsideration of an order denying a motion for reconsideration. The filing of a motion for reconsideration does not stay the effect of the order addressed in the motion.

RULE 7.312. BRIEFS AND APPENDIXES IN CALENDAR CASES AND ORAL ARGUMENTS ON THE APPLICATION.

(A) Form and Length. Briefs in calendar cases must be prepared in conformity with subrule (B), MCR 7.212(B), (C), (D), and (G) as to form and length. Briefs shall be printed on only the front side of the page of good quality, white unglazed paper by any printing, duplicating, or copying process that provides a clear

image. Typewritten, handwritten, or carbon copy pages may be used so long as the printing is legible.

(B) Citation of Record; Summary of Arguments.

(1) [Unchanged.]

(2) If the argument of any one issue in a brief exceeds 6,500 words or, for self-represented litigants without access to a word-processing system, 20 pages, a summary of the argument must be included. The summary must be a succinct, accurate, and clear condensation of the argument actually made in the body of the brief and may not be a mere repetition of the headings under which the argument is arranged. The summary of argument is included in the brief's word or page limit.

(C)-(J) [Unchanged.]

Staff Comment: The amendments establish word limits for briefs, motions, and other documents submitted to the Court of Appeals and Supreme Court and provide new procedures to facilitate this limitation. Briefs can be submitted using wider margins, larger line spacing, or larger fonts than the minimum requirements set forth in MCR 7.212(B)(5). A page limit is still available for self-represented parties who do not have access to a word-processing system.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted June 29, 2022, effective July 1, 2022 (File No. 2021-22)—REPORTER.

On order of the Court, the following amendments are adopted, effective July 1, 2022.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1)-(8) [Unchanged.]

(9) Personal Identifying Information.

(a)-(d) [Unchanged.]

(e) Protected personal identifying information provided to the court as required by subrule (be) shall be entered into the court's case management system in accordance with standards established by the State Court Administrative Office. The information shall be maintained for the purposes for which it was collected and for which its use is authorized by federal or state law or court rule; however, it shall not be included or displayed as case history under MCR 8.119(D)(1).

(10) [Unchanged.]

(E)-(G) [Unchanged.]

(H) Definitions. The following definitions apply to case records as defined in MCR 8.119(D) and (E).

(1) "Confidential" means that a case record is nonpublic and accessible only to those individuals or entities specified in statute or court rule. A confidential record is accessible to parties only in the manner~~as~~ specified in statute or court rule.

(2)-(5) [Unchanged.]

RULE 2.003. DISQUALIFICATION OF JUDGE.

(A)-(C) [Unchanged.]

(D) Procedure.

(1)(a) [Unchanged.]

(b) Time for Filing in the Court of Appeals. All motions for disqualification must be filed within 14 days of disclosure of the judge's assignment to the case or within 14 days of the discovery of the grounds for disqualification. If a party discovers the grounds for disqualification within 14 days of a scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

(c)-(d) [Unchanged.]

(2)-(4) [Unchanged.]

(E) [Unchanged.]

RULE 2.106. NOTICE BY POSTING OR PUBLICATION.

(A) Availability. This rule governs service of process by publication or posting pursuant to an order under MCR 2.105(J~~H~~).

(B) Procedure. A request for an order permitting service under this rule shall be made by motion in the manner provided in MCR 2.105(J~~H~~). In ruling on the motion, the court shall determine whether mailing is required under subrules (D)(2) or (E)(2).

(C)-(G) [Unchanged.]

RULE 2.117. APPEARANCES.

(A) [Unchanged.]

(B) Appearance by Attorney.

(1)-(2) [Unchanged.]

(3) Appearance by Appointing Authority.

(a)-(b) [Unchanged.]

(c) In actions where an attorney is appointed for a single hearing, the attorney should orally inform the court of the limited appointment at the time of the

hearing. It is not necessary for the appointing authority to file ~~an~~ notice of appointment or for the attorney to file an appearance.

(4) [Unchanged.]

(C)-(E) [Unchanged.]

RULE 2.403. CASE EVALUATION.

(A)-(K) [Unchanged.]

(L) Acceptance or Rejection of Evaluation.

(1)-(2) [Unchanged.]

(3) In case evaluations involving multiple parties the following rules apply:

(a)-(b) [Unchanged.]

~~(c) If a party makes a limited acceptance under subrules (L)(3)(b) and some of the opposing parties accept and others reject, for purposes of the cost provisions of subrule (O) the party who made the limited acceptance is deemed to have rejected as to those opposing parties who accept.~~

(M)-(N) [Unchanged.]

RULE 3.201. APPLICABILITY OF RULES.

(A)-(C) [Unchanged.]

(D) When used in this subchapter, unless the context otherwise indicates:

(1) "Case" means an action commenced in the family division of the circuit court by filing one of the following case initiating documents:

(a)-(d) [Unchanged.]

(e) ~~filing~~ a consent judgment under MCR 3.223;

(f)-(g) [Unchanged.]

(2)-(4) [Unchanged.]

RULE 3.706. ORDERS.

(A)-(C) [Unchanged.]

(D) Service. The petitioner shall serve the order on the respondent as provided in MCR 2.105(A). If the respondent is a minor, and the whereabouts of the respondent's parent or parents, guardian, or custodian is known, the petitioner shall also in the same manner serve the order on the respondent's parent or parents, guardian, or custodian. On an appropriate showing, the court may allow service in another manner as provided in MCR 2.105(J~~H~~). Failure to serve the order does not affect its validity or effectiveness.

(E) [Unchanged.]

RULE 3.707. MODIFICATION, TERMINATION, OR EXTENSION OF ORDER.

(A) Modification or Termination.

(1) Time for Filing and Service.

(a)-(b) [Unchanged.]

(c) The moving party shall serve the motion to modify or terminate the order and the notice of hearing at least 7 days before the hearing date as provided in MCR 2.105(A)(2) at the mailing address or addresses provided to the court. On an appropriate showing, the court may allow service in another manner as provided in MCR 2.105(J~~H~~). If the moving party is a respondent who is issued a license to carry a concealed weapon and is required to carry a weapon as a condition of employment, a police officer certified by the Michigan law enforcement training council act of 1965, 1965 PA 203, MCL 28.601 to 28.616, a sheriff, a deputy sheriff or a member of the Michigan department of state police, a local corrections officer, department of corrections employee, or a federal law enforcement officer who carries

a firearm during the normal course of employment, providing notice one day before the hearing is deemed as sufficient notice to the petitioner.

(2)-(3) [Unchanged.]

(B)-(D) [Unchanged.]

RULE 3.935. PRELIMINARY HEARING.

(A) Time.

(1)-(2) [Unchanged.]

(3) Special Adjournment; Specified Juvenile Violation. This subrule applies to a juvenile accused of an offense that allegedly was committed between the juvenile's 14th and 18~~7~~th birthdays and that would constitute a specified juvenile violation listed in MCL 712A.2(a)(1).

(a)-(c) [Unchanged.]

(B)-(F) [Unchanged.]

RULE 3.943. DISPOSITIONAL HEARING.

(A)-(D) [Unchanged.]

(E) Dispositions.

(1)-(6) [Unchanged.]

(7) Mandatory Detention for Use of a Firearm.

(a) In addition to any other disposition, a juvenile, other than a juvenile sentenced in the same manner as an adult under MCL 712A.18(1)(~~m~~o), shall be committed under MCL 712A.18(1)(e) to a detention facility for a specified period of time if all the following circumstances exist:

(i)-(iii) [Unchanged.]

(b)-(c) [Unchanged.]

RULE 3.955. SENTENCING OR DISPOSITION IN DESIGNATED CASES.

(A) Determining Whether to Sentence or Impose Disposition. If a juvenile is convicted under MCL 712A.2d, sentencing or disposition shall be made as provided in MCL 712A.18(1)(o~~m~~) and the Crime Victim's Rights Act, MCL 780.751 *et seq*., if applicable. In deciding whether to enter an order of disposition, or impose or delay imposition of sentence, the court shall consider all the following factors, giving greater weight to the seriousness of the offense and the juvenile's prior record:

(1)-(6) [Unchanged.]

The court also shall give the juvenile, the juvenile's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in deciding whether to enter an order of disposition or to impose or delay imposition of sentence.

(B)-(E) [Unchanged.]

RULE 3.965. PRELIMINARY HEARING.

(A)-(B) [Unchanged.]

(C) Pretrial Placement.

(1) [Unchanged.]

(2) Criteria. The court may order placement of the child into foster car~~r~~se if the court finds all of the following:

(a)-(e) [Unchanged.]

(3)-(8) [Unchanged.]

(D) [Unchanged.]

RULE 3.972. TRIAL.

(A)-(E) [Unchanged.]

(F) Respondent's Rights Following Trial. If the trial results in a verdict that one or more statutory grounds for jurisdiction has been proven, the court shall advise the respondent orally or in writing that:

(1) [Unchanged.]

(2) ~~that~~ an indigent respondent is entitled to appointment of an attorney to represent the respondent on any appeal as of right and to preparation of transcripts, and

(3) [Unchanged.]

(G) [Unchanged.]

RULE 5.143. ALTERNATIVE DISPUTE RESOLUTION.

(A) [Unchanged.]

(B) If a dispute is submitted to case evaluation, MCR 2.403 and 2.404 shall apply to the extent feasible~~, except that sanctions must not be awarded unless the subject matter of the case evaluation involves money damages or division of property~~.

RULE 7.118. APPEALS FROM THE MICHIGAN PAROLE BOARD.

(A)-(H) [Unchanged.]

(I) Subsequent Appeal to the Court of Appeals. An appeal of a circuit court decision is by application for leave to appeal~~motion for immediate consideration in~~ to the Court of Appeals under MCR 7.205~~(F)~~, and the Court of Appeals shall expedite the matter.

(J) [Unchanged.]

RULE 7.202. DEFINITIONS.

For purposes of this subchapter:

(1)-(5) [Unchanged.]

(6) "final judgment" or "final order" means:

(a) In a civil case,

(i)-(iii) [Unchanged.]

(iv) a postjudgment order awarding or denying attorney fees and costs under court rule~~MCR 2.403, 2.405, 2.625~~ or other law ~~or court rule~~; or

(v) [Unchanged.]

(b) [Unchanged.]

RULE 7.208. AUTHORITY OF COURT OR TRIBUNAL APPEALED FROM.

(A)-(I) [Unchanged.]

(J) Attorney Fees and Costs. The trial court may rule on requests for costs or attorney fees under court rule~~MCR 2.403, 2.405, 2.625~~ or other law ~~or court rule~~, unless the Court of Appeals orders otherwise.

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(C) [Unchanged.]

(D) [Unchanged.]

(1) [Unchanged.]

(a) Case History. The clerk shall create and maintain a case history of each case, known as a register of actions, in the court's automated case management system. The automated case management system shall be capable of chronologically displaying the case history for each case and shall also be capable of searching a case by number or party name (previously known as numerical and alphabetical indices) and displaying the case number, date of filing, names of parties, and names of any attorneys of record. The case history shall contain both pre- and post-judgment information

and shall, at a minimum, consist of the data elements prescribed in the Michigan Trial Court Records Management Standards. Each entry shall be brief, but shall show the nature of each item filed, each item issued by the court, and the returns showing execution. The case history entry of each item filed shall be dated with the date of filing (if relevant) and the date and initials of the person recording the action, except where the entry is recorded by the electronic filing system. In that instance, the entry shall indicate that the electronic filing system recorded the action. The case history entry of each order, judgment, opinion, notice, or other item issued by the court shall be dated with the date of issuance and the initials of the person recording the action. Protected personal identifying information entered into the court's case management system as required by MCR 1.109(D)(9)(ed) shall be maintained for the purposes for which it was collected and for which its use is authorized by federal or state law or court rule; however, it shall not be included or displayed as case history, including when transferred to the Archives of Michigan pursuant to law.

(b) [Unchanged.]

(2)-(4) [Unchanged.]

(E)-(L) [Unchanged.]

Administrative Order No. 2004-2 — Approval of the Adoption of Concurrent Jurisdiction Plans for Barry, Berrien, Isabella, Lake, and Washtenaw Counties, and for the 46th Circuit Consisting of Crawford, Kalkaska, and Otsego Counties.

[Entered April 28, 2004; effective August 1, 2004. Amended July 1, 2022 to reflect new numbering of Lake County courts. See 2022 PA 7.]

[The existing language of the order remains unchanged with the exception of the paragraph shown below.]

LAKE COUNTY

27th~~51st~~ Circuit Court

78~~9~~th District Court

Lake County Probate Court

Administrative Order No. 2014-8 — Adoption of Concurrent Jurisdiction Plan for the 27th Circuit Court, the 78th District Court, and the Newaygo County and Lake~~Oceana~~ County Probate Courts.

[Entered March 26, 2014. Amended July 1, 2022 to reflect new numbering of Lake and Oceana County courts. See 2022 PA 7.]

[The existing language of the order remains unchanged with the exception of the paragraph shown below.]

The 27th Circuit Court, the 78th District Court, and the Newaygo County and Lake~~Oceana~~ County Probate Courts.

Local Court Rules for District Courts. [All rules related to the Recorder's Court are hereby rescinded.]

~~LOCAL COURT RULE 2.302. DISCOVERY OF DOCUMENTS AND EXHIBITS.~~

~~(A) On a motion in open court at the arraignment on the information or by a subsequent proper motion, the trial court may order that the prosecution make copies of the following available to defense counsel:~~

~~(1) All statements known to the police and prosecutor by all endorsed witnesses;~~

~~(2) All statements by the defendant which have been recorded or written;~~

(3) The investigator's report and all preliminary complaint reports (PCR's) concerning the case;

(4) The defendant's arrest and conviction record;

(5) All scientific and laboratory reports;

(6) All corporeal and photographic lineup sheets.

(B) The trial court may also order that the prosecution permit defense counsel to view the following:

(1) All photographs, diagrams, or other visual evidence pertaining to the case that are in police custody;

(2) All physical or tangible evidence pertaining to the case that are in police custody.

(C) Additionally, the court may order that the prosecution permit defense counsel to view or receive copies of any and all other documents pertaining to the case that are in the possession or control of the police or prosecution. This shall be in effect whenever such documents or items may be material to the defense, regardless of whether they are intended for evidence at trial.

LOCAL COURT RULE 2.401. PRETRIAL CONFERENCES.

(A) The pretrial stage begins after the arraignment on the information. The purpose of the pretrial conference is to review the legal issues, to advise the court of any motions, and to fix time limitations on such motions and filings. Guilty plea possibilities are to be discussed as well as other matters the court may determine to be necessary to expedite the orderly progression of the case. The pretrial stage consists of three phases:

(1) The calendar conference for setting the calendar of events;

(2) Motion and evidentiary hearings; and

(3) Final conference for terminating plea negotiations, certifying readiness for trial, and setting a firm trial date.

(B) Attendance is required. The presence of the defendant, defense counsel, and the prosecutor is required at each conference.

LOCAL COURT RULE 2.503. CONTINUANCES AND ADJOURNMENTS.

Adjournments, postponements, or continuances of any trial or other proceeding shall occur only on a written order of the chief judge or a designee.

LOCAL COURT RULE 2.506. WITNESSES AND SUBPOENAS.

(A) Filing of Witness Lists. The court clerk may assume responsibility for the service of subpoenas on witnesses for either party provided that either party, the prosecution, or defense, files in the clerk's office, no later than 28 days prior to the scheduled trial date, a complete list of the respective witnesses for whom subpoenas are sought, together with their addresses.

(B) Subpoenas, Preparation, and Service. When witness lists are filed in accordance with subrule (A), the court clerk shall direct the timely and proper preparation of subpoenas for each of the witnesses listed and shall be responsible for seeing that the proper officers of the Detroit Police Department receive the subpoenas timely with directions that they be promptly served and that a return of service for each subpoena is filed with the court before the trial date or the date of such other proceeding for which the attendance of the witness is required.

(C) Whenever the procedure for service of subpoenas which is outlined in this rule is not followed, and due diligence is not shown with respect to the service of

~~subpoenas on any witness, no adjournment, postponement, or continuance will be granted because of the failure of the witness to appear.~~

~~LOCAL COURT RULE 2.511. JURORS; JURY SERVICE.~~

~~(A) Supervision of Jurors. The chief judge shall supervise persons summoned for jury duty in Recorder's Court and shall exercise the other responsibilities required by law or court rules pertaining to jury service. The trial judge, however, shall supervise jurors summoned before him or her for voir dire and the entire jury selection process, and shall supervise those jurors selected to sit on a case until they are discharged by the trial judge.~~

~~(B) Term of Juror Services. Persons summoned for jury duty shall serve one day, or the duration of any trial for which they are jurors.~~

~~(C) Communication Between Jurors, Attorneys, and Court Personnel. Deputy clerks, prosecuting or defense attorneys, police officers, or other officials or employees on duty in the Recorder's Court building who must perform any duty, directly or indirectly, with or for any jurors or panel of jurors, shall not converse with them at any time or place during their period of service. Only necessary social civility or the transaction of necessary court business are excepted from this rule.~~

~~LOCAL COURT RULE 6.101. PRETRIAL PROCEEDINGS; ARRAIGNMENT ON THE INFORMATION.~~

~~(A) Immediately after a defendant is bound over for trial, the defendant, the defense counsel, and the prosecuting attorney shall be notified of the date and time of arraignment on the information.~~

~~(B) When a defendant is confined in jail, he or she shall be arraigned on the information before the chief judge or a designee on the seventh calendar day after the magistrate signs the return; when a defendant is free on bail or recognizance, he or she shall be arraigned on the fourteenth calendar day after the magistrate signs the return. Court holidays shall not be counted in computing time.~~

~~(C) At the arraignment on the information, the chief judge, or a designee, may accept a plea of guilty and may consider an application for youthful trainee or diversionary status.~~

Staff Comment: These amendments update cross-references and make other nonsubstantive revisions to clarify the rules.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted July 13, 2022, effective September 1, 2022 (File Nos. 2019-28 and 2021-36)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 9.202 of the Michigan Court Rules is adopted, effective September 1, 2022.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 9.202. STANDARDS OF JUDICIAL CONDUCT.

(A) [Unchanged.]

(B) Grounds for Action. A judge is subject to censure, suspension with or without pay, retirement, or

removal for conviction of a felony, physical or mental disability that prevents the performance of judicial duties, misconduct in office, persistent failure to perform judicial duties, habitual intemperance, or conduct that is clearly prejudicial to the administration of justice. ~~In addition to any other sanction imposed, a~~A judge may not be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint~~ only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court~~.

(1)-(3) [Unchanged.]

Staff Comment: The amendment of MCR 9.202 clarifies that a judge who is the subject of judicial disciplinary proceedings may not be ordered to pay the costs, fees, and expenses incurred by the Judicial Tenure Commission in prosecuting the complaint.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

SUPREME COURT CASES

AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN v CALHOUN COUNTY SHERIFF'S OFFICE

Docket No. 163235. Decided February 4, 2022.

The American Civil Liberties Union of Michigan (the ACLU) filed a complaint in the Calhoun Circuit Court against the Calhoun County Jail; the ACLU subsequently filed an amended complaint naming the Calhoun County Sheriff's Office (the CCSO) as the defendant. The ACLU alleged that the CCSO violated Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*., when it denied the ACLU's request for documents under FOIA. The ACLU sought disclosure of all records related to the December 2018 detention of United States citizen Jilmar Benigno Ramos-Gomez. Ramos-Gomez's three-day detention at the Calhoun County Correctional Facility occurred pursuant to an Intergovernmental Service Agreement executed between United States Immigration and Customs Enforcement (ICE) and the jail. The CCSO denied the ACLU's request, asserting that the requested records were exempt from disclosure under MCL 15.243(1)(d) because they related to an ICE detainee. The ACLU filed its amended complaint, and the CCSO moved for summary disposition, arguing that the ACLU's FOIA request was appropriately denied under MCL 15.243(1)(d) because the records and information sought by the ACLU were not public records subject to disclosure by the CCSO under 8 CFR 236.6 and 81 Fed Reg 72080 (October 19, 2016). The CCSO cited *Soave v Dep't of Ed*, 139 Mich App 99 (1984), in support of its position that MCL 15.243(1)(d) includes federal regulations. The ACLU filed a cross-motion for partial summary disposition. The court, John A. Hallacy, J., granted the CCSO's motion for summary disposition, ruling that it did not have the authority to order the CCSO to disclose the records in light of MCL 15.243(1)(d) and 8 CFR 236.6 and that the ACLU's exclusive remedy was to request the records from ICE. The ACLU appealed in the Court of Appeals, and the Court of Appeals, MURRAY, C.J., and M. J. KELLY and RICK, JJ., affirmed, holding that 8 CFR 236.6 constituted a basis to exempt public records from disclosure under MCL 15.243(1)(d). *American Civil Liberties Union of Mich v Calhoun Co Jail*, unpublished per

curiam opinion of the Court of Appeals, issued March 25, 2021 (Docket No. 352334). In so ruling, the Court of Appeals relied on *Mich Council of Trout Unlimited v Dep't of Military Affairs*, 213 Mich App 203 (1995), which cited *Soave*. The ACLU moved for reconsideration, and the Court of Appeals denied the motion. The ACLU sought leave to appeal.

In a unanimous opinion by Justice ZAHRA, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

A regulation cannot serve as the basis for exempting public records from disclosure under MCL 15.243(1)(d) because a regulation is not a statute; *Soave* and *Trout Unlimited* were overruled insofar as those cases ignored the Legislature's deliberate linguistic choice in MCL 15.243(1)(d). FOIA requires disclosure of the public records of a public body to persons who request to inspect, copy, or receive copies of those requested public records. However, FOIA sets forth a series of exemptions granting the public body the discretion to withhold a public record from disclosure if it falls within one of the exemptions. MCL 15.243(1)(d) provides, in relevant part, that a public body may exempt from disclosure as a public record records or information specifically described and exempted from disclosure by statute. In this case, the CCSO invoked federal law, 8 CFR 236.6, in denying the ACLU's FOIA request. 8 CFR 236.6 provides, in relevant part, that no person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of ICE (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. 8 CFR 236.6 further provides that this information shall be under the control of ICE and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations, and executive orders and that insofar as any documents or other records contain such information, those documents shall not be public records. The Court of Appeals erred by holding that "exempted from disclosure by statute" in MCL 15.243(1)(d) really meant exempted from disclosure by statute *or regulation*. The Court of Appeals relied on the fact that a federal regulation has the legal force of a federal statute; however, a federal regulation is not a federal statute. Moreover, the Court of Appeals holding was at odds with the plain language of MCL 15.243(1)(d). When MCL 15.243(1)(d)

was enacted, the relevant definition of "statute" was "[a]n act of the legislature declaring, commanding, or prohibiting something; a particular law enacted and established by the will of the legislative department of government; the written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state." Accordingly, a regulation promulgated by an executive-branch agency is not a statute. Had the Legislature wanted a regulation to be a basis for exemption, it could have easily included two additional words in MCL 15.243(1)(d): "or regulation." The Legislature has done just that in various other statutes. Therefore, an exemption that only uses the word "statute" is plainly different from an exemption that uses the words "statute or regulation" or "statute or court rule." Moreover, the procedure for creating a statute differs from that of creating a regulation, and that difference in process further supported the conclusion that a regulation is not a statute and that a regulation cannot serve as a basis for exempting public records from disclosure under MCL 15.243(1)(d). Finally, with regard to the caselaw, *Trout Unlimited* did not engage in an independent analysis of whether a federal regulation can serve as a basis for exempting public records from disclosure under MCL 15.243(1)(d); *Trout Unlimited* merely cited *Soave*, which itself relied on a federal district court case to conclude that reliance on a federal regulation to exempt a document under MCL 15.243(1)(d) was proper. Accordingly, *Soave* and *Trout Unlimited* were overruled insofar as those cases ignored the Legislature's deliberate linguistic choice in MCL 15.243(1)(d).

Court of Appeals holding reversed, *Soave* and *Trout Unlimited* overruled as to their erroneous interpretations of MCL 15.243(1)(d), and case remanded to the Calhoun Circuit Court.

STATUTES — FREEDOM OF INFORMATION ACT — EXEMPTIONS — PUBLIC RECORDS OR INFORMATION EXEMPTED FROM DISCLOSURE BY STATUTE.

MCL 15.243(1)(d) of Michigan's Freedom of Information Act, MCL 15.231 *et seq*., provides, in relevant part, that a public body may exempt from disclosure as a public record records or information specifically described and exempted from disclosure by statute; a regulation cannot serve as the basis for exempting from disclosure public records under MCL 15.243(1)(d) because a regulation is not a statute.

Miriam J. Aukerman and *Daniel S. Korobkin* for the American Civil Liberties Union of Michigan.

Amicus Curiae:

Susan E. Reed for the American Immigration Council, American Oversight, the Center for Constitutional Rights, Citizens for Responsibility and Ethics in Washington, the Michigan Press Association, the MuckRock Foundation, the National Immigration Project of the National Lawyers Guild, the Michigan Immigrant Rights Center, and Immigrant Legal Defense.

ZAHRA, J. This action involves a request for documents under Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*. Pursuant to the express terms of that act, certain information may be exempted from disclosure. One exemption is found in MCL 15.243(1)(d), which provides that "[a] public body may exempt from disclosure . . . [r]ecords or information specifically described and exempted from disclosure by statute." We must decide whether a federal regulation with a nondisclosure component, 8 CFR 236.6 (2021),[1] can be the basis for exempting public records from disclosure under MCL 15.243(1)(d). We hold that it cannot, for the simple reason that a regulation is not a statute. We reverse the Court of Appeals' holding to the contrary, and we overrule *Soave v Dep't of Ed*[2] and *Mich Council of Trout Unlimited v Dep't of Military Affairs*[3] as to their erroneous interpretations of MCL

[1] 8 CFR 236.6 (2021) provides that certain persons and entities are not permitted to "disclose or otherwise permit to be made public the name of, or other information relating to, [Department of Homeland Security (DHS) Immigration and Customs Enforcement (ICE)] detainee[s]."

[2] *Soave v Dep't of Ed*, 139 Mich App 99, 102; 360 NW2d 194 (1984).

[3] *Mich Council of Trout Unlimited v Dep't of Military Affairs*, 213 Mich App 203, 218, 220; 539 NW2d 745 (1995).

15.243(1)(d). We remand this case to the Calhoun Circuit Court for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff, the American Civil Liberties Union of Michigan (the ACLU), submitted a January 23, 2019 FOIA request[4] to defendant, the Calhoun County Sheriff's Office (the CCSO),[5] seeking disclosure of all records related to the December 2018 detention of United States citizen Jilmar Benigno Ramos-Gomez.[6] Ramos-Gomez's three-day detention at the Calhoun County Correctional Facility occurred pursuant to an Intergovernmental Service Agreement (IGSA) executed between United States Immigration and Customs Enforcement (ICE) and the jail.[7] The CCSO denied the ACLU's request, asserting that the re-

[4] The ACLU's FOIA request was initially submitted on January 17, 2019, and was subsequently amended on January 23, 2019.

[5] The Court of Appeals opinion suggested that the Calhoun County Correctional Facility is the defendant but also stated in a footnote that the CCSO is the proper defendant. See *American Civil Liberties Union of Mich v Calhoun Co Jail*, unpublished per curiam opinion of the Court of Appeals, issued March 25, 2021 (Docket No. 352334), p 1 n 1. In its application for leave to appeal, the ACLU states that it filed an amended complaint naming the CCSO as the defendant. This is accurate. Accordingly, we refer to the CCSO as the defendant.

[6] Ramos-Gomez was carrying both a United States passport and a Michigan REAL ID.

[7] IGSAs are basically bed-space contracts. People detained under them are in federal custody. In Michigan, however, all such individuals are housed in county jails alongside detainees of the state's criminal-justice system. According to the ACLU, in Calhoun, "ICE detainees are indistinguishable from the criminal detainees." IGSAs are distinct from detainers, which are requests by ICE for a state or local facility to continue a person's detention for a period of time until ICE can take the person into custody. Persons held on detainers are in state or local custody, not ICE custody. ICE issues a detainer to whatever law-

quested records were exempt from disclosure under MCL 15.243(1)(d) because they related to an ICE detainee.[8]

The ACLU filed a complaint in the Calhoun Circuit Court, alleging that the CCSO violated FOIA by denying its request. In response, the CCSO moved for summary disposition under MCR 2.116(C)(8) (failure to state a claim on which relief can be granted) and (10) (no genuine issue of material fact), arguing that the ACLU's FOIA request was appropriately denied under MCL 15.243(1)(d) because the records and information sought by the ACLU were not public records subject to disclosure by the CCSO under 8 CFR 236.6 and 81 Fed Reg 72080 (October 19, 2016). The CCSO cited *Soave*[9] in support of its position that MCL 15.243(1)(d) includes federal regulations. The ACLU filed a cross-motion for partial summary disposition under MCR 2.116(C)(9) (failure by the opposing party to state a valid defense to the claim asserted) and (10).

The circuit court granted the CCSO's motion for summary disposition and denied the ACLU's cross-motion for partial summary disposition. The circuit court ruled that it did not have the authority to order the CCSO to disclose the records in light of MCL

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enforcement agency it believes is holding an individual whom ICE wishes to arrest. In other words, any jail in Michigan can receive an ICE detainer.

[8] The ACLU also sent a federal FOIA request to ICE. When ICE did not respond, the ACLU filed suit in federal court. According to the ACLU, although ICE provided the ACLU with some of the requested records, the vast majority of records requested from ICE were not produced because ICE did not have them, including Calhoun's custody, disciplinary, and medical and mental health records, as well as audio and video recordings and other documents showing interactions between Ramos-Gomez and the jail staff.

[9] *Soave*, 139 Mich App at 102.

15.243(1)(d) and 8 CFR 236.6 and that the ACLU's exclusive remedy was to request the records from ICE.

The ACLU appealed in the Court of Appeals, and the Court of Appeals affirmed.[10] The Court of Appeals held that the federal regulation at issue, 8 CFR 236.6—which was promulgated by the Department of Homeland Security (DHS) Secretary pursuant to a federal statute, the Immigration and Nationality Act, 8 USC 1101 *et seq*.—constitutes a basis to exempt public records from disclosure under MCL 15.243(1)(d), which provides for exemption of records or information as "a public record" when such records or information are specifically described and exempted from disclosure by statute. In so ruling, the Court of Appeals relied on *Trout Unlimited*,[11] which itself cited *Soave*,[12] and it rejected the ACLU's reliance on *Detroit Free Press, Inc v Warren*.[13] The ACLU moved for reconsideration, and the Court of Appeals denied the motion. Thereafter, the ACLU sought leave to appeal in this Court. Concluding that oral argument is unnecessary to resolve the dispute presented by this case, we reverse the Court of Appeals judgment for the reasons stated in this opinion.

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[10] *American Civil Liberties Union of Mich v Calhoun Co Jail*, unpublished per curiam opinion of the Court of Appeals, issued March 25, 2021 (Docket No. 352334).

[11] *Trout Unlimited*, 213 Mich App at 218, 220.

[12] *Soave*, 139 Mich App at 102.

[13] *Detroit Free Press, Inc v Warren*, 250 Mich App 164, 171; 645 NW2d 71 (2002).

II. STANDARD OF REVIEW

The interpretation of state or federal regulations is a question of law that is reviewed de novo.[14] Statutory interpretation is also a question of law that we review de novo.[15] "The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language."[16] The first step in that determination is to review the language of the statute itself.[17] When statutory language is unambiguous, no further judicial construction is required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed by the words it chose.[18]

This Court reviews de novo a trial court's decision on a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law.[19] In this case, the trial court did not expressly indicate whether it granted defendant's motion under MCR 2.116(C)(8) or (10), but because it considered

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[14] *In re LFOC*, 319 Mich App 476, 480; 901 NW2d 906 (2017). Accord *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007) ("The interpretation and application of statutes and government regulations adopted pursuant to statutory authority present questions of law, which we review de novo.").

[15] *Dep't of Talent & Economic Development/Unemployment Ins Agency v Great Oaks Country Club, Inc*, 507 Mich 212, 226; 968 NW2d 336 (2021).

[16] *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011) (quotation marks and citation omitted).

[17] *Id*. (quotation marks and citation omitted).

[18] *2 Crooked Creek, LLC v Cass Co Treasurer*, 507 Mich 1, 9; 967 NW2d 577 (2021) ("When the statutory language is clear and unambiguous, judicial construction is not permitted and the statute is enforced as written.") (quotation marks and citation omitted). See also *People v Pinkney*, 501 Mich 259, 268; 912 NW2d 535 (2018).

[19] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

affidavits and documentary evidence beyond the pleadings, we can fairly surmise that it granted the motion under MCR 2.116(C)(10).[20] A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint.[21] When faced with such a motion, a trial court

> considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.[22]

III. ANALYSIS

FOIA is a prodisclosure statute.[23] It "requires disclosure of the 'public record[s]' of a 'public body' to persons who request to inspect, copy, or receive copies of those

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[20] When a trial court considers "documentary evidence beyond the pleadings" and does not specify under which subrule of MCR 2.116 it granted summary disposition, "we construe the motion as having been granted pursuant to MCR 2.116(C)(10)." *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). See also MCR 2.116(G)(2) ("Except as to a motion based on subrule (C)(8) or (9), affidavits, depositions, admissions, or other documentary evidence may be submitted by a party to support or oppose the grounds asserted in the motion."); MCR 2.116(G)(5) ("The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10). Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9).").

[21] *Maiden*, 461 Mich at 120.

[22] *Id*.

[23] MCL 15.231(2) (providing that "all persons . . . are entitled to full and complete information regarding the affairs of government"); see also *Herald Co v Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000).

requested public records."[24] "However, § 13 of FOIA sets forth a series of exemptions granting the public body the discretion to withhold a public record from disclosure if it falls within one of the exemptions."[25] The exemption at issue in this case, MCL 15.243(1)(d), provides, in relevant part, "A public body may exempt from disclosure as a public record . . . [r]ecords or information specifically described and exempted from disclosure by *statute*."[26] A public body may withhold public records only when it has been proven that an exemption applies.[27] If a FOIA request is denied and the requesting party commences an action to compel disclosure of a public record, the public body bears the burden of sustaining its decision to withhold the requested record from disclosure.[28]

In this case, the CCSO invoked federal law in denying the ACLU's FOIA request. Under the Immigration and Nationality Act, the DHS Secretary "shall have control, direction, and supervision of all employees and of all the files and records of the Service,"[29] and the Secretary "shall establish such regulations; . . . is-

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[24] *Mich Federation of Teachers & Sch Related Personnel, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 664-665; 753 NW2d 28 (2008), citing MCL 15.231(2), MCL 15.232(d) and (e), and MCL 15.233. In this case, it is undisputed that, for FOIA purposes, the CCSO is a "public body," see MCL 15.232(h), and that the ACLU's requests from it are for "public record[s]," see MCL 15.232(i).

[25] *Mich Federation*, 481 Mich at 665, citing MCL 15.243 and *Herald Co*, 463 Mich at 119 n 6.

[26] Emphasis added.

[27] *Landry v Dearborn*, 259 Mich App 416, 419-420; 674 NW2d 697 (2003). In addition, FOIA's exemptions "must be narrowly construed to serve the policy of open access to public records." *Mich Open Carry, Inc v Mich State Police*, 330 Mich App 614, 625; 950 NW2d 484 (2019).

[28] *Mich Federation*, 481 Mich at 665, citing MCL 15.240(4).

[29] 8 USC 1103(a)(2).

sue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter."[30] Pursuant to those provisions, the Secretary promulgated 8 CFR 236.6, which provides:

> No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service[31] (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, *shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee*. Such information shall be under the control of the Service and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records. This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002.[32]

The Court of Appeals erred by holding that "exempted from disclosure by statute" in MCL 15.243(1)(d) really means "exempted from disclosure

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[30] 8 USC 1103(a)(3).

[31] "Service" means "U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and/or U.S. Immigration and Customs Enforcement, as appropriate in the context in which the term appears." See 8 CFR 1.2.

[32] Emphasis added.

by statute *or regulation*."[33] In reaching this conclusion, the Court of Appeals relied on the fact that a federal regulation has the legal force of a federal statute.[34] But it does not logically follow that a federal regulation therefore *is* a federal statute. More importantly, the Court of Appeals holding is at odds with the plain language of MCL 15.243(1)(d). When this statute was enacted, the relevant definition of "statute" was "[a]n act of the legislature declaring, commanding, or prohibiting something; a particular law enacted and established by the will of the legislative department of government; the written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state."[35] A regulation promulgated by an executive-branch agency is therefore not a statute. If the Legislature wanted a regulation to be a basis for exemption, it would have included language to that effect. But it did not, and we interpret the statute as written.[36]

In general, the procedure for creating a statute differs from that of creating a regulation. That difference in process further supports our conclusion that a regulation is not a statute and that a regulation cannot serve as a basis for exempting public records from disclosure under MCL 15.243(1)(d). At the federal level, for a bill to become law, it must clear the

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[33] See *American Civil Liberties Union of Mich*, unpub op at 5, citing *Trout Unlimited*, 213 Mich App at 218, 220, relying on *Soave*, 139 Mich App at 102.

[34] See *Wickey v Employment Security Comm*, 369 Mich 487, 500; 120 NW2d 181 (1963).

[35] *Black's Law Dictionary* (4th ed).

[36] *2 Crooked Creek, LLC*, 507 Mich at 9 ("When the statutory language is clear and unambiguous, judicial construction is not permitted and the statute is enforced as written.") (quotation marks and citation omitted). See also 73 Am Jur 2d, Statutes (November 2021 update), § 107.

constitutionally mandated hurdle of bicameralism and presentment: a bill must be passed by a simple majority vote of both houses of Congress and then be signed into law by the President or, alternatively, be passed into law by a two-thirds vote of both houses of Congress either in the first instance or following a presidential veto.[37] In contrast, in the context of federal regulations, an executive agency can unilaterally promulgate a regulation pursuant to its authority derived from its organic statute(s)[38] and in accordance with the requirements of the Administrative Procedure Act, 5 USC 500 *et seq*.[39] The same basic dichotomy exists in Michigan.[40]

Had the Legislature wanted to "exempt from disclosure as a public record . . . [r]ecords or information

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[37] See US Const, art I, § 7.

[38] *Natural Resources Defense Council, Inc v US Environmental Protection Agency*, 273 US App DC 180, 193; 859 F2d 156 (1988) ("Any action taken by a federal agency must fall within the agency's appropriate province under its organic statute(s)."). See also *Chevron, USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837, 842-843; 104 S Ct 2778; 81 L Ed 2d 694 (1984).

[39] See *Perez v Mtg Bankers Ass'n*, 575 US 92, 95-97; 135 S Ct 1199; 191 L Ed 2d 186 (2015) (briefly outlining the rulemaking process of the federal Administrative Procedure Act); accord Office of the Federal Register, *A Guide to the Rulemaking Process* (2011), available at <https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf> (accessed December 29, 2021) [https://perma.cc/T6T7-36RZ]; Congressional Research Service, *An Overview of Federal Regulations and the Rulemaking Process* (March 19, 2021), available at <https://sgp.fas.org/crs/misc/IF10003.pdf> (accessed December 29, 2021) [https://perma.cc/T8VJ-Z5ZC].

[40] See Const 1963, art 4, §§ 22, 24, 26, and 33 (establishing the legislative process in Michigan). Cf. *Detroit Base Coalition for Human Rights of the Handicapped v Dep't of Social Servs*, 431 Mich 172, 177-178; 428 NW2d 335 (1988) (noting that Michigan's APA "requires public hearings, public participation, notice, approval by the joint committee on administrative rules, and preparation of statements, with intervals between each process").

specifically described and exempted from disclosure" either by statute *or by regulation*, it could have easily done so simply by including two additional words in MCL 15.243(1)(d): "or regulation." Indeed, the Legislature has proven itself capable of doing exactly that in various other statutes. For example, MCL 400.105b(6) provides that "[t]he department of community health shall not implement incentives under this section that conflict with [a] federal *statute or regulation*."[41] And MCL 409.118 provides that employment of a minor "shall not be in violation of a federal *statute or regulation* . . . ."[42] Similar examples of the Legislature's understanding that a statute is not a regulation abound.[43]

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[41] Emphasis added.

[42] Emphasis added.

[43] See, e.g., MCL 400.589(2)(i) (providing that an area agency on aging may take actions "in compliance with the policies, guidelines, or rules as set forth by federal or state *statute and regulation*") (emphasis added); MCL 408.101 (providing that all the Michigan Workforce Investment Board's members "shall be individuals with optimum policymaking authority within the organizations, agencies or entities that they represent as required by federal *statute and regulation*") (emphasis added); MCL 600.2974(2)(a) (providing that "civil liability for personal injury or death [is not precluded] based on . . . [a] material violation of an adulteration or misbranding requirement prescribed by a *statute or regulation* of this state or the United States that proximately caused the injury or death") (emphasis added); MCL 21.272(k) (providing that the governor shall report "[t]o the extent available from published statistical data, estimated cost of the following [listed] items not taxed by this state due to federal *statute or regulation*") (emphasis added); MCL 440.9311(1)(a) (describing an exemption from the necessity of filing a financing statement when "[a] *statute*, *regulation*, or treaty of the United States" is at issue) (emphasis added); MCL 324.503(10)(d) (providing that the requirement for the Department of Natural Resources to "provide a copy of [an] order to the relevant legislative committees . . . does not apply to an order that does not alter the substance of a lawful provision that exists in the form of a *statute*, rule, *regulation*, or order at the time the order is prepared") (emphasis added); MCL 333.5477(2) (providing that "[t]he application of sanctions [to persons

What's more, the Legislature has also provided for a nonstatutory basis for exemption in FOIA itself. Four subdivisions beneath MCL 15.243(1)(d), MCL 15.243(1)(h) provides, in relevant part, that "[a] public body may exempt from disclosure as a public record . . . [i]nformation or records subject to the physician-patient privilege, the psychologist-patient privilege, the minister, priest, or Christian Science practitioner privilege, or other privilege recognized by *statute or court rule*."[44] An exemption that only uses the word "statute" is plainly different from an exemption that uses the words "statute or regulation" or "statute or court rule." As simple as it would have been for the Legislature to include in MCL 15.243(1)(d) just two additional words—"or regulation"—their absence here is dispositive. We are bound to respect the Legislature's linguistic choice,[45] and we thereby conclude that a regulation cannot be the basis for exemption under the plain language of MCL 15.243(1)(d) because a regulation is not a statute.

Finally, we assess the applicability of the two cases on which the Court of Appeals relied, and the one it rejected, to reach its holding in this case: that a federal regulation can serve as a basis for exempting public records from disclosure under MCL 15.243(1)(d). The Court of Appeals cited *Trout Unlimited*, but that case did not engage in independent analysis of this ques-

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who engage in a lead-based paint activity in violation of the Public Health Code] does not preclude the application of other sanctions or penalties contained in the provisions of any other federal, state, or political subdivision *statute*, rule, *regulation*, or ordinance") (emphasis added).

[44] Emphasis added.

[45] *2 Crooked Creek, LLC*, 507 Mich at 9 ("When the statutory language is clear and unambiguous, judicial construction is not permitted and the statute is enforced as written.") (quotation marks and citation omitted).

tion.[46] Instead, *Trout Unlimited* merely cited *Soave*, which itself reasoned that "[s]ince agency regulations promulgated by the federal government have the force of federal statutory law, *Wyoming Hospital Ass'n v Harris*, 527 F Supp 551, 557 (D Wy, 1981), reliance upon a federal regulation to exempt a document [under MCL 15.243(1)(d)] is proper."[47] The Court of Appeals also rejected the ACLU's reliance on *Detroit Free Press*, which held that because "MCL 15.243(1)(d) plainly includes only statutes, and not rules of procedure, F R Crim P 6(e) cannot serve as a basis for exemption" under MCL 15.243(1)(d).[48] The Court of Appeals' rationale for following *Trout Unlimited* and *Soave* rather than *Detroit Free Press* to hold that a federal regulation can be the basis for an exemption under MCL 15.243(1)(d) boils down to its observation that federal regulations have the force and effect of federal statutory law, unlike the federal rules of criminal procedure at issue in *Detroit Free Press*. For the reasons already expressed, we reject this distinction on the basis of the plain text of MCL 15.243(1)(d).[49] Consequently, we

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[46] See *Trout Unlimited*, 213 Mich App at 218, 220.

[47] *Soave*, 139 Mich App 102.

[48] *Detroit Free Press*, 250 Mich App at 171.

[49] Moreover, we question the Court of Appeals' premise—that the federal rules of criminal procedure lack the full force of federal law, which makes them unlike federal regulations for purposes of MCL 15.243(1)(d)—in distinguishing this case from *Detroit Free Press*. In truth, the federal rules of criminal procedure are just as binding as federal regulations. See *United States v Marion*, 562 F3d 1330, 1339 (CA 11, 2009) ("The Federal Rules of Criminal Procedure have the force and effect of law. Just as a statute, the requirements promulgated in these Rules must be obeyed.") (quotation marks and citation omitted); *United States v Cowan*, 524 F2d 504, 505 (CA 5, 1975) ("The Federal Rules of Criminal Procedure have the force and effect of law. Just [like] a statute . . . ."), quoting *Dupoint v United States*, 388 F2d 39, 44 (CA 5, 1967).

overrule *Soave* and *Trout Unlimited*, which perfunctorily cited *Soave*, insofar as those cases ignored the Legislature's deliberate linguistic choice in MCL 15.243(1)(d).

IV. CONCLUSION

A regulation cannot serve as the basis for exempting from disclosure public records under MCL 15.243(1)(d) because a regulation is not a statute. Accordingly, we reverse the Court of Appeals' holding to the contrary, and we overrule *Soave* and *Trout Unlimited* as to their erroneous interpretations of MCL 15.243(1)(d). We remand this case to the Calhoun Circuit Court for further proceedings.

MCCORMACK, C.J., and VIVIANO, BERNSTEIN, CLEMENT, CAVANAGH, and WELCH, JJ., concurred with ZAHRA, J.

TOWNSHIP OF FRASER v HANEY

Docket No. 160991. Argued October 6, 2021 (Calendar No. 3). Decided February 8, 2022.

Fraser Township filed a complaint in the Bay Circuit Court against Harvey and Ruth Ann Haney, seeking a permanent injunction to enforce its zoning ordinance and to prevent defendants from raising on their commercially zoned property hogs or other animals that would violate the zoning ordinance, to remove an allegedly nonconforming fence, and to plow and coat the ground with nontoxic material. Defendants brought a hog onto their property as early as 2006, and defendants maintained hogs on their property through the time this lawsuit was filed in 2016. Defendants moved for summary disposition, arguing that plaintiff's claim was time-barred by the six-year statutory period of limitations in MCL 600.5813. The trial court, Harry P. Gill, J., denied the motion, concluding that because the case was an action in rem, the statute of limitations did not apply. Defendants sought leave to appeal in the Court of Appeals. The Court of Appeals, SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ., reversed, holding that because defendants had kept hogs on the property since 2006 and plaintiff did not bring suit until 2016, plaintiff's case was time-barred. 327 Mich App 1 (2018). Plaintiff sought leave to appeal in the Supreme Court, and in lieu of granting leave to appeal, the Supreme Court vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals for it to address whether defendants waived an affirmative defense under *Baker v Marshall*, 323 Mich App 590 (2018). 504 Mich 968 (2019). On remand, the Court of Appeals, SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ., distinguished *Baker* and explained that defendants did not waive the statute-of-limitations defense. 331 Mich App 96 (2020). Plaintiff again sought leave to appeal in the Supreme Court, and the Supreme Court granted leave to consider whether MCL 600.5813 barred plaintiff from enforcing its zoning ordinance. 506 Mich 964 (2020).

In a unanimous per curiam opinion, the Supreme Court *held*:

MCL 600.5813 did not bar plaintiff's suit, which was an action for injunctive relief to address violations of the zoning ordinance that occurred within the six-year limitations period. MCL 600.5813 provides that all other personal actions shall be commenced within the period of six years after the claims accrue and not afterwards unless a different period is stated in the statutes. MCL 600.5827 defines when a claim accrues for purposes of MCL 600.5813. MCL 600.5827 states that except as otherwise provided, the period of limitations runs from the time the claim accrues and that the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results. In this case, plaintiff sought to enforce its zoning ordinance through a nuisance-abatement action under MCL 125.3407 of the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*. Plaintiff alleged that because defendants' land was zoned for commercial use, rather than agricultural use, defendants could not raise hogs or other animals on the land. The wrong alleged in plaintiff's complaint was defendants' keeping of hogs on their property. The presence of the hogs on the property constituted the wrong, and that wrong, along with the attendant harms it caused, was being committed as long as the piggery was in operation. The plain language of the Zoning Enabling Act supported this conclusion. MCL 125.3407 states that a "use" of land in violation of a zoning ordinance is a nuisance per se. "Use" means the application or employment of something, especially a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional. A use is inherently ongoing. Defendants' use of the property to raise hogs was not a one-time occurrence that happened in 2006; the use continued as long as the property was employed as a piggery. Therefore, whether the zoning violation accrued continuously or each day, it accrued within the limitations period, and plaintiff's action was timely because its complaint was initiated within six years of defendants' most recent offenses. The Court of Appeals erroneously concluded that plaintiff's action would be timely only under the continuing-wrongs doctrine, which has been abrogated in Michigan. The continuing-wrongs doctrine was not relevant to plaintiff's claim for relief because plaintiff did not seek to reach back and remedy or impose monetary fines for violations that occurred outside the period of limitations; rather, plaintiff's injunctive action sought to remedy only present violations, which occurred within the six-year period of limitations.

Court of Appeals judgment reversed, trial court order denying summary disposition reinstated, and case remanded to the trial court for further proceedings.

ZONING — MICHIGAN ZONING ENABLING ACT — WORDS AND PHRASES — "USE."

MCL 125.3407 of the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*., states that a "use" of land in violation of a zoning ordinance is a nuisance per se; "use" means the application or employment of something, especially a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional; a use is inherently ongoing.

Birchler, Fitzhugh, Purtell & Brissette, PLC (by *Mark J. Brissette*) for plaintiff.

Outside Legal Counsel PLC (by *Philip L. Ellison*) for defendants.

Amici Curiae:

Bauckham, Sparks, Thall, Seeber & Kaufman, PC (by *Robert E. Thall* and *T. Seth Koches*) for the Michigan Townships Association.

Rosati, Schultz, Joppich & Amtsbuechler, PC (by *Steven P. Joppich*) and *Gerald A. Fisher* for the Michigan Municipal League and the Government Law Section of the State Bar of Michigan.

Bloom Sluggett, PC (by *Clifford H. Bloom*) for the Michigan Lakes & Streams Association, Inc.

Williams Williams Rattner & Plunkett, PC (by *Jason C. Long*) for the Real Property Law Section of the State Bar of Michigan.

PER CURIAM. Defendants, Harvey and Ruth Ann Haney, owned property in Fraser Township that is zoned for commercial use. Defendants brought a hog

onto their property as early as 2006. At some point, additional hogs were brought onto the property. Plaintiff, Fraser Township, filed its complaint in May 2016, alleging that defendants' property is not zoned for agricultural use and that defendants' actions violate its zoning ordinance and constitute a nuisance. Plaintiff seeks a permanent injunction to enforce its ordinance and to prevent defendants from raising on their property hogs or other animals that would violate the zoning ordinance, to remove an allegedly nonconforming fence, and to plow and coat the ground with nontoxic material. We must decide whether plaintiff's action is barred by the pertinent six-year statute of limitations.[1] We hold that it is not. Plaintiff has alleged a harm that has occurred every day on which defendants maintain hogs on their property. Plaintiff's action is timely under MCL 600.5813 because its complaint was initiated within six years of defendants' most recent offenses. The Court of Appeals erred by analyzing this case as a "continuing wrongs" case because plaintiff does not seek to reach back and remedy or impose monetary fines for violations that occurred outside the period of limitations. Rather, plaintiff's injunctive action seeks to remedy only present violations, which occurred within the six-year period of limitations. We therefore reverse the judgment of the Court of Appeals, reinstate the trial court's order denying summary disposition, and remand this case to the trial court for further proceedings that are consistent with this opinion.

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[1] MCL 600.5813.

I. BASIC FACTS AND PROCEEDINGS

Defendants began raising at least one hog on their commercially zoned property in 2006.[2] Plaintiff alleges that defendants were raising approximately 20 hogs when the complaint was filed and that the property was saturated with animal waste, "creating a horrible stench and attraction for flies." The complaint alleges that defendants had a history of illegal animal operations on the property, including a deer farm that had been ordered closed by a circuit court and Russian boar production that had been banned by the Michigan Department of Natural Resources.

Defendants moved for summary disposition, arguing that plaintiff's claim was time-barred by the six-year statutory period of limitations set forth in MCL 600.5813. The trial court denied the motion, reasoning that this was an action in rem, as opposed to a "personal action," so the statute of limitations did not apply. Defendants sought leave to appeal in the Court of Appeals, and the Court of Appeals granted leave to appeal and reversed. It held that because defendants had kept hogs on the property since 2006 and plaintiff did not bring suit until 2016, plaintiff's case was time-barred.[3]

Plaintiff sought leave to appeal in this Court, and in lieu of granting leave, we vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals for it to address whether defendants waived

[2] Defendants' property was not (and is not) zoned for agriculture.

[3] *Fraser Twp v Haney*, 327 Mich App 1, 11; 932 NW2d 239 (2018), vacated 504 Mich 968 (2019). This opinion was originally released as an unpublished opinion, but the panel agreed to publish its opinion per defendants' request. See MCR 7.215(D).

an affirmative defense under *Baker v Marshall*.[4] On remand, the Court of Appeals distinguished *Baker* and explained that defendants did not waive the statute-of-limitations defense.[5]

Plaintiff again sought leave to appeal in this Court, and we granted leave to consider whether MCL 600.5813 bars plaintiff from enforcing its zoning ordinance.[6]

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition.[7] We also review de novo questions of law and statutory interpretation.[8]

III. ANALYSIS

The statute of limitations at issue, MCL 600.5813, states, "All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." MCL 600.5827 defines when a claim accrues for purposes of interpreting MCL 600.5813, and it provides:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The

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[4] *Baker v Marshall*, 323 Mich App 590; 919 NW2d 407 (2018); *Fraser Twp v Haney*, 504 Mich 968 (2019).

[5] *Fraser Twp v Haney*, 331 Mich App 96, 98-99; 951 NW2d 97 (2020).

[6] *Fraser Twp v Haney*, 506 Mich 964 (2020).

[7] *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 917 NW2d 584 (2018).

[8] *Id*. at 285-286.

> claim accrues . . . at the time the wrong upon which the claim is based was done regardless of the time when damage results.

" '[T]he wrong is done when the plaintiff is harmed rather than when the defendant acted' under § 5827 . . . ."[9] "The relevant 'harms' . . . are the actionable harms alleged in a plaintiff's cause of action."[10] We thus look to plaintiff's complaint to determine when the wrong upon which the claim is based was done.

Plaintiff seeks to enforce its zoning ordinance through a nuisance-abatement action. The Michigan Zoning Enabling Act[11] permits such actions, providing, in relevant part:

> Except as otherwise provided by law, a use of land or a dwelling, building, or structure, including a tent or recreational vehicle, used, erected, altered, razed, or converted in violation of a zoning ordinance or regulation adopted under this act is a nuisance per se. The court shall order the nuisance abated, and the owner or agent in charge of the dwelling, building, structure, tent, recreational vehicle, or land is liable for maintaining a nuisance per se.[12]

Plaintiff alleges that defendants have used their land in violation of the local zoning ordinances. Specifically, because defendants' land is zoned for commercial use, rather than agricultural use, defendants cannot raise hogs or other animals on the land.

Defendants do not argue that they have used their land in conformity with the zoning ordinance. They have indeed maintained at least one hog on their

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[9] *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 387 n 8; 738 NW2d 664 (2007) (citation omitted).

[10] *Frank v Linkner*, 500 Mich 133, 150; 894 NW2d 574 (2017).

[11] MCL 125.3101 *et seq*.

[12] MCL 125.3407.

property since 2006. Defendants argue that because plaintiff did not bring the present suit until 2016, this action is time-barred by the six-year period of limitations in MCL 600.5813. We conclude that MCL 600.5813 does not bar plaintiff's suit, which is an action for injunctive relief to address violations of the zoning ordinance that occurred within the six-year limitations period.

The wrong alleged in plaintiff's complaint is defendants' keeping of hogs on their property. The presence of the hogs on the property constitutes the wrong, and that wrong, along with the attendant harms it causes, is being committed as long as the piggery operates.[13] For example, the fact that defendants had hogs on their property *yesterday* is not a wrong that occurred until yesterday, and any claims arising from harms due to the hogs' presence yesterday could not have accrued until then either. Therefore, because defendants had hogs on their property within the limitations period, claims accrued during that period and plaintiff's action is timely.[14]

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[13] Cf. *Woldson v Woodhead*, 159 Wash 2d 215, 219; 149 P3d 361 (2006) (en banc) ("With most torts, a single isolated event begins the running of the statute of limitations. . . . A continuing trespass tort is different; the 'event' happens every day the trespass continues. Every moment, arguably, is a new tort. Thus, the statute of limitations does not prevent recovery for a continuing trespass that 'began' before the statutory period; instead the statute of limitations excludes recovery for any trespass occurring more than three years before the date of filing."); *Russo Farms, Inc v Vineland Bd of Ed*, 144 NJ 84, 102; 675 A2d 1077 (1996) (" '[I]f the nuisance or trespass is "temporary" or "continuous," a new cause of action arises day by day or injury by injury, with the result that the plaintiff in such a case can always recover for such damages as have accrued within the statutory period immediately prior to suit.' "), quoting Dobbs, Law of Remedies (1973), § 5.4, p 343.

[14] Although not necessary to our analysis, Fraser Township's zoning ordinance is consistent with our conclusion, in that it describes when a

Our conclusion is further supported by the plain language of the Zoning Enabling Act. MCL 125.3407 states that a "use" of land in violation of a zoning ordinance is a nuisance per se. "Use" means "[t]he application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional . . . ."[15] A "use" is thus inherently ongoing. And the nature of zoning violations typically makes a limitations period of little relevance to nuisance-abatement actions concerning present or ongoing nonconforming uses.

A single property can be subject to many "uses." The Zoning Enabling Act refers to "residential use" as one such use.[16] Operation of a state-licensed residential

violation of the zoning ordinance occurs: "A separate offense shall be deemed committed upon each day during or when a violation occurs or continues." Fraser Township Zoning Ordinance, § 2503. Thus, per the plain language of this ordinance, defendants committed a separate offense each day they had hogs on their property in violation of the zoning ordinance. Plaintiff does not seek to impose monetary penalties or to obtain a remedy for actions that occurred more than six years prior to the filing of this case. Rather, plaintiff seeks only an injunction—a remedy to enforce its ordinance against current and future violations. Defendants maintained hogs on their property through the time this lawsuit was filed in 2016, thus violating the ordinance during this period. These violations gave rise to the harms alleged in plaintiff's complaint, and thus fresh harms occurred during the limitations period. Fraser Township Zoning Ordinance, § 2503.

[15] *Black's Law Dictionary* (8th ed); see also *Random House Webster's College Dictionary* (2007) (defining "use" as "the enjoyment of property, as by occupation or employment of it"). It is unnecessary to determine whether "use" is a legal term of art because the legal and lay dictionary definitions are substantially the same. See *Sanford v Michigan*, 506 Mich 10, 21; 954 NW2d 82 (2020).

[16] MCL 125.3206.

facility, for example, is a residential use.[17] Land that is employed as a state-licensed residential facility is continuously being used for a residential purpose as long as the land is so employed. The use is not finished on the first day construction of the facility is completed or the first day someone moves in. The same is true of the use at issue here. Defendants' use of the property to raise hogs was not a one-time occurrence that happened in 2006. The use continues as long as the property is employed as a piggery. Under MCL 600.5813, "the claim accrues at the time the wrong upon which the claim is based was done . . . ."[18] Whether the "wrong" here, a zoning violation, accrued continuously or each day, it certainly accrued within the limitations period.

In its initial opinion, the Court of Appeals erroneously concluded that plaintiff's action would be timely only under the continuing-wrongs doctrine, which has been abrogated in Michigan.[19] The continuing-wrongs doctrine (or its abrogation) is not relevant to plaintiff's claim for relief. The doctrine allowed a plaintiff to reach back to recover for wrongs that occurred outside the statutory period of limitations. If a plaintiff could establish that a wrong or injury experienced within the permitted time period was part of a series of sufficiently related "continuing wrongs," the plaintiff might have been able to recover damages for each wrong that was part of the series—including those that otherwise would have been time-barred.[20] But even under the

[17] MCL 125.3206(1).

[18] MCL 600.5827.

[19] *Fraser Twp*, 327 Mich App at 11-12.

[20] See *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 510; 398 NW2d 368 (1986), overruled by *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263 (2005).

continuing-wrongs doctrine, a plaintiff had to establish that one of the wrongs or injuries occurred within the statutory period of limitations.[21] The doctrine has never operated to toll the statutory period of limitations for such claims, which were timely because the claim accrued during the limitations period.[22]

When we abrogated the continuing-wrongs doctrine in *Garg*, we explained that the relevant statute of limitations there, MCL 600.5805, "requires a plaintiff to commence an action within three years of *each adverse employment act* by a defendant."[23] After *Garg*, a plaintiff in Michigan may not revive stale claims even if the claims are part of a series of "continuing violations." But *Garg*, of course, did not operate to immunize future wrongful conduct. In other words, a plaintiff's failure to timely sue on the first violation in a series does not grant a defendant immunity to keep committing wrongful acts of the same nature.[24] A plaintiff is free to bring a new action each time a

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[21] See *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 280; 696 NW2d 646 (2005), as amended on denial of reh July 18, 2005 ("[M]erely demonstrating a 'present effect to a past act of discrimination' is insufficient to create a continuing violation."), quoting *United Air Lines, Inc v Evans*, 431 US 553, 558; 97 S Ct 1885; 52 L Ed 2d 571 (1977).

[22] *Accrual of Claims for Continuing Trespass or Continuing Nuisance for Purposes of Statutory Limitations*, 14 ALR7th Art 8 (2016) ("[C]ontinuing torts do not avoid the statute of limitations; rather, such torts remain timely not because the limitation period is tolled but because the cause of action continues to accrue.").

[23] *Garg*, 472 Mich at 282 (emphasis added).

[24] Even our opinion *adopting* the continuing-wrongs doctrine recognized that it would be incorrect to bar a suit based on misconduct occurring within the limitations period simply because the defendants had committed the same acts before. See *Sumner*, 427 Mich at 537 & n 11, overruled by *Garg*, 472 Mich 263.

defendant commits a new violation.[25] *Garg* simply held that a plaintiff may not recover for injuries that fall outside the statutory period of limitations—regardless of how related those injuries are to timely claims—when the Legislature has not permitted such recovery by statute.[26] But, importantly, *Garg* allowed the claim that accrued within the limitations period to go forward.[27]

Defendants here are not free to continue committing zoning-ordinance violations simply because plaintiff did not bring an action against their first zoning violation. Whether Michigan recognizes the continuing-wrongs doctrine has no bearing on a plaintiff's ability to bring an action for claims that accrued within the statutory period of limitations. Thus, Michigan's abrogation of the doctrine is irrelevant to this case because plaintiff does not seek a remedy for violations outside the limitations period. Defendants violate the law as long as they keep hogs on their property, and plaintiff seeks to remedy only violations that occurred within the statutory period of limitations in the form of an injunction.

IV. CONCLUSION

We hold that plaintiff's action to enforce its zoning ordinance is not barred by MCL 600.5813. The wrong alleged is defendants' retention of hogs on their commercially zoned property. Plaintiff's action is timely because it was commenced while defendants' unlawful

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[25] See 1A American Law of Torts (December 2021 update), § 5:33 ("The continuing tort theory does not apply when tortuous [sic] instances, though similar, constitute distinctly separate transactions.").

[26] *Garg*, 472 Mich at 282.

[27] *Id*. at 286.

conduct was ongoing. We reverse the judgment of the Court of Appeals, reinstate the trial court's order denying summary disposition, and remand this case to the trial court for further proceedings that are consistent with this opinion.

MCCORMACK, C.J., and ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, CAVANAGH, and WELCH, JJ., concurred.

PEOPLE v WAFER

Docket No. 153828. Argued on application for leave to appeal October 7, 2021. Decided February 16, 2022.

Theodore P. Wafer was convicted by a jury in the Wayne Circuit Court of second-degree murder, MCL 750.317, statutory involuntary manslaughter, MCL 750.329, and carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b, for the killing of Renisha McBride. Defendant was sentenced to concurrent prison terms of 15 to 30 years for second-degree murder and 7 to 15 years for manslaughter, to be served consecutively to the two-year term of imprisonment for felony-firearm. McBride crashed her vehicle into a parked car around 1:00 a.m. in November 2013. Around 4:00 a.m., McBride arrived at defendant's home, and defendant heard someone banging on his door. Defendant retrieved his shotgun, believing that someone was trying to break into his house. He opened the door a few inches and fired his gun when he saw a person approaching the door, shooting McBride in the face and killing her. Defendant appealed his convictions, alleging, among other things, that the multiple punishments for second-degree murder and statutory involuntary manslaughter violated the Double Jeopardy Clauses of the United States and Michigan Constitutions. In an unpublished opinion, the Court of Appeals, STEPHENS, P.J., and HOEKSTRA, J. (SERVITTO, J., dissenting in part and concurring in part), concluded that defendant's convictions for these two offenses did not violate double-jeopardy protections because each offense contained different elements. Defendant sought leave to appeal in the Supreme Court, and the Supreme Court heard oral argument on defendant's claim that the jury instructions were improper, but not on the double-jeopardy issue. The Court denied leave to appeal. 501 Mich 986 (2018). Defendant moved for reconsideration, and the Supreme Court ordered and heard argument on whether to grant defendant's application or take other action regarding his double-jeopardy claim. 505 Mich 1112 (2020).

In a unanimous opinion by Justice VIVIANO, the Supreme Court, in lieu of granting leave to appeal, *held*:

Conviction of both second-degree murder and statutory involuntary manslaughter for the death of a single victim violates the multiple-punishments strand of state and federal double-jeopardy jurisprudence. Accordingly, the Court of Appeals judgment was reversed, defendant's statutory manslaughter conviction vacated, and the case remanded for resentencing.

1. Under the Michigan Constitution, Const 1963, art 1, § 15, and federal Constitution, US Const, Am V, the prohibition against double jeopardy protects individuals against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. The "multiple punishments" strand of double jeopardy is designed to ensure that courts confine their sentences to the limits established by the Legislature, but it does not prevent the Legislature from specifically authorizing cumulative punishments under two statutes. In order to determine whether multiple punishments are, or are not, permitted, a court first looks to the ordinary meaning of the statutes to determine whether the Legislature has clearly indicated its intent to allow multiple punishments. If the intent is not clear from the text, the court then applies the abstract-legal-elements test, which provides that if each of the offenses of which the defendant was convicted has an element that the other does not, then there is no double-jeopardy violation.

2. The elements of second-degree murder, MCL 750.317, are (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. The elements of statutory involuntary manslaughter, MCL 750.329(1), are (1) a death, (2) caused by an act of the defendant, (3) resulting from the discharge of a firearm, (4) at the time of the discharge, the defendant was intentionally pointing the firearm at the victim, and (5) the defendant did not have lawful justification or excuse for causing the death. The Legislature incorporated the common-law definition of murder into MCL 750.317, which includes the element of malice. However, the Legislature expressly excluded malice from the offense of statutory involuntary manslaughter. On the basis solely of the inconsistent language of the statutes, the natural conclusion is that a person cannot be punished under both statutes for the same conduct. Additionally, the historical evolution of the malice requirement in murder and manslaughter offenses supported that the presence of a malice requirement distinguished between the two offenses for the purpose of determining the punishment. Historically, at common law, the punishment for murder was death, whereas the punishment for man-

slaughter was imprisonment; therefore, punishments for both crimes could not have been cumulatively imposed.

3. Malice distinguishes murder from manslaughter, even though the "without malice" language in MCL 750.329 does not represent an element that must be proved by the prosecution to establish statutory involuntary manslaughter. "Without malice" is a negative requirement, while elements are, by definition, positive. Nevertheless, the absence of malice is fundamental to statutory involuntary manslaughter in a general definitional sense. And by requiring malice as an element of the offense of second-degree murder, while stipulating that statutory involuntary manslaughter be committed without malice, the Legislature clearly indicated its intent to prevent the prosecution from obtaining convictions and sentences for both offenses with regard to the same conduct. Further, because "without malice" is not an element of statutory involuntary manslaughter, that language would be nugatory if it failed to prevent multiple punishments because it defines neither the criminal conduct required to be proven by the prosecution nor the penalty for engaging in that conduct.

4. A different conclusion was not required by this Court's caselaw holding that statutory involuntary manslaughter was not a necessarily included lesser offense of second-degree murder. The caselaw did not address the multiple-punishments strand of the Double Jeopardy Clause. And the fact that statutory involuntary manslaughter is not a lesser included offense does not necessarily mean that the Legislature intended to allow cumulative punishments for both crimes.

Court of Appeals judgment reversed, statutory manslaughter conviction vacated, and case remanded for resentencing.

CONSTITUTIONAL LAW — DOUBLE JEOPARDY CLAUSE — MULTIPLE PUNISHMENTS — SECOND-DEGREE MURDER AND MANSLAUGHTER.

By requiring malice for second-degree murder but not for statutory involuntary manslaughter, the Legislature expressed its clear intent to prohibit an individual from being punished for both of these offenses related to the death of a single victim; therefore, conviction of both offenses stemming from the death of a single victim violates the multiple punishments strand of double-jeopardy jurisprudence (US Const, Am V; Const 1963, art 1, § 15; MCL 750.317; MCL 750.329).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney,

Jon P. Wojtala, Chief of Research, Training, and Appeals, *Timothy A. Baughman*, Special Assistant Prosecuting Attorney, and *Amanda Morris Smith*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jacqueline J. McCann*, *Michael L. Mittlestat*, and *Maya Menlo*) for defendant.

Amicus Curiae:

Aaron Cyers *in propria persona*.

VIVIANO, J. Defendant Theodore Wafer was found guilty of both second-degree murder, MCL 750.317, and statutory involuntary manslaughter, MCL 750.329, and was sentenced to concurrent prison terms for those convictions. The convictions and sentences arose from defendant's shooting and killing of Renisha McBride. The issue presented in this case is whether the Double Jeopardy Clause prohibits these multiple punishments for the same homicide. We find the answer to this question in the statutory text establishing these crimes. To be guilty of second-degree murder, MCL 750.317, an individual must have acted with malice. By contrast, the Legislature crafted the involuntary manslaughter statute to encompass certain conduct that occurred "without malice." MCL 750.329(1). By including this language, the Legislature provided a clear indication that it sought to prevent an individual from receiving punishments for both of these offenses in relation to a single homicide. Accordingly, we reverse the judgment of the Court of Appeals, which reached the opposite conclusion, and remand this case to the trial court for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of the death of Renisha McBride. On the evening of November 1, 2013, McBride left her friend's home and crashed her vehicle into a parked car around 1:00 a.m. The owner of the parked car, seeing McBride walk away from the scene in an apparently injured state, called for an ambulance. McBride left before the ambulance arrived.

It is unclear what occurred from this point until McBride arrived at defendant's home half a mile away from the crash site some three hours later. But after 4:00 a.m., defendant awoke to the sound of banging on his door. Defendant testified that he was frightened and thought someone was trying to break into his home because his neighborhood had recently experienced an increase in crime and his vehicle had recently been vandalized. Defendant retrieved his shotgun from the closet, opened the home's front door a few inches (but kept the screen door shut), saw a person come toward the door, and raised his gun and shot. Defendant shot McBride in the face, killing her. Defendant called 911 at 4:42 a.m. and said that he "shot somebody on [his] front porch with a shotgun banging on [his] door."

At trial, defendant admitted to shooting McBride but asserted that it was in self-defense because he thought that McBride was trying to break into his home. Defendant was convicted of second-degree murder, statutory involuntary manslaughter, and carrying a firearm during the commission of a felony (felony-firearm). Defendant was sentenced to concurrent prison terms of 15 to 30 years for the second-degree murder conviction and 7 to 15 years for the man-

slaughter conviction, to be served consecutively to a 2-year term of imprisonment for the felony-firearm conviction.

Defendant appealed as of right, alleging a host of errors, including that convicting him of and sentencing him for both second-degree murder and statutory involuntary manslaughter violated the Double Jeopardy Clause because statutory manslaughter must be committed without malice whereas malice is an element of second-degree murder. US Const, Am V; Const 1963, art 1, § 15. The Court of Appeals majority disagreed. Following the test set out in *People v Miller*, 498 Mich 13; 869 NW2d 204 (2015), the Court of Appeals majority first determined that the Legislature gave no clear indication of whether it wished to permit or prohibit multiple punishments. *People v Wafer*, unpublished per curiam opinion of the Court of Appeals, issued April 5, 2016 (Docket No. 324018), p 9. Therefore, the Court of Appeals majority proceeded to the second part of the *Miller* framework, comparing the abstract legal elements of each offense. *Id*. The Court of Appeals determined that defendant's two convictions did not constitute a double-jeopardy violation because each offense contained different elements. *Id*. In dissent, Judge SERVITTO would have concluded that the Legislature clearly indicated its intent to prohibit multiple punishments. *Id*. at 1-2 (SERVITTO, J., dissenting in part and concurring in part). She wrote, "There would have been no need to add the limitation '*but without malice*' in the manslaughter statute had the Legislature intended to authorize dual punishments for both second degree murder and manslaughter under these circumstances." *Id*. at 3.

Defendant then sought leave to appeal in this Court. We heard argument on his claim that the jury instruc-

tions were improper but not on the double-jeopardy issue. We then denied leave to appeal. *People v Wafer*, 501 Mich 986 (2018). On defendant's motion for reconsideration, however, we granted argument on defendant's application, limited to his double-jeopardy claim. *People v Wafer*, 505 Mich 1112 (2020). The parties were directed to "address[] whether the defendant's convictions for second-degree murder, MCL 750.317, and statutory manslaughter, MCL 750.329(1), violate constitutional prohibitions against double jeopardy." *Id*. at 1113.

II. STANDARD OF REVIEW

We review de novo questions of law regarding statutory interpretation and the application of the state and federal Constitutions. *Miller*, 498 Mich at 16-17.

III. ANALYSIS

The issue in this case is whether defendant's dual convictions for second-degree murder and statutory involuntary manslaughter violate constitutional double-jeopardy protections. The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]" US Const, Am V. The Michigan Constitution similarly provides that "[n]o person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15. We have interpreted our double-jeopardy provision consistently with the federal provision. *Miller*, 498 Mich at 17 n 9.

The prohibition against double jeopardy protects individuals in three ways: (1) it protects against a second prosecution for the same offense after acquittal,

(2) it protects against a second prosecution for the same offense after conviction, and (3) it protects against multiple punishments for the same offense. *People v Torres*, 452 Mich 43, 64; 549 NW2d 540 (1996), citing *United States v Wilson*, 420 US 332, 343; 95 S Ct 1013; 43 L Ed 2d 232 (1975). The first two of these three protections concern the "successive prosecutions" strand of the Double Jeopardy Clause, while the third concerns the "multiple punishments" strand, which is before us in this case. *Miller*, 498 Mich at 17.[1]

As we explained in *Miller*, the multiple-punishments strand of double jeopardy "is designed to ensure that courts confine their sentences to the limits established by the Legislature and therefore acts as a restraint on the prosecutor and the Courts." *Id*. at 17-18 (cleaned up). It therefore does not prevent the Legislature from "specifically authoriz[ing] cumulative punishment under two statutes." *Id*. at 18 (cleaned up). "Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial." *Id*. (citations omitted). Accordingly, the question of when multiple punishments are constitutionally permissible is a matter of determining what the Legislature intended. *Id*.

In *Miller*, we set forth a two-part test to determine when multiple punishments are, or are not, permitted.

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[1] The prosecution argues that there is no "multiple punishments" strand of double jeopardy. But this case proceeded below as a double-jeopardy case, our precedent treats it as such, no one has asked us to overrule our precedent, and the prosecution has not shown that the choice of theory would affect the outcome here, as the case ultimately comes down to the Legislature's intent as framed by the text. Therefore, we decline to address the prosecution's argument.

The first step is to look to the ordinary meaning of the statute. If the Legislature has "clearly indicate[d] its intent with regard to the permissibility of multiple punishments," the inquiry ends here. *Id*. at 19. " 'The touchstone of legislative intent is the statute's language,' " and we accord clear and unambiguous language its ordinary meaning. *People v Hardy*, 494 Mich 430, 439; 835 NW2d 340 (2013) (citation omitted). However, if the intent is not apparent from the text, Michigan courts apply the abstract-legal-elements test under *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008), and *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).[2] Using this tool of statutory interpretation, if each of the offenses for which defendant was convicted has an element that

[2] While *Miller* referred to the need for the Legislature's intent to be "clear" before resorting to the *Blockburger* elements test, it did not suggest that courts should do anything more than they usually do when interpreting a statute, i.e., provide a fair reading of the statutory text, in light of its context, to discern its ordinary meaning. See *People v Pinkney*, 501 Mich 259, 268; 912 NW2d 535 (2018) ("When interpreting a statute, 'our goal is to give effect to the Legislature's intent, focusing first on the statute's plain language.' ") (citation omitted). To the extent we have ever recognized a true clear-statement rule in this area—i.e., a requirement that the Legislature make its meaning unmistakable, see Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 426—that rule is that the Legislature " 'ordinarily does not intend to punish the same offense under two different statutes.' " *People v Robideau*, 419 Mich 458, 470; 355 NW2d 592 (1984), overruled by *People v Smith*, 478 Mich 292, 314-316 (2007), quoting *Whalen v United States*, 445 US 684, 691-692; 100 S Ct 1432; 64 L Ed 2d 715 (1980). Thus, courts have presumed that statutes did not allow cumulative punishment if the statutes were considered to proscribe the same offense under the *Blockburger* test, but this presumption could "be rebutted by a clear indication of legislative intent . . . ." *Robideau*, 419 Mich at 470. Whatever the viability of this presumption, it has no operation in the present case. Instead, we find the clear intent through a reasonable reading of the statutory text.

the other does not, then there is no double-jeopardy violation. *Ream*, 481 Mich at 225-226.

To determine whether the Legislature authorized defendant's two convictions, we must first examine the two statutes at issue in this case. First, defendant was convicted of second-degree murder under MCL 750.317, which provides:

> All other kinds of murder shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.

The elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). The punishment for this offense is "life, or any term of years, in the discretion of the court." MCL 750.317.

Second, defendant was convicted of statutory involuntary manslaughter under MCL 750.329(1), which provides:

> A person who wounds, maims, or injures another person by discharging a firearm that is pointed or aimed intentionally but without malice at another person is guilty of manslaughter if the wounds, maiming, or injuries result in death.

The elements of this offense are: (1) a death, (2) caused by an act of the defendant, (3) resulting from the discharge of a firearm, (4) at the time of the discharge, the defendant was intentionally pointing the firearm at the victim, and (5) the defendant did not have lawful justification or excuse for causing the death.

People v Smith, 478 Mich 64, 70; 731 NW2d 411 (2007).[3] An individual found guilty of committing this crime "shall be guilty of a felony punishable by imprisonment in the state prison, not more than 15 years or by fine of not more than 7,500 dollars, or both, at the discretion of the court." MCL 750.321.[4]

Our focus is on the threshold *Miller* question of whether the statutory text prohibits multiple punishments.[5] We believe that it does. As noted, in criminalizing second-degree murder in MCL 750.317, the Legislature incorporated the common-law definition of murder, which includes the element of malice. *People v Couch*, 436 Mich 414, 419-420; 461 NW2d 683 (1990) (opinion by BOYLE, J.) (recognizing that, in leaving murder undefined, the Legislature imported the common law's definition of murder into our statutes). However, in fashioning the offense of statutory manslaughter, MCL 750.329, the Legislature expressly

[3] At common law, manslaughter is divided into voluntary and involuntary forms. *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003). Voluntary manslaughter concerns intentional killings committed under mitigating circumstances. *Id*. Involuntary manslaughter, by contrast, is the unintentional killing of another during the commission of an unlawful act. *People v Datema*, 448 Mich 585, 606; 533 NW2d 272 (1995) ("An unlawful act committed with the intent to injure or in a grossly negligent manner that proximately causes death is involuntary manslaughter.").

[4] MCL 750.329 does not contain its own punishment provision. MCL 750.321 is the general manslaughter statute, which imposes the above penalty on "[a]ny person who shall commit the crime of manslaughter . . . ." Because an individual found guilty under MCL 750.329 has committed manslaughter, the penalty in MCL 750.321 is applicable.

[5] Comparing the elements of the criminal offenses, it is clear that each contains an element that the other does not. The prosecution therefore argues that the *Blockburger* test is met and convictions for both crimes should be allowed. We do not, however, reach the second *Miller* inquiry because we find that the Legislature has clearly prohibited cumulative punishments in the text of the statute.

excluded malice. As a purely textual matter, then, the language of the offenses is inconsistent, leading to the natural conclusion that the same person cannot be punished under both offenses for the same conduct. Absent other textual indications to the contrary—and there are none here—it is hard to imagine a clearer sign that the Legislature did not intend to authorize cumulative punishments for these crimes.

This reading of the statute is consistent with the historical evolution of the malice requirement in murder and manslaughter offenses. Manslaughter developed centuries ago as a separate offense in order to provide for a separate, less severe punishment than the death penalty applicable to homicide. At early common law, homicide was either justifiable, excusable, or felonious. See *People v Mendoza*, 468 Mich 527, 536-537; 664 NW2d 685 (2003). Manslaughter grew out of the third class, felonious homicide. Coldiron, *Historical Development of Manslaughter*, 38 Ky L J 527, 527 (1950). But at early common law, "there were no degrees of punishment for felonious homicide"; thus, "[w]hether the slayer killed by the most heinous method or upon sudden, violent provocation, his punishment was death, usually by hanging." *Id*. at 531-532; see also 2 Pollock and Maitland, *History of English Law* (1898), § 2, p 485 (noting that all felonious homicide was punishable by death). Thus, all felonious homicides—including those that later became manslaughter—were punishable by death. See *Mendoza*, 468 Mich at 536-537; 4 Blackstone, Commentaries on the Laws of England, p *201.

To restrict this expansive use of the death penalty, an exemption called the "benefit of clergy" was extended to all literate persons. *Mendoza*, 468 Mich at 537; see also Perkins, *A Re-Examination of Malice*

Aforethought, 43 Yale L J 537, 541 (1934). Under the exemption, literate offenders were "allowed . . . to be sentenced by the ecclesiastical courts, which did not impose capital punishment." *Mendoza*, 468 Mich at 537. To correct this "absurd distinction" between literate and illiterate offenders, the English parliament began to exclude certain felonies from the benefit of clergy. *A Re-Examination of Malice Aforethought*, 43 Yale L J at 543 & n 60. In 1532, the English statute 23 Henry VIII, c 1, § 3, was enacted, providing " 'that no person or persons which shall hereafter happen to be found guilty . . . for any wilful murder of malice prepensed . . . shall from henceforth be admitted to the benefit of his or their clergy, but utterly be excluded thereof, and shall suffer death.' " Note, *The Presumption of Malice in the Law of Murder*, 8 Va L Reg 178, 183-184 (1922) (quoting statute) (alterations in original).

The effect of the statute was that "the benefit of clergy is taken away from murder through malice prepense . . . ." Blackstone, p *201. This left two classes of homicide felonies: one committed with malice aforethought for which the punishment was death and one committed without malice aforethought punishable by a brand and imprisonment not to exceed a year. *A Re-Examination of Malice Aforethought*, 43 Yale L J at 541-542. This latter form later became known as manslaughter. *Id*. at 544; *The Presumption of Malice*, 8 Va L Reg at 184 (noting that "[e]very wilful killing attributable to what in this [1532] statute is called 'malice prepensed' or 'aforethought,' . . . by judicial interpretation, were made to mean, was called murder, and all other kinds of felonious homicide came by degrees to be classified under the general name of manslaughter").

The presence of malice thus distinguished between the two offenses *for purposes* of determining the punishment. Since the punishment for murder—which includes the element of malice—was death, whereas the punishment for manslaughter—which does not include that element—was imprisonment, *A Re-Examination of Malice Aforethought*, 43 Yale L J at 541, punishments for both crimes could not have been cumulatively imposed for the same offense. The common law, consistently with this view, considered manslaughter and murder to be the same offense for purposes of the prohibition of successive prosecutions. As Blackstone observed, "it has been held, that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment, of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree." Blackstone, p *336. Thus, the historical significance of the element of malice was to ensure that murder and manslaughter stood apart and could not be cumulatively punished. We must read the term "malice" in light of this background. See MCL 8.3a ("[T]echnical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."). So the function of the "without malice" language in MCL 750.329 is to textually signal the statute's relationship with murder crimes that include the element of malice, with regard to the effect of the malice element on the severity of the crime and applicable punishment.[6]

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[6] Similarly, during Michigan's territorial period, the two types of homicide, murder and manslaughter, had very different punishments: death by hanging, for murder, and a fine plus up to three years at hard labor for manslaughter. See Chardavoyne, *A Hanging in Detroit: Stephen Gifford Simmons and the Last Execution Under Michigan Law*

This conclusion remains valid despite the fact that the "without malice" language does not represent an element that must be proved for the crime of statutory involuntary manslaughter. In *People v Doss*, 406 Mich 90, 99; 276 NW2d 9 (1979), we held that the absence of malice was not an element that the prosecution needed to prove. In reaching this conclusion, we implicitly overruled caselaw that had understood a statutory "without malice" requirement to be an element of

(Detroit: Wayne State University Press, 2003), p 59. Although Michigan eliminated the death penalty in May 1846, the penalty for murder remained severe: "solitary confinement at hard labor in the state prison for life" for first-degree murder, and "life[] or any term of years" for second-degree murder. 1846 RS, ch 153, §§ 1-2. And when, a few years later, the predecessor of MCL 750.329 was passed, the penalty continued to be significantly lighter than for first-degree murder: if death occurred, then the defendant was guilty of manslaughter, 1869 PA 68; 1871 CL 7550, punishable by a fine, not more than 15 years' imprisonment, or both, 1871 CL 7519. While it was then possible—as it is today—that a manslaughter conviction might, in certain cases, lead to a higher sentence than a conviction for second-degree murder, the *requirement* of imprisonment and the *possibility* of a life sentence for murder nonetheless stood in stark contrast to the possibility of a person guilty of manslaughter merely receiving a fine. Even recognizing the possibility of a greater sentence for manslaughter than for second-degree murder, this Court nonetheless noted that the "distinction [between these crimes] is a vital one," relating to the lack of malice, i.e., "the greater disregard of human life shown in the higher crime." *Wellar v People*, 30 Mich 16, 19 (1874). For that reason, we suggested that one could be guilty of "murder *or* manslaughter," depending on the defendant's state of mind. *Id*. (emphasis added).

Moreover, it is worth remembering that the common law did not recognize degrees of murder, see *A Re-Examination of Malice Aforethought*, 43 Yale L J at 541, which developed in this country to provide an alternative to the death penalty. See Stacy, *Changing Paradigms in the Law of Homicide*, 62 Ohio St L J 1007, 1012 (2001). Second-degree murder nonetheless retained the malice requirement and, as shown, provided for much greater potential penalties than manslaughter. Thus, it remains clear that the malice requirement has consistently and meaningfully distinguished manslaughter from all forms of murder with regard to the penalties involved.

statutory manslaughter. Specifically, in *People v Chappell*, 27 Mich 486, 487-488 (1873), this Court set aside the defendant's conviction under a prior version of the statutory involuntary manslaughter statute because the evidence indicated he had acted maliciously. "[I]t is manifestly impossible," we noted, "for an act to be at the same time malicious and free from malice." *Id*. at 488.[7]

Doss did not disturb *Chappell*'s conclusions that the statute "was aimed at acts where no harm was designed" and that a finding of malice would be logically inconsistent with a finding of no malice. *Id*. Rather, *Doss* involved the related yet separate question of whether the absence of malice was "an essential element of manslaughter as defined in MCL 750.329[.]" *Doss*, 406 Mich at 93. Addressing this issue, we observed that our caselaw had subsequently "undermined" *Chappell*'s treatment of the "without malice" language as an element needed to be proved by the prosecution. *Id*. at 98. In particular, in *People v Chamblis*, 395 Mich 408, 424; 236 NW2d 473 (1975), we rejected the "treat[ment] as positive elements of a crime such negative concepts as [being] 'unarmed' " in an unarmed robbery statute. A negative requirement of being "unarmed," we explained, "is not a distinct, separate element. Elements are, by definition, positive." *Id*. Consequently, "[a] negative element of a crime is a contradiction in terms." *Id*.

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[7] Under *Chappell*, as under the early common law, it was simply not possible to convict a defendant for both offenses, much less impose cumulative punishments for them. The phrase "without malice" had the same function of precluding cumulative punishments with murder as it does under *Doss*, given that the prosecution would be unable to demonstrate that the defendant both acted with malice and without malice. *Doss* did not change this reality, as it never purported to address the possibility of cumulative punishments.

Relying on this reasoning, *Doss* simply held that " 'without malice' is the absence of an element, rather than an additional element which the people must prove beyond a reasonable doubt." *Doss*, 406 Mich at 99. In other words, a charge of statutory involuntary manslaughter would not fail simply because the evidence demonstrated that the defendant acted with malice. Thus, a defendant could not successfully defend against a manslaughter charge by saying that he or she actually committed murder. See Tiffany, *A Treatise on the Criminal Law of the State of Michigan* (5th ed, 1900), p 973 n 89 ("But it is no defense to an indictment for manslaughter that the homicide appears by the evidence to have been committed with malice aforethought, and was therefore murder[.]"), citing *Commonwealth v McPike*, 57 Mass 181, 186 (1849). But *Doss* did not disavow—indeed, it reaffirmed—the fundamental distinction between the crimes that was introduced by the "without malice" language. Malice "is that quality which distinguishes murder from manslaughter," we reiterated. *Doss*, 406 Mich at 99. Although the absence of malice was not an element of statutory involuntary manslaughter, it remained "fundamental to manslaughter in a general definitional sense[.]" *Id*. See also *Mendoza*, 468 Mich at 534 ("Manslaughter is murder without malice.") (citation omitted); *id*. at 538 ("The critical difference between murder and manslaughter was the presence or absence of 'malice aforethought.' ").

Contrary to the prosecution's argument here, the present case does not turn upon whether the absence of malice is an element of the crime; rather, the critical question is whether the Legislature has indicated its intent in the text to prohibit multiple punishments.

With regard to that question, the observations in *Chappell* and *Doss* on the incompatibility of malice and absence-of-malice requirements remain valid and illuminating. By stipulating in MCL 750.329 that the crime be committed "without malice," the Legislature used language that was logically inconsistent with a showing of malice. Although the malice requirement in the second-degree murder statute is an element of the offense, while the absence of malice in the involuntary manslaughter statute is not an element of that offense, the use of inconsistent terms in the latter statute clearly indicates the Legislature's intent to prevent the prosecution from obtaining convictions and sentences for both with regard to the same conduct.

In fact, *because* the phrase "without malice" is not an element, it would be nugatory if it failed to prevent double punishments. That is, for the language to have any effect, it must prevent cumulative punishments. Otherwise, it would define neither the criminal conduct required to be proven by the prosecution nor the penalty for engaging in that conduct. As these are the core substantive aspects of criminal offenses, it is difficult to see what function the language would have if it related to neither conduct nor penalty and was not procedural. See *People v Arnold*, 508 Mich 1, 19-21; 973 NW2d 36 (2021) (describing the substantive and procedural components of criminal statutes). Because we strive, when possible, to give effect to every word and phrase in a statute, we must reject the prosecutor's proposed interpretation, which drains the meaning of "without malice" from the statute. See *People v Pinkney*, 501 Mich 259, 283-284; 912 NW2d 535 (2018).

From this perspective, the only function of the phrase "without malice" is to enable the prosecution to

secure a conviction of statutory involuntary manslaughter even when the prosecution fails to prove the malice necessary for second-degree murder. And the punishment imposed in such circumstances is calibrated to firearms-related conduct. In other words, the Legislature created a specific offense that provides the prosecution with an alternative punishment that can be imposed for the intentional pointing or aiming of a firearm, even if the prosecution fails to demonstrate malice. Cf. *People v Heflin*, 434 Mich 482, 504; 456 NW2d 10 (1990) ("In our opinion, in promulgating the involuntary manslaughter statute, the Legislature intended to punish the intentional pointing of a firearm which results in death even though the defendant did not act with the criminal intent sufficient for conviction under common-law involuntary manslaughter."); see also *Chappell*, 27 Mich at 487 (opining that the statute was designed to "punish a class of acts done carelessly, but without any design of doing mischief"). Nothing in the text indicates a clear intent that the punishment for this alternate homicide offense could be imposed along with the punishment for second-degree murder.

Nor does our later decision in *Smith* require a different conclusion. In *Smith*, 478 Mich at 71, we examined the elements of second-degree murder and statutory involuntary manslaughter and held that the latter was not a necessarily included lesser offense of the former. We reached this conclusion because "the elements of statutory involuntary manslaughter are not completely subsumed in the elements of second-degree murder." *Id*. Specifically, we noted that the manslaughter statute required proof that the death resulted from the discharge of a firearm intentionally

pointed at the victim. *Id*. Because second-degree murder did not require such a showing, it was possible to commit that crime without also committing statutory involuntary manslaughter. *Id*. While the prosecution relies on *Smith* here, that opinion did not address the multiple-punishments strand of the Double Jeopardy Clause. And the fact that statutory involuntary manslaughter is not a lesser included offense does not necessarily mean that the Legislature intended to allow cumulative punishments for both crimes.

We are aware of no cases in this state in which defendants were convicted of and received punishments for both second-degree murder and statutory involuntary manslaughter on the basis of a single killing. The outcome urged by the prosecution was not even a possibility until after both *Doss* and *Smith* were decided. As noted above, prior to *Doss* the prosecution had to prove the absence of malice to obtain a conviction of statutory involuntary manslaughter—a showing contrary to what it would need to prove to convict for second-degree murder.

For these reasons, we hold that the Legislature clearly intended to prohibit multiple punishments for second-degree murder and statutory involuntary manslaughter.

IV. CONCLUSION

By requiring malice for second-degree murder but not for statutory involuntary manslaughter, the Legislature has expressed its clear intent that an individual cannot be punished for both of these offenses related to the death of a single victim. A contrary conclusion would nullify the language in MCL 750.329 that statutory involuntary manslaughter be committed "without

malice." Accordingly, we reverse the Court of Appeals judgment, vacate defendant's statutory manslaughter conviction, and remand for resentencing.

MCCORMACK, C.J., and ZAHRA, BERNSTEIN, CLEMENT, CAVANAGH, and WELCH, JJ., concurred with VIVIANO, J.

PEOPLE v DAVIS

Docket No. 161396. Argued on application for leave to appeal November 10, 2021. Decided March 14, 2022.

Donald W. Davis, Jr., was convicted following a jury trial in the Genesee Circuit Court of multiple felonies in connection with the shooting death of Devante Hanson. During a recess on the second day of the trial, the mother of the victim's child made contact with a juror in the hallway. When the trial resumed, the court, Geoffrey L. Neithercut, J., ordered the woman and all other spectators, with the exception of the victim's mother, removed from the courtroom and directed them not to return for the remainder of the trial. After his conviction, defendant appealed and moved to remand for an evidentiary hearing, arguing that he had been denied his constitutional right to a public trial and that his trial counsel had been ineffective for failing to object to the closure of the courtroom. The Court of Appeals granted the motion. On remand, following the evidentiary hearing, the trial court denied defendant's motion for a new trial, stating that it had not actually closed the courtroom to the public and that the doors were never locked. In addition, the court concluded that while it had poorly worded its directive to the spectators not to return during the trial, defendant was not prejudiced by the removal because no one supporting defendant had been affected by the removal order. The Court of Appeals, MARKEY, P.J., and REDFORD, J. (SWARTZLE, J., concurring in part and dissenting in part), affirmed, stating that the courtroom had been "cleared" rather than closed, that defendant had waived his right to a public trial when defense counsel failed to object to the clearing of the courtroom, and that even if the courtroom had been closed and the error had been forfeited rather than waived, defendant would not have been entitled to relief because any error in this regard would not have warranted reversal. 331 Mich App 699 (2020). Defendant applied for leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 507 Mich 853 (2021).

In an opinion by Justice CLEMENT, joined by Chief Justice MCCORMACK and Justices VIVIANO, BERNSTEIN, CAVANAGH, and WELCH, the Supreme Court, in lieu of granting leave to appeal, *held*:

The trial court's closure of the courtroom for nearly the entirety of defendant's trial after a single, benign interaction between an observer and a juror constituted plain error. Because the deprivation of a defendant's public-trial right is a structural error, the error necessarily affected defendant's substantial rights. This structural error presumptively satisfied the plain-error standard's requirements for reversal, and neither the prosecution's arguments nor the record evidence rebutted that presumption. The Court of Appeals judgment was reversed, and the case was remanded to the trial court for a new trial.

1. Appellate review was not precluded on the ground that defendant had waived the argument regarding the closure of the courtroom by failing to object. In order to waive a known right, a party must clearly express satisfaction with a trial court's decision, which defense counsel did not do in this case. The Court of Appeals erred by considering defense counsel's posttrial statements at the evidentiary hearing to supplement defense counsel's silence at trial to conclude that the issue had been waived rather than forfeited. A failure to object—even when purposeful or strategic—does not constitute the clear, outward expression of satisfaction with a trial court's decision that is necessary to find waiver, and defense counsel's testimony detailing his motivation behind the lack of objection, elicited months after trial when defense counsel was no longer representing defendant, did not retroactively transform defense counsel's silence into an affirmative approval. Further, after the trial, a defense counsel's interests are no longer necessarily aligned with those of the defendant and defense counsel may no longer make decisions on the defendant's behalf. Accordingly, an attorney's posttrial testimony about the reason for a lack of objection cannot retroactively transform the forfeiture of a client's right at trial into a waiver of the same.

2. The United States Constitution and the Michigan Constitution guarantee a criminal defendant the right to a public trial. This right allows the public to see that a defendant is fairly dealt with and not unjustly condemned, reminds defendant's triers of their responsibility and the importance of their functions, helps ensure that judges and prosecutors fulfill their duties ethically, encourages witnesses to come forward, and discourages perjury. However, a courtroom may be closed during any stage of a criminal proceeding if there is an overriding interest that is likely

to be prejudiced, if the closure is no broader than necessary to protect that interest, and if the trial court has considered reasonable alternatives to closing the proceeding and made findings adequate to support the closure.

3. The trial court and the Court of Appeals clearly erred by finding that the courtroom was not closed to the public. The trial court ordered everyone in the gallery to leave the courthouse and not come back, told the observers that they were not allowed to return for the remainder of the trial, and stated that the only person allowed to watch the trial was the victim's mother. The trial court's posttrial interpretation of this oral order as a temporary "clearing" of the courtroom ignored its own explicit instruction that the observers were not allowed to return for the remainder of trial, not just the remainder of that particular day. Even accepting as true the trial court's posttrial assertions that it did not lock the courtroom or eject any observers during the remainder of trial, the trial court's failure to enforce or otherwise effectuate the order did not undo it. The observers who were removed from the courtroom on the day of the order were directed not to return for the remainder of the trial, and they did not. It was not necessary for the trial court to have ejected potential observers or taken actions to bar entry of potential observers to find that a closure order was in place.

4. When preserved, the erroneous denial of a defendant's public-trial right is considered a structural error that defies analysis by harmless-error standards and results in automatic relief to the defendant. When such an error is forfeited, a defendant must prove that error occurred, that the error was plain, and that the plain error affected substantial rights. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence.

5. The trial court's decision to close the courtroom was plain error. The observer's prohibited interaction with the juror implicated the impartiality of the jury, and given defendant's constitutional right to be tried by an impartial jury, preventing interference with the jury was an overriding interest that the trial court was justified in attempting to safeguard. However, the closure was broader than necessary to protect the impartiality of the jury, the trial court failed to consider reasonable alternatives to closing the proceeding, and the trial court failed to make adequate factual findings to support the closure. The trial court's failure to comply with these requirements constituted plain error,

given that these requirements are well established and the trial court's failure to comply with them was readily apparent from the record.

6. The trial court's plain error in closing the courtroom affected defendant's substantial rights. Because structural errors such as this affect the framework within which the trial proceeds rather than a single piece of evidence or aspect of the trial, the harm they cause is substantial but often difficult to quantify, and they are thus particularly ill-suited to an analysis of whether the error affected the outcome of the trial court proceedings. The United States Supreme Court has held that structural errors involve constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error and that the proper remedy for a preserved structural error is automatic reversal. The Michigan Supreme Court has previously suggested that structural errors affect substantial rights and thus satisfy the third prong of the plain-error standard. The harmless-error and plain-error standards require the same kind of inquiry because they both require appellate courts to assess the effect of the error on the outcome of the trial court proceedings. Just as preserved structural errors defy analysis by harmless-error standards, forfeited structural errors defy analysis under the third prong of the plain-error standard. Because structural errors often render a trial fundamentally unfair and an unreliable vehicle for determining guilt or innocence and also affect the framework within which the trial proceeds, they necessarily affect a defendant's substantial rights. Therefore, the existence of a forfeited structural error alone satisfies the third prong of the plain-error standard, and a defendant need not also show the occurrence of outcome-determinative prejudice. Because the deprivation of the public-trial right is a structural error, defendant satisfied the third prong of the plain-error standard.

7. The fourth prong of the plain-error standard requires consideration of whether the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. A forfeited structural error creates a formal presumption that this prong of the plain-error standard has been satisfied. A trial that has been rendered fundamentally unfair or had its framework affected by structural error is generally one whose fairness, integrity, or public reputation has been damaged. Given this conceptual overlap between the third and fourth prongs of the plain-error standard and that a forfeited structural error automatically satisfies the third prong of the plain-error standard, a forfeited structural error is very likely to

also satisfy the fourth prong of the plain-error test. Recognizing a formal rebuttable presumption creates a better framework for future courts applying the plain-error standard to forfeited structural errors. Just as defendants face difficulty in proving prejudice from structural errors, they also face difficulty in identifying specific facts on the record showing that the forfeited structural error seriously affected the fairness, integrity, or public reputation of the trial. The formal rebuttable presumption in cases of forfeited structural error will shift the burden of demonstrating that the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding to the prosecution, which is better positioned to marshal record facts supporting the overall fairness of the trial proceedings.

8. The denial of defendant's public-trial right, as a structural error, presumptively establishes that the error had a serious effect on the fairness, integrity, or public reputation of the trial. The prosecution did not rebut this presumption with its argument that the closure reduced the perception that the gallery supported the victim while defendant had no supporters in attendance. The public-trial right does not serve only defendant's interest in the presence of community support; rather, the existence of public observers, no matter their affiliation, helps to ensure a fair trial, to ensure that attorneys and judges do their jobs responsibly, to encourage witnesses to come forward, and to discourage perjury. Further, the prosecution's focus on the supposed absence of harm to defendant himself failed to consider the harm rendered to the integrity and public reputation of the trial. Having satisfied the plain-error standard, defendant is entitled to relief.

Reversed and remanded for a new trial.

Justice ZAHRA, concurring in the result only, agreed that the closure of the courtroom for the majority of defendant's trial violated his constitutional right to a public trial and amounted to plain structural error warranting reversal. He disagreed, however, with the majority's decision to modify the existing plain-error standard for reviewing unpreserved structural errors on its own initiative and with no warning to the bench and the bar, notwithstanding the Court's prior precedent rejecting the rule that the majority adopted. He stated that the majority opinion's framework erodes the preservation standard by undermining the reasons for requiring errors to be preserved for appellate review, which are to allow trial courts the opportunity to correct the error, to prevent the administrative and social costs of further proceedings that could have been avoided with a timely objection, and to

deter defendants and their counsel from harboring error as an appellate parachute. He further noted that the majority need not have adopted a new standard in order to provide relief in this case given that defendant could demonstrate that he was entitled to a reversal under all four prongs of the current plain-error standard.

1. APPEALS — ISSUE PRESERVATION — WAIVER — POSTTRIAL TESTIMONY.

In order to waive a known right, a party must clearly express satisfaction with a trial court's decision; a defense attorney's posttrial testimony as to the reason for the attorney's lack of objection to an error during the trial cannot retroactively transform the forfeiture of the defendant's right at trial into a waiver of that right.

2. CONSTITUTIONAL LAW — RIGHT TO PUBLIC TRIAL — COURTROOM CLOSURES.

The United States Constitution and the Michigan Constitution guarantee a criminal defendant the right to a public trial; however, a courtroom may be closed during any stage of a criminal proceeding if there is an overriding interest that is likely to be prejudiced, if the closure is no broader than necessary to protect that interest, and if the trial court has considered reasonable alternatives to closing the proceeding and made findings adequate to support the closure; the improper denial of a defendant's public-trial right is a structural error (US Const, Am VI; Const 1963, art 1, § 20).

3. CONSTITUTIONAL LAW — RIGHT TO PUBLIC TRIAL — COURTROOM CLOSURES — STRUCTURAL ERROR — ISSUE PRESERVATION — FORFEITURE — PRESUMPTIONS.

When the error is preserved, the erroneous denial of a defendant's public-trial right is a structural error that defies analysis by harmless-error standards and results in automatic relief to the defendant; when such an error is forfeited, a defendant must prove (1) that error occurred, (2) that the error was plain, (3) that the plain error affected substantial rights, and (4) that the plain, forfeited error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence; the existence of a forfeited structural error alone satisfies the third prong of the plain-error standard and creates a formal rebuttable presumption that the fourth prong of the plain-error standard has been satisfied.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Michael A. Tesner*, *Alena M. Clark*, and *Rebecca Jurva-Brinn*, Assistant Prosecuting Attorneys, for the people.

State Appellate Defender Office (by *Jacqueline J. McCann* and *Steven Helton*) for defendant.

CLEMENT, J. At issue in this case is whether defendant, Donald W. Davis, Jr., was deprived of his constitutional right to a public trial. After a benign interaction between a courtroom observer and a juror on the second day of trial, the trial court removed all but one observer from the courtroom, instructed the removed observers not to return, and stated that the courtroom would be closed for the remainder of trial. Although the trial court did not take any further action to effectuate this closure, we hold that the unjustified closure nonetheless violated defendant's public-trial right and constituted plain error requiring reversal.

I. FACTS AND PROCEDURAL HISTORY

This case arises from the murder of Devante Hanson. In 2016, a security guard found Hanson's body in the driver's seat of a running car parked outside an apartment complex. Hanson had been shot to death. On the basis of surveillance-camera footage, defendant and Spencer Holiday were identified as the parties who might have been responsible for Hanson's death. As part of a plea deal, Holiday testified against defendant at trial. According to Holiday, defendant lured Hanson to the apartment complex by offering to purchase marijuana from Hanson, but actually intended to rob Hanson. When defendant and Holiday entered Hanson's vehicle, defendant brandished a gun at Hanson

and demanded money and marijuana. Hanson reached for defendant's gun, and defendant fatally shot him. Defendant then demanded at gunpoint that Holiday shoot Hanson as well, and Holiday complied.

The prosecutor charged defendant with first-degree murder, based on alternate theories of premeditated murder and felony murder.[1] On the second day of trial, the trial court became aware that a courtroom observer had spoken to a juror during a break in the proceedings. The trial court identified the courtroom observer as Daundria Frye, who explained that she was attending the trial because Hanson was the father of her child. The following exchange then took place:

> *The Court*: So you know, counselors, the jury has complained that that woman has tried to talk to them.
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> *Ms. Frye*: No. I didn't try to talk, I just saw a lady and I asked—I'm like did you—do you work at Hurley's? I know I'm not supposed to talk to them.
>
> *The Court*: I've got two choices. One is to find you in contempt of court and lock you up.
>
> *Ms. Frye*: [Are] you serious?
>
> *The Court*: I'm serious. The other is to order everyone in the gallery to leave the courthouse and not come back. What we're going to do is this; in order to lock you up I'd have to get you a lawyer first and that wastes time because we have things to do here. So instead, I'm going to bar everyone from this courthouse except for the mother of Devante [Hanson]. The rest of you leave. Don't you come back.
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> *Ms. Frye*: Okay.

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[1] The prosecutor also charged defendant with assault with intent to commit armed robbery, being a felon in possession of a firearm, being a felon in possession of ammunition, and four counts of carrying a firearm during the commission of a felony.

The Court: Shame on you trying to subvert the justice system.

Shortly thereafter, a person unidentified in the trial transcript sought clarification of the trial court's verbal order:

Unidentified Speaker: Judge, you did mean for the remainder of the trial correct?

The Court: For the remainder of the trial, all the way in to next week.

Unidentified Speaker: All right.

The Court: The only person allowed to watch this trial is the mother of the young man who died. What foolishness.

The prosecutor asked the trial court whether the "jurors who have a complaint" regarding the interaction with Frye should be questioned to determine whether they were prejudiced by the interaction. The trial court responded that this was not necessary, reasoning that Frye had merely asked one juror whether that juror worked at Hurley Hospital and that this interaction was merely "a short comment."

The trial continued, and, over the course of several days, the jury heard from 14 additional witnesses, including the key testimony from Holiday described above. Ultimately, the jury found defendant guilty as charged.

Defendant appealed by right in the Court of Appeals, and he included in his appeal a motion to remand for an evidentiary hearing and to allow him the opportunity to file a motion for a new trial based on a variety of issues. The Court of Appeals granted this motion in part, ordering a remand for the sole purpose of "expand[ing] the factual record regarding [the trial court's] decision to close the trial to all members of the

public except for the victim's mother, and to allow defendant to file a motion for new trial based on his claim that trial counsel was ineffective for failing to object to the court's decision." *People v Davis*, unpublished order of the Court of Appeals, entered November 13, 2018 (Docket No. 343432).

On remand, testimony was elicited regarding the factual circumstances of the courtroom closure. Defense counsel testified that, before the courtroom closure, there were between 3 and 10 people observing the trial on the side of the prosecution, and no observers on defendant's side.[2] After the closure, only the decedent's mother and an employee from the prosecutor's office remained in the gallery. Defense counsel also testified that he did not know of any members of the public who tried to view the trial but were stopped, that he did not recall there being a sign on the door telling people the trial was closed, and that he did not believe there was a deputy posted outside the courtroom to stop people from entering.[3]

Defendant's sister testified that she came to the courthouse during the trial and found the courtroom door locked, but she was unsure whether her attempted entry occurred during a break in the proceed-

[2] Defense counsel acknowledged on redirect examination that it was never made clear to the jury that there was a defense side and a prosecution side of the courtroom.

[3] Defense counsel also testified regarding his decision not to object to the trial court's decision to close the courtroom. Defense counsel explained that when the trial court made its decision, none of the trial observers was there to support defendant. When asked whether "it was actually better to only have the victim's mother here as opposed to having a large group of people," defense counsel answered, "Absolutely."

ings.[4] She returned the next day but left before entering the courtroom after feeling threatened by the decedent's family.

Finally, Bryan Wooten, who attempted to view the trial in support of defendant, also testified. He stated that there was no sign at the courtroom door indicating that he could not enter, and Wooten was able to enter the courtroom without interference from the courtroom deputy. However, after he entered, defendant gestured toward the door and indicated that Wooten should leave, and Wooten did so.[5]

After evaluating this testimony, the trial court denied defendant's motion for a new trial. The court reasoned that it had not actually closed the courtroom, explaining as follows:

> But I did not lock the courtroom, I did not close it to the public, I just kicked out three to ten people. And I admit I poorly worded it because I said don't come back and I probably should have said don't come back today. That's my error.

The trial court also determined that defendant had not suffered prejudice from this clearing of the courtroom, reasoning that there was no evidence that defense supporters were cleared from the courtroom or later prevented from observing the trial.

Defendant appealed, and the Court of Appeals affirmed in a split, published decision. The majority

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[4] She testified that she arrived at 1:30 p.m., which was during the period in which the court was in recess.

[5] The record does not reflect the reason for defendant's gesture, and, on appeal, the parties have put forth competing arguments regarding the basis behind this gesture. Defendant argues that he asked Wooten to leave to comply with the courtroom closure order; the prosecutor argues that defendant's request was based instead on defendant's desire that Wooten not observe the trial.

succinctly agreed with the trial court that the courtroom had been "cleared," not closed. Further, the majority held that defendant had waived his right to a public trial when defense counsel intentionally—according to his hearing testimony—declined to object to the trial court's clearing of the courtroom. In the alternative, if the trial court's order was instead understood to be a closure and defendant was deemed to have forfeited, rather than intentionally waived, the argument, the Court held that defendant would still not have been entitled to relief because he could not have satisfied the plain-error standard. Specifically, defendant could not have demonstrated that the courtroom closure seriously affected the fairness, integrity, or public reputation of the judicial proceedings because the effect of the courtroom closure was merely to limit the presence of observers supporting the prosecution. Because no observers supporting defendant were removed or prevented from observing the trial, the courtroom closure was to defendant's benefit, and he was not entitled to relief. *People v Davis*, 331 Mich App 699; 954 NW2d 552 (2020).[6]

Defendant subsequently applied for leave to appeal in this Court, and we ordered oral argument on the application on the following issues:

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[6] Judge SWARTZLE, concurring in part and dissenting in part, would have held that defendant satisfied the plain-error standard and, accordingly, was entitled to a new trial. Regarding the fourth prong of the plain-error standard, Judge SWARTZLE determined that the closure seriously affected the fairness, integrity, and reputation of the judicial proceedings because a majority of defendant's trial—the testimony of 14 witnesses, closing arguments, and the rendering of the verdict—was not subject to public view. He reasoned that the public-trial right serves several interests beyond demonstrating community support for a defendant or a prosecution and that defendant was denied these benefits without sufficient justification.

(1) whether [defendant] was denied his right to a public trial pursuant to US Const, Am VI, and Const 1963, art 1, § 20 where the Genesee Circuit Court stated that it was barring everyone, but the decedent's mother, from the courtroom for the remainder of the trial and told others in the courtroom to leave and not return; (2) whether, despite the court's statement, the courtroom remained open to the public because the courtroom door was unlocked, no sign was posted advising members of the public that the courtroom was closed, and court personnel did not prevent persons from entering the courtroom; (3) whether the appellant waived his right to a public trial; (4) whether trial counsel rendered ineffective assistance in failing to object; see *Weaver v Massachusetts*, 582 US [286] (2017); and (5) whether the trial court committed plain error entitling the appellant to a new trial. [*People v Davis*, 507 Mich 853 (2021).]

II. ANALYSIS

A. WAIVER AND FORFEITURE

As a threshold issue, the prosecutor argues that defendant has waived this argument and that, accordingly, appellate review is precluded. We disagree. Waiver is " 'the intentional relinquishment or abandonment of a known right,' " and one who waives an issue cannot later seek appellate review of that issue. *People v Carines*, 460 Mich 750, 752 n 7; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (some quotation marks omitted). In order to waive a known right, a party must "clearly express[] satisfaction with a trial court's decision . . . ." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). In contrast, a party merely forfeits rather than waives an issue when that party fails to timely assert a right. *Id*. at 504 n 27.

As applied to the public-trial right, this Court has held that mere silence in the face of a courtroom closure results in forfeiture, not waiver, of the public-trial right. *People v Vaughn*, 491 Mich 642, 663-664; 821 NW2d 288 (2012). Similarly, here, defense counsel did not object to the courtroom closure, but also did not "clearly express[] satisfaction" with the closure, so the alleged error was forfeited. *Kowalski*, 489 Mich at 503.

In so holding, we reject the Court of Appeals' use of defense counsel's posttrial statements at the evidentiary hearing to supplement defense counsel's silence at trial and its resultant conclusion that the issue was waived rather than forfeited. The failure to object—even when purposeful or strategic—does not constitute the clear, outward expression of satisfaction with a trial court's decision that is necessary to find waiver. See *Vaughn*, 491 Mich at 663-664. And defense counsel's testimony detailing his motivation behind the lack of objection, elicited months after trial when defense counsel was no longer representing defendant, does not retroactively transform defense counsel's silence into an affirmative approval. Eliciting testimony from defense counsel regarding his motivations for not objecting at trial is not the same as defense counsel's waiving an issue at trial on behalf of his client. Further, the majority's analysis ignores the reality that, posttrial, defense counsel's interests are no longer necessarily aligned with those of the defendant and that defense counsel may no longer make decisions on behalf of the defendant. It places defendants who seek posttrial evidentiary hearings in an unequal position with those defendants who do not, as the former risk having their arguments deemed waived and prohibited from appellate review by virtue of their defense counsel's testimony at the hearing, whereas the latter class of defendants is not exposed to such a risk. Accordingly,

an attorney's posttrial testimony as to the reason for the attorney's lack of objection cannot retroactively transform the forfeiture of a client's right at trial into a waiver of the same.

B. THE PUBLIC-TRIAL RIGHT

Having determined that defendant has not waived this argument, we must now consider whether the alleged courtroom closure violated defendant's right to a public trial. Both the United States Constitution and the Michigan Constitution guarantee a criminal defendant the right to a public trial. US Const, Am VI; Const 1963, art 1, § 20. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of responsibility and to the importance of their functions . . . ." *Gannett Co v DePasquale*, 443 US 368, 380; 99 S Ct 2898; 61 L Ed 2d 608 (1979) (quotation marks and citations omitted). The public-trial right also helps ensure that judges and prosecutors fulfill their duties ethically, encourages witnesses to come forward, and discourages perjury. *Vaughn*, 491 Mich at 667.

Despite serving these important interests, the public-trial right is not unlimited, and circumstances may exist that warrant the closure of a courtroom during any stage of a criminal proceeding. *Id*. at 653. In order to justify a courtroom closure, there must be "an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the clo-

sure." *Id*. at 653, quoting *Waller v Georgia*, 467 US 39, 48; 104 S Ct 2210; 81 L Ed 2d 31 (1984) (quotation marks omitted).

1. STANDARD OF REVIEW

When preserved, the erroneous denial of a defendant's public-trial right is considered a structural error. *Weaver v Massachusetts*, 582 US 286, 296; 137 S Ct 1899; 198 L Ed 2d 420 (2017). Structural errors "are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Arizona v Fulminante*, 499 US 279, 309; 111 S Ct 1246; 113 L Ed 2d 302 (1991). Because the harm rendered by these errors is extensive but intrinsic and difficult to quantify, preserved structural errors result in automatic relief to the defendant to "ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver*, 582 US at 295.

Although preserved structural errors are subject to automatic reversal, the alleged error here was forfeited.[7] In order to receive relief on a forfeited claim of constitutional error, a defendant must prove that (1) error occurred, (2) the error "was plain, i.e., clear or obvious," and (3) "the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when

[7] Although the term "structural error" was coined in the context of preserved claims of errors exempt from the harmless-error standard, for brevity's sake, and for the sake of the bench and bar moving forward, we will also use the term "structural error" to include the same type of errors, even when unpreserved.

an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (quotation marks, brackets, and citation omitted). However, as discussed later in this opinion, there are special considerations relevant to this analysis when a forfeited structural error is at issue.

Finally, we review a trial court's factual findings for clear error. *Vaughn*, 491 Mich at 650. "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993) (opinion of GRIFFIN, J.).

2. FACTUAL ISSUE OF CLOSURE

To begin, we disagree with the lower courts' finding that the courtroom was not closed to the public.

Here, the trial court ordered "everyone in the gallery to leave the courthouse and not come back."[8] And it further specified that the observers were not allowed to return "[f]or the remainder of the trial, all the way in to next week" and that "[t]he only person allowed to watch this trial is the mother of the young man who died." There is no ambiguity in this language: The trial court had ordered the courtroom closed to all observers except Hanson's mother for the remainder of the trial. We are "left with a definite and firm conviction" that the trial court was mistaken in concluding otherwise. *Kurylczyk*, 443 Mich at 303.

The trial court's posttrial interpretation of this oral order as a temporary "clearing" of the courtroom ig-

[8] The court made an exception for Hanson's mother, whose presence was expressly permitted by statute. MCL 780.761; MCL 780.752(1)(m)(*ii*)(C).

nores its own explicit instruction that the observers were not allowed to return for the remainder of trial, not just the remainder of that particular day.[9] Moreover, even accepting as true the trial court's posttrial assertions that it did not lock the courtroom or eject any observers during the remainder of trial, the trial court's failure to enforce or otherwise effectuate the order does not undo it.[10] The observers who were removed from the courtroom on the day of the order were directed not to return for the remainder of the trial, and they did not. The parties understood that no observers would be allowed for the remainder of the trial, and the trial court did not later advise them otherwise. We do not require the trial court to have ejected potential observers or taken actions to bar entry of potential observers to find that a closure order was in place. Such requirements would expose poten-

[9] Specifically, at the close of the evidentiary hearing, the trial court stated, "I admit I poorly worded [the order] because I said don't come back and I probably should have said don't come back today," but the trial court actually directed the observers not to return "[f]or the remainder of the trial."

[10] While the Court of Appeals found that the courtroom was not closed, it proceeded in the alternative with a plain-error analysis as follows:

> The trial court stated that it did not actually close the courtroom to the public and that the doors were never locked, and no one was ejected from the courtroom after Frye and the victim's other supporters were ejected. We decline to call into question the highly respected jurist's credibility, so we shall proceed with our analysis on the *assumption* that the courtroom was closed for the remainder of the trial. [*People v Davis*, 331 Mich App at 712 n 1.]

There are established standards for reviewing the trial court's findings of fact and conclusions of law, and none of these standards involves an assessment of the presiding judge's professional reputation. See *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The presence of legal error does not depend on a jurist's respectability, and to the extent that the Court of Appeals adopted the trial court's rulings and findings of fact on that basis, it erred.

tial observers to the risk of being held in contempt of court for violating the previously rendered closure order. It would also treat defendants inequitably on the basis of the level of community interest in their prosecution, as those whose cases lack potential interested observers would be unable to meet this standard.

In sum, pursuant to the plain language of the trial court's verbal order, we find that the trial court's order rendered the courtroom closed to the public for a majority of the trial.

3. APPLICATION OF THE PLAIN-ERROR STANDARD

Having found that the courtroom was factually closed, we hold that the decision to close the courtroom was plain error.

a. PLAIN ERROR OCCURRED

As discussed, to justify a courtroom closure, there must be "an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Vaughn*, 491 Mich at 653, quoting *Waller*, 467 US at 48 (quotation marks omitted). Here, Frye's prohibited interaction with the juror implicated the impartiality of the jury. Given defendant's constitutional right to be tried by an impartial jury, US Const, Am VI; Const 1963, art 1, § 20, preventing interference with the jury is undoubtedly an overriding interest. The trial court thus was justified in attempting to safeguard that interest.

However, the trial court failed to comply with the remainder of the requirements set forth in *Vaughn* and

Waller. First, the closure was broader than necessary to protect the impartiality of the jury. See *Waller*, 467 US at 48. The trial court could have banned only Frye from the courtroom, given that no other member of the public attempted to interact with the jury. It could have repeated its previous instructions to observers regarding the prohibition on juror interaction or given more detailed instructions. Or it could have had the deputy escort the jury to and from the courtroom to prevent any potential interaction with members of the public. Any of these alternatives on their own or in combination would have safeguarded the jury's impartiality while still maintaining a public trial under the circumstances of this case.

Second, the trial court failed to consider reasonable alternatives to closing the proceeding. See *id*. As discussed, there were several alternatives to closure available to the trial court. But the trial court considered only the option of holding Frye in contempt of court.

Third, the trial court also failed to make adequate factual findings to support the closure. See *id*. The trial court did not find that Frye's interaction with the juror was for the purpose of interfering with court proceedings or tampering with the jury. It did not find that the result of Frye's interaction with the juror was a biased juror. And it did not find that a closure was necessary to protect the impartiality of the jury. To the contrary, the trial court concluded that it was unnecessary to question the jurors to determine whether any were prejudiced by Frye's interaction with the juror because it was merely a "short comment." Without factual findings to support its conclusion, the trial court's decision to close the courtroom was unjustified.

The trial court's failure to comply with the requirements set forth in *Vaughn* and *Waller* constituted error. We also conclude that the error was plain, as these requirements are well established and the trial court's failure to comply with them is readily apparent from the record. See *Carines*, 460 Mich at 763.

b. THE ERROR AFFECTED DEFENDANT'S SUBSTANTIAL RIGHTS

Having found that plain error occurred, we must now consider whether the plain error affected defendant's substantial rights. See *id*. This prong of the plain-error analysis is typically satisfied by demonstrating that the plain error likely affected the outcome of the trial court proceedings. See *Olano*, 507 US at 734; *Carines*, 460 Mich at 763. We readily apply that standard in the context of nonstructural error—for example, by concluding that wrongly admitted evidence likely caused the jury to reach a guilty verdict. See *Fulminante*, 499 US at 307-308. But this prong presents special difficulty when presented with a structural error. Because structural errors by definition "affect[] the framework within which the trial proceeds" rather than a single piece of evidence or aspect of the trial, the harm rendered by structural errors is substantial but often difficult to quantify. *Id*. at 310. Given these difficulties, structural errors are particularly ill-suited to an analysis of whether the error affected the outcome of the trial court proceedings.

The United States Supreme Court faced similar difficulty in the context of applying the harmless-error standard to preserved structural errors. Generally, preserved errors are subject to the harmless-error rule, under which a defendant is denied relief only if the complained-of error was harmless beyond a reasonable

doubt. *Chapman v California*, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967); *Carines*, 460 Mich at 774. But when faced with applying this prejudice standard to preserved structural errors, the Court was met with the same difficulties we described earlier; specifically, that errors in the framework of the trial cause serious, but usually unquantifiable harm. *Fulminante*, 499 US at 289-290. The Court ultimately determined that these structural errors involved "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," *Chapman*, 386 US at 23, and held that the proper remedy for a preserved structural error is automatic reversal, *Fulminante*, 499 US at 309.

This Court has previously suggested that structural errors satisfy the third prong of the plain-error standard. See *Vaughn*, 491 Mich at 666; see also *Cain*, 498 Mich 108, 145; 869 NW2d 829 (2015) (VIVIANO, J., dissenting) (advocating for this Court to expressly recognize that structural errors satisfy the third prong). The harmless-error and plain-error standards require "the same kind of inquiry," because they both require appellate courts to assess the effect of the error on the outcome of the trial court proceedings. *Olano*, 507 US at 734. Accordingly, just as preserved structural errors "defy analysis by 'harmless-error' standards," *Fulminante*, 499 US at 309, we conclude that forfeited structural errors defy analysis under the third prong of the plain-error standard. Just as the United States Supreme Court jettisoned the prejudice analysis for preserved structural errors, we similarly jettison the prejudice analysis for forfeited structural errors. Instead, we hold that because structural errors often "render a trial fundamentally unfair" and an "unreliable vehicle for determining guilt or innocence," *Neder v United States*, 527 US 1, 8-9; 119 S Ct 1827;

144 L Ed 2d 35 (1999) (quotation marks and citations omitted),[11] and affect the framework within which the trial proceeds, *Fulminante*, 499 US at 310, they necessarily affect a defendant's substantial rights.[12] Accordingly, the existence of a forfeited structural error alone satisfies the third prong of the plain-error standard, and a defendant need not also show the occurrence of outcome-determinative prejudice.[13] As applied here, because the deprivation of the public-trial right is a structural error, defendant has satisfied the third prong of the plain-error standard. *Vaughn*, 491 Mich at 666; *Weaver*, 582 US at 296.

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[11] Although the United States Supreme Court in *Weaver* reasoned that "not every public-trial violation will in fact lead to a fundamentally unfair trial," the Court continued to recognize that some structural errors do always result in fundamental unfairness, "either to the defendant in the specific case or by pervasive undermining of the systematic requirements of a fair and open judicial process." *Weaver*, 582 US at 300-301. In the specific context of the public-trial right, the Court further recognized that its violation *may* result in fundamental unfairness, that the harm rendered by such a violation is difficult to quantify, and that the public-trial right protects interests of people beyond the defendant. *Id*. at 298. Although the violation of the public-trial right may not always result in fundamental unfairness, it does affect the framework within which the trial proceeds, and the harm rendered is sufficiently significant to support our conclusion that violation of this right necessarily affects a defendant's substantial rights.

[12] This holding is consistent with the United States Supreme Court's decision in *Olano*, 507 US at 735, in which the Court suggested, but did not affirmatively hold, that forfeited structural errors may constitute "a special category of forfeited errors that can be corrected regardless of their effect on the outcome" of the trial court proceedings.

[13] In so doing, we join multiple federal circuits that have held similarly. See *United States v Adams*, 252 F3d 276, 285-286 (CA 3, 2001); *United States v Ramirez-Castillo*, 748 F3d 205, 215 (CA 4, 2014); *Robinson v Ignacio*, 360 F3d 1044, 1061 (CA 9, 2004).

c. REVERSAL IS WARRANTED

We must now consider whether "the plain, forfeited error . . . seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Carines*, 460 Mich at 763 (quotation marks, citation, and brackets omitted).[14]

We take this opportunity to hold that a forfeited structural error creates a formal presumption that this prong of the plain-error standard has been satisfied.[15] "[T]here is substantial overlap between the characteristics of structural errors (i.e., they 'necessarily render a trial fundamentally unfair') and the standard under the fourth *Carines* prong ('serious effect on the fairness, integrity, or public reputation of the proceedings')." *Cain*, 498 Mich at 148 (VIVIANO, J., dissenting). A trial that has been rendered fundamentally unfair or had its framework affected by structural error is generally one whose fairness, integrity, or public reputation has been damaged. See *Vaughn*, 491 Mich at 667 (reasoning that "any error that is structural is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings") (quotation marks and citation omitted); *United States v Recio*, 371 F3d 1093, 1103 n 7 (CA 9, 2004) ("We note that structural error is particularly likely to satisfy [the] fourth prong [of the plain-error standard]."). Given this conceptual

[14] Defendant does not argue that the error resulted in the conviction of an actually innocent defendant.

[15] The concurrence asserts that this part of our holding is a sua sponte modification of the law. We disagree. Defendant prompted us to take this approach as a responsive suggestion to the part of our order that asked the parties whether a plain error occurred below. *Davis*, 507 Mich 853. Given that this modification of the prior plain-error standard was made at a party's prompting, we do not view this as a sua sponte change to the law. See, e.g., *Black's Law Dictionary* (11th ed) (defining "sua sponte" as "[w]ithout prompting or suggestion; on [the court's] own motion").

overlap between the third and fourth prongs of the plain-error standard and that a forfeited structural error automatically satisfies the third prong of the plain-error standard, a forfeited structural error is very likely to also satisfy the fourth prong of the plain-error test.

Recognizing a formal rebuttable presumption creates a better framework for future courts applying the plain-error standard to forfeited structural errors. Just as defendants face difficulty in proving prejudice from structural errors, they also face difficulty in identifying specific facts on the record showing that the forfeited structural error seriously affected the fairness, integrity, or public reputation of the trial. The formal rebuttable presumption in cases of forfeited structural error will shift the burden to the prosecutor to demonstrate that the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding. The prosecutor is better positioned to marshal record facts supporting the overall fairness of the trial proceedings. For example, in the context of courtroom closures, a prosecutor may successfully rebut the presumption when the trial court failed to sufficiently articulate the basis for the closure under *Waller*, but sufficient justification for the specific closure was present elsewhere in the record. A prosecutor may also successfully rebut such a presumption when an unjustified closure was limited and the courtroom remained open during most of the critical stages of trial. In those hypothetical situations, specific facts could affirmatively demonstrate that, despite the error, the overall fairness, integrity, and reputation of the trial court proceedings were preserved.[16]

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[16] The ability to rebut this presumption is consistent with our historical differentiation between preserved and unpreserved errors. "This

As applied in the present case, the denial of defendant's public-trial right—as a structural error—presumptively establishes that the error had a serious effect on the fairness, integrity, or public reputation of the trial, and the prosecutor has not rebutted this presumption. The prosecutor, with whom the Court of Appeals agreed, argues that this prong is not satisfied because the closure "reduced the perception that the gallery was pro-victim and against defendant, and it made less glaring the fact that no one was there who supported defendant." *Davis*, 331 Mich App at 716. But the public-trial right does not serve only defendant's interest in the presence of community support. The existence of public observers, no matter their affiliation, helps to ensure a fair trial, to ensure that attorneys and judges do their jobs responsibly, to encourage witnesses to come forward, and to discourage perjury.

Court disfavors consideration of unpreserved claims of error," and the mere occurrence of error is insufficient for relief if the defendant failed to object to the error in the trial court. *Carines*, 460 Mich at 761-762. Enforcing a higher standard to achieve relief for unpreserved error encourages defendants to identify error at trial, as the trial court is "ordinarily in the best position to determine the relevant facts and adjudicate the dispute," and resolution at the trial court level prohibits the defendant from using the alleged error as an appellate parachute. *Puckett v United States*, 556 US 129, 134; 129 S Ct 1423; 173 L Ed 2d 266 (2009). Here, although the fundamental and unquantifiable harm rendered by forfeited structural errors is sufficient to satisfy the third prong of the plain-error standard and presumptively satisfy the fourth, the prosecutor's ability to rebut the latter presumption means that the defendant is not guaranteed relief for a forfeited structural error. Accordingly, defendants remain encouraged to object to structural errors at the trial court, where the trial court may contemporaneously cure the error, or, upon appeal, the defendant will receive automatic relief. Those defendants who forfeit their argument continue to face a higher threshold for relief on appeal than those who preserved their argument. Under these circumstances, we find unlikely the concurrence's concern that litigants will strategically choose not to object to potential structural error in order to harbor that error as an appellate parachute.

Vaughn, 491 Mich at 667. Further, this focus on the supposed absence of harm to defendant himself fails to consider the harm rendered to the integrity and public reputation of the trial. While we agree with the prosecutor that jurors are presumed to follow their instructions and that the jurors in this case were instructed to base their decisions on the evidence, that alone is not enough to rebut the presumption where the vast majority of the critical parts of this trial occurred behind closed doors.[17] Therefore, we hold that the prosecutor has failed to rebut the presumption that the deprivation of defendant's public-trial right had a serious effect on the fairness, integrity, or public reputation of the trial. Having satisfied the plain-error standard, defendant is entitled to relief.

III. CONCLUSION

The trial court's closure of the courtroom for nearly the entirety of trial after a single, benign interaction between an observer and a juror constituted plain error. Because the deprivation of a defendant's public-trial right is a structural error, it necessarily affected defendant's substantial rights. This structural error presumptively satisfies the plain-error standard's requirements for reversal, and here, neither the prosecu-

[17] While the courtroom was closed in this case, "the jury heard the testimony of 14 witnesses, 13 of whom testified for the prosecution. Counsel then presented their closing arguments, the trial court instructed the jury, and the jury returned its verdict—all in private." *Davis*, 331 Mich App at 724 (SWARTZLE, P.J., concurring in part and dissenting in part). "If a portion of the trial may be conducted behind barred doors, it may all be conducted behind barred doors. If one constitutional right may be violated with impunity, all may be and the bill of rights becomes but a scrap of paper. The defendant has not had the public trial guaranteed him by the Constitution." *People v Micalizzi*, 223 Mich 580, 585; 194 NW 540 (1925).

tor's arguments nor the record evidence rebuts that presumption. Accordingly, we reverse the Court of Appeals judgment and remand to the trial court for a new trial.

MCCORMACK, C.J., and VIVIANO, BERNSTEIN, CAVANAGH, and WELCH, JJ., concurred with CLEMENT, J.

ZAHRA, J. (*concurring in the result*). I concur with the majority opinion that the closure of the courtroom for the majority of defendant's trial violated his constitutional right to a public trial and amounted to plain structural error warranting reversal. I disagree, however, with this Court's sua sponte decision to modify the existing plain-error standard of review adopted by this Court in *People v Carines*[1] for reviewing unpreserved structural errors. With no warning to the bench and the bar, the majority opinion opportunistically concludes that structural errors defy plain-error review and that the prosecution must bear the burden of proving that an unpreserved structural error did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, or public reputation of a defendant's trial so as to warrant reversal—notwithstanding this Court's prior precedent rejecting such a rule. The majority opinion's newfound framework erodes the preservation standard in this state by undermining the very reasons for which we require errors to be preserved for appellate review—to allow trial courts the opportunity to correct the error, to prevent the administrative and social costs of further proceedings that could have been avoided with a timely objection, and to deter defendants and their counsel from harboring error as an

[1] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

appellate parachute. Further still, the majority opinion casts aside our jurisprudence without any apparent need to do so in this case. That is, because defendant can demonstrate that he is entitled to a reversal under all four prongs of the current plain-error standard, this Court fashions a rule it need not even apply to afford defendant relief. Accordingly, while I concur in the result reached by the majority opinion, I very much disagree with its reasoning.

I. THE PLAIN-ERROR STANDARD

Time and again, this Court has emphasized " ' "the importance of preserving issues for appellate review" ' " and expressed its disfavor of considering " ' "unpreserved claims of error," even unpreserved claims of constitutional error.' "[2] "As a general rule, appellate courts will not grant relief on belated claims of error unless *the proponent* establishes, among other things, that the unpreserved error seriously affected the fairness, integrity, or public reputation of the judicial proceedings."[3] This general rule exists for good reason: " ' "[A]nyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." ' "[4] "Pres-

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[2] *People v Cain*, 498 Mich 108, 115; 869 NW2d 829 (2015), quoting *People v Vaughn*, 491 Mich 642, 653-654; 821 NW2d 288 (2012). See also *Carines*, 460 Mich at 761-762, citing *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994).

[3] *Cain*, 498 Mich at 112 (emphasis added).

[4] *Id*. at 115, quoting *Puckett v United States*, 556 US 129, 134; 129 S Ct 1423; 173 L Ed 2d 266 (2009).

ervation serves 'the important need to encourage all trial participants to seek a fair and accurate trial the first time around[.]' "[5]

It is with this basic understanding of appellate law that this Court in *Carines* adopted the plain-error standard set forth by the Supreme Court of the United States in *United States v Olano* for forfeited constitutional errors.[6] "[I]n order to receive relief on his forfeited claim of constitutional error, *defendant* must establish (1) that the error occurred, (2) that the error was plain, (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings."[7] Although the third prong generally requires a defendant to establish "prejudice," i.e., that the error affected the outcome of the proceedings, there exists a special "category of cases, yet to be clearly defined, where prejudice is presumed or reversal is automatic."[8] Errors in these cases are referred to as "structural errors" because "they 'affect the framework within which the trial proceeds' and are not 'simply an error in the trial process itself.' "[9] As we stated in

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[5] *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006), quoting *Grant*, 445 Mich at 551.

[6] *Carines*, 460 Mich at 763-764, citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

[7] *Vaughn*, 491 Mich at 664-665 (quotation marks omitted; emphasis added), citing *Carines*, 460 Mich at 763.

[8] *Vaughn*, 491 Mich at 666 (quotation marks and citation omitted).

[9] *United States v Gonzalez-Lopez*, 548 US 140, 148; 126 S Ct 2557; 165 L Ed 2d 409 (2006) (brackets omitted), quoting *Arizona v Fulminante*, 499 US 279, 309-310; 111 S Ct 1246; 113 L Ed 2d 302 (1991). Structural errors are distinguishable from "trial error[s]," which are errors that "occur[] during presentation of the case to the jury" and "may be quantitatively assessed in the context of other evidence presented in

People v Vaughn, another case involving an unpreserved claim of error regarding a defendant's right to a public trial:

> While the Supreme Court of the United States has specifically reserved judgment on whether an unpreserved structural error automatically affects a defendant's substantial rights, this Court's decision in *People v Duncan*[10] has explained that structural errors are intrinsically harmful, without regard to their effect on the outcome. Accordingly, our caselaw suggests that a plain structural error satisfies the third *Carines* prong.
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> Nevertheless, even if defendant can show that the error satisfied the first three *Carines* requirements, we must exercise discretion and only grant defendant a new trial if the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Although denial of the right to a public trial is a structural error, it is still subject to this requirement. While any error that is structural is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings, the plain-error analysis requires us to consider whether an error *seriously* affected those factors.[11]

In *People v Cain*, this Court reaffirmed *Vaughn*'s holding that even with respect to unpreserved structural errors, "a defendant is still not entitled to relief unless he or she can satisfy the four requirements set forth in *Carines*."[12] "While meeting all four prongs is difficult, as it should be, the plain-error test affords

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order to determine whether [they are] harmless beyond a reasonable doubt." *Gonzalez-Lopez*, 548 US at 148 (quotation marks and citation omitted).

[10] *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000).

[11] *Vaughn*, 491 Mich at 666-667 (quotation marks, citations, and ellipses omitted).

[12] *Cain*, 498 Mich at 116.

defendants sufficient protection because . . . [a]pplication of a plain-error analysis to unpreserved structural error does not deny that error close consideration . . . ."[13] Reviewing courts must " 'consider carefully whether any forfeited error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.' "[14] "[T]he fourth *Carines* prong is meant to be applied on a case-specific and fact-intensive basis."[15]

II. PROBLEMS WITH THE MAJORITY OPINION'S FRAMEWORK

Rather than follow the traditional plain-error framework outlined in *Carines* and applied in *Vaughn*, the majority opinion carves out an exception for unpreserved structural errors. The Court concludes that all structural errors defy the third prong of *Carines* because they render a trial fundamentally unfair, undermine the reliability of the guilt-determining process, and affect the framework within which the trial proceeds. As to the fourth *Carines* prong, the majority opinion shifts the burden to the prosecution to show why the forfeited structural error did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, and public reputation of defendant's trial. I discern a number of problems with the Court's newfound framework.

As an initial matter, I am troubled by this Court's sua sponte decision to modify the current plain-error standard with absolutely no notice to the bench and the bar. Nothing in this Court's order for supplemental

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[13] *Id*. (quotation marks, citations, and brackets omitted).

[14] *Id*. at 116-117, quoting *Vaughn*, 491 Mich at 655 n 42.

[15] *Cain*, 498 Mich at 121.

briefing even hinted at the notion that this Court was considering altering our traditional framework, nor did our order invite traditional interest groups, such as the Prosecuting Attorneys Association of Michigan, to file briefs amicus curiae.[16] Also, defendant did not request such a change in the law in his application for leave to appeal. Instead, defendant's supplemental brief advocates for this new standard in the alternative; that is, only if this Court concludes that defendant cannot satisfy his burden under all four *Carines* prongs. By adopting a new standard of appellate review for unpreserved structural errors without notice to the bench and the bar, this Court deprives interested parties from weighing in on this jurisprudentially significant issue, which has far-reaching ramifications in our state's criminal law jurisprudence.

These prudential concerns are particularly heightened considering that the majority opinion goes further than the Supreme Court of the United States or this Court has previously been willing to go. "Despite its name, the term 'structural error' carries with it no talismanic significance as a doctrinal matter. It means *only* that the government is not entitled to deprive the defendant of a new trial by showing that the error was *harmless beyond a reasonable doubt*."[17] As we stated in *Vaughn*, the Supreme Court of the United States "has expressly distinguished plain-error analysis from harmless-error analysis" by "repeatedly with[holding] judgment on whether a structural error automatically satisfies the third prong of plain-error analysis, implying that structural errors do not entirely defy plain-

[16] See *People v Davis*, 507 Mich 853 (2021).

[17] *Weaver v Massachusetts*, 582 US 286, 299; 137 S Ct 1899; 198 L Ed 2d 420 (2017) (quotation marks and citation omitted; emphasis added).

error analysis, even if they do defy harmless-error analysis."[18] We also explained in *Vaughn* that the Supreme Court's decision in *Johnson v United States* "rejected the argument that *Olano* does not apply to a claimed structural error because it had 'no authority' to create 'out of whole cloth' an exception to the traditional forfeiture analysis simply because the claimed error was structural."[19] By concluding that all unpreserved structural errors defy the traditional plain-error framework, automatically satisfy the third *Carines* prong, and presumptively satisfy the fourth *Carines* prong, the majority opinion breaks new ground with little discussion of this Court's previous concerns about keeping harmless-error review and plain-error review conceptually separate.

Further, this Court in *Cain* specifically rejected the majority opinion's new burden-shifting framework, stating:

> The dissent's theory that the structural nature of the error presumptively establishes the fourth prong is inconsistent with this Court's recent holding in *Vaughn*, that even with regards to a structural error, a defendant is not entitled to relief unless he can establish that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings and that while any error that is structural is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings, the plain-error analysis requires us to consider whether an error *seriously* affected those factors.[20]

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[18] *Vaughn*, 491 Mich at 656 n 42 (emphasis omitted), citing *Puckett*, 556 US at 140.

[19] *Vaughn*, 491 Mich at 655, quoting *Johnson v United States*, 520 US 461, 466; 117 S Ct 1544; 137 L Ed 2d 718 (1997).

[20] *Cain*, 498 Mich at 118 n 4 (quotation marks, citations, and ellipses omitted). Although the majority opinion recognizes that "not every public-trial violation will in fact lead to a fundamentally unfair trial,"

This Court now adopts the dissent's theory in *Cain* and overrules *Vaughn*'s application of the plain-error standard for unpreserved structural errors without any mention of the doctrine of stare decisis.[21]

Weaver, 582 US at 300, it fails to give due weight to this principle in its articulation of its rebuttable presumption under the fourth *Carines* prong. The majority states that "[t]here is substantial overlap between the characteristics of structural errors (i.e., they *necessarily render a trial fundamentally unfair*) and the standard under the fourth *Carines* prong (serious effect on the fairness, integrity, or public reputation of the proceedings)." *Ante* at 75 (quotation marks and citation omitted; emphasis added). However, "[a]n error can count as structural even if the error does not lead to fundamental unfairness in every case." *Weaver*, 582 US at 296; see also *Gonzalez-Lopez*, 548 US at 149 n 4 (rejecting the notion that "fundamental unfairness" is the sole criterion of structural error and stating that structural errors do not "*always* or *necessarily* render a trial fundamentally unfair and unreliable"). Indeed, we recognized in *Vaughn* that "[t]he right to a public trial is of a different order because the violation of that right does not necessarily affect qualitatively the guilt-determining process or the defendant's ability to participate in the process." *Vaughn*, 491 Mich at 657 (quotation marks and citation omitted). Therefore, while there may be some overlap between the characteristics of structural error and the "fairness" principles encompassed in the fourth *Carines* prong, this will not always be the case, as there are other considerations unrelated to the fairness or reliability of the proceedings that can contribute to an error being labeled "structural" such that it defies harmless-error analysis. See *Weaver*, 582 US at 295-296 (explaining that there are at least three broad, nonexclusive rationales for why an error may be deemed "structural"—(1) "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest"; (2) "if the effects of the error are simply too hard to measure"; or (3) "if the error always results in fundamental unfairness"—and that public-trial violations have characteristics of all three).

[21] *People v Feezel*, 486 Mich 184, 212; 783 NW2d 67 (2010) ("Deciding to overrule precedent is not a decision that this Court takes lightly. Indeed, this Court should respect precedent and not overrule or modify it unless there is substantial justification for doing so."). See *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000) (establishing a three-part test to determine whether to depart from stare decisis).

The majority opinion's new framework also largely ignores the broader teachings of the United States Supreme Court's recent decision in *Weaver v Massachusetts*.[22] The issue in *Weaver* was whether the burden of proving prejudice for an unpreserved public-trial violation changed when the defendant raised that claim of structural error on collateral review via an ineffective-assistance-of-counsel claim rather than on direct review.[23] The Court ultimately concluded that the burden remained on the defendant to show prejudice under either the traditional ineffective-assistance-of-counsel standard articulated in *Strickland v Washington* (i.e., " 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' "), or a less " 'mechanical' " framework that focused on " 'the fundamental fairness of the proceeding' " (i.e., that the attorney's error rendered the defendant's trial fundamentally unfair).[24] Particularly relevant is the Court's discussion as to why placing the burden on the defendant, who failed to preserve the claimed error on direct appeal, was appropriate:

> The reason for placing the burden on the [defendant] in this case . . . derives both from the nature of the error and the difference between a public-trial violation *preserved*

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[22] *Weaver*, 582 US 286.

[23] *Id*. at 299.

[24] *Id*. at 300, quoting *Strickland v Washington*, 466 US 668, 694, 696; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The Court in *Weaver* accepted, "for analytical purposes," the defendant's argument "that under a proper interpretation of *Strickland*, even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair." *Weaver*, 582 US at 300. The Court ultimately deemed it unnecessary to decide whether the defendant's interpretation of *Strickland* was correct.

> and then raised on direct review and a public-trial violation raised as an ineffective-assistance-of-counsel claim. . . . [W]hen a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed. When a defendant first raises the closure in an ineffective-assistance claim, however, the trial court is deprived of the chance to cure the violation either by opening the courtroom or by explaining the reasons for closure.
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> Furthermore, when state or federal courts adjudicate errors *objected to during trial* and then raised on direct review, the systemic costs of remedying the error are diminished to some extent. That is because, if a new trial is ordered on direct review, there may be a reasonable chance that not too much time will have elapsed for witness memories still to be accurate and physical evidence not to be lost. . . .
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> * * *
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> In sum, "an ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial," thus undermining the finality of jury verdicts.[25]

In this way, the majority opinion's burden-shifting framework for unpreserved structural errors subverts the many reasons we require litigants to preserve their claims of error for appellate review. Requiring litigants to preserve their claims of error with a contemporaneous objection provides trial courts the opportunity to correct the error, thereby obviating the need for further proceedings and avoiding the costs of new trials that could have been rendered unnecessary by timely objec-

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[25] *Id*. at 302-303 (brackets and citations omitted; emphasis added), quoting *Harrington v Richter*, 562 US 86, 105; 131 S Ct 770; 178 L Ed 2d 624 (2011).

tions.[26] " 'And of course the contemporaneous-objection rule prevents a litigant from "sandbagging" the court —remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.' "[27] Indeed, this case illustrates the precise problem with the Court's new rule. Not only did defendant not object to the closure, but defense counsel testified at the postconviction evidentiary hearing that his decision not to object was intentional and that he believed the courtroom closure inured to defendant's benefit by decreasing the number of supporters on the victim's side of the courtroom. Also, although not argued by the prosecution, defense counsel appeared to express some level of agreement with the trial court's decision to close the courtroom. At the time the trial court ordered the courtroom closed, the following exchange occurred:

> *The Court*: . . . Who is in the gallery that works at Hurley Hospital? . . .
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> * * *
>
> *Member of the gallery*: I work there.

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[26] *Cain*, 498 Mich at 114; *Grant*, 445 Mich at 551 (" 'The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. The passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. Thus, while reversal may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution, and thereby cost the society the right to punish admitted offenders.' ") (quotation marks and brackets omitted), quoting *United States v Mechanik*, 475 US 66, 72; 106 S Ct 938; 89 L Ed 2d 50 (1986).

[27] *Cain*, 498 Mich at 115, quoting *Puckett*, 556 US at 134 (quotation marks omitted).

* * *

The Court: Where do you work at Hurley Hospital?

Member of the gallery: Housekeeping. Environmental Services.

The Court: And are you here watching this trial why?

* * *

Member of the gallery: Because [the victim] was my kid's father.

The Court: So you know, counselors, the jury has complained that that woman has tried to talk to them.

Member of the gallery: No. I didn't try to talk. I just saw a lady and I asked[,] . . . do you work at Hurley's? I know I'm not supposed to talk to them.

The Court: I've got two choices. One is to find you in contempt of court and lock you up.

* * *

. . . The other is to order everyone in the gallery to leave the courthouse and not come back. . . . I'm going to bar everyone from this courthouse except for the mother of [the victim]. The rest of you leave. Don't come back.

Member of the gallery: Okay.

The Court: Shame on you trying to subvert the justice system.

* * *

The Court: The only person allowed to watch this trial is the mother of the young man who died. What foolishness.

[*Defense Counsel*]: Your Honor, may we approach?

The Court: Yes. Do you want this on the record or off the record?

[*The Prosecutor*]: It probably should be on because I think it's for both of our benefit here.

The Court: Okay.

[*The Prosecutor*]: Do you want to have the jurors who have a complaint to come in to double check to make sure that there has been no comment that has been made that's go[ing to] prejudice the—anything?

The Court: No.

[*The Prosecutor*]: Okay. Fair enough.

The Court: No. It was a short comment. What she asked one juror was, do you work at Hurley Hospital[?]

[*The Prosecutor*]: Okay. So, there's nothing about the case itself that was implicated?

The Court: Right.

[*Defense Counsel*]: Well it's still enough to . . . cause some concerns, but I guess you worked it out. I understand why the concern (inaudible).

The Court: Sure.

[*The Prosecutor*]: It's up to you. Do you want him—are you okay with it?

[*Defense Counsel*]: (inaudible) with the Judge's decision.

[*The Prosecutor*]: I don't have a need for a hearing if that's all that was said.

The Court: I don't think it's necessary.

[*The Prosecutor*]: Okay. Thank you.

The Court: I don't want to make the jury nervous. Now we'll bring the jury out.

Admittedly, the record is cryptic and difficult to discern. Nonetheless, defense counsel's statement that the trial court "worked it out" can arguably be interpreted as an express approval of the courtroom closure, particularly when coupled with counsel's later testimony that his decision not to object was intentional.

These facts make it a close question as to whether defendant waived, rather than forfeited, his claim that his right to a public trial was violated.[28] Had the record been developed on this point, the result here could have been very different. In any event, accepting the notion that the underlying record is so unclear it cannot establish that defendant waived this claim of error, I seriously question the logic behind shifting the burden of proving the fourth *Carines* prong to the prosecution when, under these circumstances, the record is crystal clear that defense counsel *intentionally* did not object to the closure. This case presents a classic example in which silent acquiescence to an erroneous decision leads to the litigant "sandbagging" the court and harboring error—which is significant enough to be deemed "structural"—as an appellate parachute.[29]

Finally, this Court's sua sponte modification of the plain-error standard for unpreserved structural errors is completely unnecessary in this case because defendant can satisfy the current standard. As the majority opinion concludes, the trial court was certainly justified in taking some action in response to the prohibited interaction between the mother of the victim's child and the juror. But the court's closure of the courtroom

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[28] See *Olano*, 507 US at 733 ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.") (quotation marks and citation omitted).

[29] The majority opinion also contends that recognizing a rebuttable presumption that shifts the burden of proving the fourth *Carines* prong to the prosecution is appropriate because the prosecution "is better positioned to marshal record facts supporting the overall fairness of the trial proceedings." *Ante* at 76. Not only is this reasoning unfounded, it ignores the fact that the burden was on defendant to object in the first place.

to everyone except the victim's mother for the remainder of defendant's trial was overbroad, and the court failed to consider other reasonable alternatives in lieu of closing the courtroom.[30] Thus, the violation of defendant's right to a public trial amounted to plain structural error. And given this Court's decision in *Vaughn*, this type of structural error satisfies the third prong of

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[30] Although the majority opinion applies the test articulated in *Waller v Georgia*, 467 US 39, 48; 104 S Ct 2210; 81 L Ed 2d 31 (1984), for complete closures, I agree with the prosecution that the courtroom was only partially closed. "[A] total closure involves excluding all persons from the courtroom for some period while a partial closure involves excluding one or more, but not all, individuals for some period." *United States v Simmons*, 797 F3d 409, 413 (CA 6, 2015). See also *People v Kline*, 197 Mich App 165, 170 n 2; 494 NW2d 756 (1992) ("A partial closure occurs where the public is only partially excluded, such as when family members or the press are allowed to remain . . . ."). "Whether a closure is total or partial depends not on how long a trial is closed, but rather who is excluded during the period of time in question." *Simmons*, 797 F3d at 413 (quotation marks, citation, and ellipsis omitted). Here, the court's closure order did not preclude all members of the public from attending the trial, as the victim's mother was notably excluded. Further, Bryan Wooten, a friend of defendant, testified at the postconviction evidentiary hearing that he entered the courtroom unencumbered and only left because of an ambiguous gesture given by defendant, not because of any state action by a court officer.

Although this Court has not distinguished between total and partial courtroom closures, courts that have made that distinction "modify the *Waller* test so that the 'overriding interest' requirement is replaced by requiring a showing of a 'substantial reason' for a partial closure, but the other three factors remain the same." *Simmons*, 797 F3d at 414 ("[U]nder the modified *Waller* test . . . , (1) a party seeking a partial closure of the courtroom during proceedings must show a 'substantial reason' for doing so that is likely to be prejudiced if no closure occurs; (2) the closure must be no broader than necessary or must be 'narrowly tailored'; (3) the trial court must consider reasonable alternatives to closing the proceeding; and (4) the trial court must make findings adequate to support the closure."). See also *Kline*, 197 Mich App at 170-171. Even applying this slightly more lenient standard, however, I conclude that the partial closure violated defendant's right to a public trial for the reasons discussed earlier.

Carines.[31] Further, defendant has shown that the closure here seriously affected the fairness, integrity, and public reputation of his trial. During the closure, 14 witnesses testified, including the prosecution's star witness, whose testimony implicated defendant in the murder; the parties gave closing arguments; the trial court instructed the jury; and the jury rendered its verdict. This stands in marked contrast to the closure that occurred in *Vaughn*, in which the courtroom was closed only during voir dire; no witnesses testified during the closure; no objections were made to either party's peremptory challenges; each party was satisfied with the jury chosen; and the venire represented the public.[32] Here, the courtroom was closed for the majority of defendant's trial and at critical points when the constitutional protections of a public trial are at their zenith.[33] Therefore, because defendant can satisfy all four prongs of the current plain-error standard articulated in *Carines*, there is no need for this Court to shift the burden to the prosecution to show why reversal is not appropriate.

III. CONCLUSION

Until now, this Court has not wavered in its position that simply labeling an error as "structural" does not place it outside the strictures of the traditional plain-error standard. Unbothered by our precedent, this Court now casts that framework aside with respect to

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[31] *Vaughn*, 491 Mich at 666.

[32] *Id*. at 668-669.

[33] *Id*. at 667 (The protections conferred by the Sixth Amendment right to a public trial "include (1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury.").

unpreserved structural errors in favor of a new burden-shifting framework that this Court has expressly rejected. For the reasons explained in this opinion, this change in the law is unwarranted. Accordingly, I concur in result only.

PEOPLE v WHITE

Docket No. 162136. Argued on application for leave to appeal December 9, 2021. Decided April 4, 2022.

Kevin White, Jr., was charged in the Livingston Circuit Court with aiding and abetting the delivery of a controlled substance in Livingston County causing death, MCL 750.317a, for allegedly selling drugs in Macomb County that later caused the fatal overdose in Livingston County. Defendant moved to dismiss the charges, arguing that under *People v McBurrows*, 504 Mich 308 (2019), venue was proper only in Macomb County. The court, Michael P. Hatty, J., denied the motion, but stayed the proceedings so that defendant could appeal the decision. After granting defendant's application for an interlocutory appeal, the Court of Appeals, MURRAY, P.J., and METER and FORT HOOD, JJ., affirmed in an unpublished per curiam opinion, holding that venue was proper in Livingston County under MCL 762.8, which allows certain felonies to be prosecuted in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect. Defendant sought leave to appeal this decision, and the Supreme Court peremptorily reversed the Court of Appeals, holding that there was no evidence that defendant knew that the drugs would be consumed in Livingston County. 505 Mich 1022 (2020). On remand, the Court of Appeals once again affirmed the trial court in an unpublished per curiam opinion. Defendant applied for leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 507 Mich 865 (2021).

In a per curiam opinion joined by Chief Justice MCCORMACK and Justices ZAHRA, VIVIANO, CLEMENT, CAVANAGH, and WELCH, the Supreme Court, in lieu of granting leave to appeal, *held*:

The county in which the criminal act of the principal occurred is a proper venue for a criminal prosecution under an aiding and abetting theory. Under MCL 767.39, defendants may be prosecuted, indicted, and tried as if they had directly committed the offense that they are charged with aiding and abetting. In this case, the prosecution alleged that defendant sold drugs to Danielle Hannaford in Macomb County and that Hannaford then

shared those drugs with Thomas Whitlow in Livingston County, where Whitlow suffered a fatal overdose. Because it would be proper to prosecute Hannaford for delivery of a controlled substance causing death in Livingston County, it was also a proper venue for prosecuting defendant in a case alleging that defendant aided and abetted Hannaford's delivery to Whitlow.

1. Under *McBurrows*, the general rule is that a criminal trial should be by a jury of the county or city where the offense was committed, and at English common law, an accomplice could be prosecuted only in the district of the accessorial acts. Because defendant's own actions occurred only in Macomb County, absent statutory modification of the common-law rule, defendant would need to be prosecuted in Macomb County. In this case, there was a statutory modification—namely, the aiding and abetting theory of prosecution set forth in MCL 767.39, which provides that every person concerned in the commission of an offense may be prosecuted, indicted, and tried as if they had directly committed the offense. Under this law, as the Supreme Court held in *People v Robinson*, 475 Mich 1 (2006), aiding and abetting is not a distinct criminal act; rather, it is a theory of prosecution that imposes vicarious criminal liability on an accomplice for the acts of the principal. To convict on an aiding and abetting theory, the prosecution must prove beyond a reasonable doubt that the defendant intended to aid the charged offense and either knew that the principal intended to commit the charged offense or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense. The prosecution in this case alleged that Hannaford delivered a controlled substance to Thomas Whitlow in Livingston County, which he consumed, causing his death. Therefore, the proper venue for prosecuting Hannaford for that offense would have been Livingston County. And because, under MCL 767.39, defendant could be prosecuted, indicted, and tried as if he had directly committed Hannaford's offense, Livingston County was also a proper venue for prosecuting defendant.

2. To support a prosecution under MCL 767.39, there must be probable cause to believe that the defendant procured, counseled, aided, or abetted in the commission of the offense. The Court of Appeals correctly held that defendant's argument that the record did not support a finding of probable cause would have been properly brought as a motion to quash the bindover to circuit court for lack of probable cause rather than as a challenge to venue.

3. Contrary to defendant's argument, *Robinson* does not require the prosecution to show that the defendant intended to aid the charged offense in the charged venue or that the defendant knew the principal intended to commit the charged offense in the charged venue. The text of MCL 767.39 does not require that a defendant have any knowledge of the location of the offense they aid or abet; having procured, counseled, aided, or abetted in the commission of the offense, the defendant can be prosecuted as if they had directly committed the offense, such as in the venue where the offense was directly committed.

Affirmed.

Justice BERNSTEIN, dissenting, agreed that defendant could be charged with delivery of a controlled substance causing death under an aiding and abetting theory of prosecution assuming that probable cause existed, but stated that he found it unclear why or how the aiding and abetting statute, which addresses substantive criminal liability, would lead to a specific conclusion about venue, especially when more traditionally understood exceptions to the general venue rule appear in a different chapter of the Code of Criminal Procedure. Because he did not understand MCL 767.39 to direct the outcome in this case, and because he disagreed with the Court of Appeals' conclusion that MCL 762.8 applied, he would have reversed the Court of Appeals judgment and held that Macomb County was the proper county for the prosecution of this offense under the general venue rule.

1. CRIMINAL LAW — AIDING AND ABETTING — VENUE.

Under MCL 767.39, defendants can be prosecuted, indicted, and tried as if they had directly committed the offense that they are charged with aiding and abetting; the county in which the criminal act of the principal occurred is a proper venue for a criminal prosecution under an aiding and abetting theory.

2. CRIMINAL LAW — AIDING AND ABETTING — VENUE.

When prosecuting a defendant as an aider and abettor under MCL 767.39, the prosecution is not required to show that the defendant intended to aid the charged offense in the charged venue or that the defendant knew the principal intended to commit the charged offense in the charged venue.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *David J. Reader*, Prosecuting Attorney, and *William M. Worden*, Assistant Prosecuting Attorney, for the people.

Gentry Nalley, PLLC (by *Kevin S. Gentry*) for defendant.

Amicus Curiae:

Mark Wiese, *Kym L. Worthy*, *Jon P. Wojtala*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

PER CURIAM. This case asks what the correct venue is for a criminal prosecution under an aiding and abetting theory. We hold that the county in which the criminal act of the principal occurred is a proper venue, and therefore we affirm the Court of Appeals.

We note at the outset that defendant maintains that he is innocent of the crimes with which he is charged. Because no trial has yet been held, no facts have yet been found in this case. The parties both accept the testimony from the preliminary examination as the factual basis for evaluating the venue issue presented. See *People v McBurrows*, 504 Mich 308, 311 n 1; 934 NW2d 748 (2019).

The prosecution alleges that defendant is a drug dealer from the Warren area in Macomb County. One of his customers, Kelly Whitlow, met a man named Craig Betke via a website. In October 2017, Whitlow moved in with Betke at his home in Livingston County, accompanied by her son, Thomas Whitlow, and a friend of Kelly's, Danielle Hannaford. Within days of moving, Kelly Whitlow advised Betke that she was "dope sick" and wanted some "boy" and "girl"—slang for particular

drugs. She arranged to meet defendant at a gas station in Warren. The four—Betke, Hannaford, and Kelly and Thomas Whitlow—drove down to make the purchase. At the gas station, Hannaford walked from Betke's vehicle over to defendant's to make the purchase. The four then returned to Betke's home in Howell. Hannaford, Kelly Whitlow, and Thomas Whitlow then consumed the drugs. At one point, Thomas went into a bathroom, but when he had been in there a suspiciously long time, he was checked on and found dead. The medical examiner later ruled that he had died of a cocaine and fentanyl overdose.

The Livingston County Prosecutor charged defendant with delivery of a controlled substance causing death. MCL 750.317a. In *McBurrows*, 504 Mich at 317-318, this Court held that, absent an applicable statutory exception, a crime must be prosecuted in the county in which the crime occurs and that the proper venue for prosecuting a violation of MCL 750.317a is the county in which the delivery occurs, not the county in which the death occurs. Here, it is not alleged that defendant directly delivered anything to the decedent; instead, the prosecution alleges that defendant aided and abetted Hannaford's delivery of the drugs to the decedent. See MCL 767.39. After the matter was bound over to circuit court, defendant moved to dismiss on the ground of improper venue. The court denied the motion, but stayed proceedings for defendant to appeal the decision.

The Court of Appeals granted defendant's application for an interlocutory appeal, but ultimately affirmed the trial court's decision to deny the motion to dismiss. *People v White*, unpublished per curiam opinion of the Court of Appeals, issued September 12, 2019 (Docket No. 346661). The panel held that prosecuting

defendant in Livingston County was proper under MCL 762.8, which allows a felony that is "the culmination of 2 or more acts done in the perpetration of that felony" to "be prosecuted in . . . any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect." The panel concluded that "[d]efendant sold the substances with the understanding that they would be consumed and with knowledge of where that would happen." *White*, unpub op at 3. Because it held that venue in Livingston County was proper under MCL 762.8, the panel declined to address the prosecution's argument "that *McBurrows* does not apply to cases premised on aiding and abetting . . . ." *Id*. at 4.

Defendant challenged the Court of Appeals' decision in this Court. We peremptorily reversed its decision that MCL 762.8 is an adequate basis for establishing venue in this case in Livingston County. We held that there was no record evidence that defendant was aware that Kelly Whitlow had relocated to reside with Betke at his home in Livingston County. As a result, we held that "there is no record evidence that the defendant knew that the person to whom he delivered the controlled substance had moved from Macomb County to Livingston County and that the controlled substance would be consumed in Livingston County." *People v White*, 505 Mich 1022, 1023 (2020). We remanded the case to the Court of Appeals for it to assess the argument that it had previously declined to reach.

On remand, the Court of Appeals once again affirmed the trial court in an unpublished opinion. *People v White*, unpublished per curiam opinion of the Court of Appeals, issued September 3, 2020 (Docket No. 346661). The panel performed a careful, thorough, and accurate review of our decision in *McBurrows*. It

noted that, under *McBurrows*, the proper county in which to prosecute defendant for his delivery of drugs to Hannaford would be Macomb County. However, it correctly observed that "[t]he question in this case is whether, by aiding and abetting a delivery of narcotics that took place in Livingston County, defendant may be charged in Livingston County despite the fact that none of his acts took place in Livingston County." The panel analogized the facts of this case to those in *People v Markey*, unpublished per curiam opinion of the Court of Appeals, issued March 15, 2007 (Docket No. 264005), to once again hold that the prosecution in Livingston County was proper. Defendant sought leave to appeal this decision to us, and we ordered argument on his application. *People v White*, 507 Mich 865 (2021).

The general rule is that "[a] criminal 'trial should be by a jury of the county or city where the offense was committed.' " *McBurrows*, 504 Mich at 313 (citation omitted). Defendant's own actions occurred only in Macomb County. "At English common law, an accomplice could be prosecuted only in the district of his accessorial acts." LaFave et al, Criminal Procedure (4th ed), § 16.2(g), p 868. As a result, absent statutory modification, defendant would need to be prosecuted in Macomb County. Here, that statutory modification is the aiding and abetting theory of prosecution. The statute provides that "[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39. Under this law, aiding and abetting is not a distinct criminal act; rather, it is a theory of prosecution that imposes vicarious criminal liability on an accomplice for the acts of the principal. See

People v Robinson, 475 Mich 1, 6; 715 NW2d 44 (2006) ("Unlike conspiracy and felony murder, which also allow the state to punish a person for the acts of another, aiding and abetting is not a separate substantive offense. Rather, 'being an aider and abettor is simply a theory of prosecution' that permits the imposition of vicarious liability for accomplices.") (citation omitted). To convict on an aiding and abetting theory, "the prosecutor must prove beyond a reasonable doubt . . . that the defendant intended to aid the charged offense" and either that the defendant "knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense." *Id*. at 15.

The Court of Appeals correctly held that venue for this prosecution is proper in Livingston County. In lieu of analogizing to an unpublished Court of Appeals opinion, however, we believe that the analysis should begin with the text of the aiding and abetting statute, MCL 767.39. It provides that defendant can "be prosecuted, indicted, [and] tried . . . as if he had directly committed" Hannaford's offense. A central reason for treating aiding and abetting as a theory of prosecution rather than a distinct criminal act is that it allows an accomplice to be "treated as a principal and prosecuted in the place of the commission of the substantive offense." LaFave, § 16.2(g), pp 868-869. After applying the venue rules to the principal to establish a proper venue, MCL 767.39 then allows the accomplice to be prosecuted in the same venue. Here, the prosecution alleges that Hannaford delivered a controlled substance to Thomas Whitlow in Livingston County which he consumed, causing his death. Therefore, it would be proper to prosecute Hannaford for that offense in Livingston County. See *McBurrows*, 504 Mich at 317-318.

And because defendant can "be prosecuted, indicted, [and] tried . . . as if he had directly committed" Hannaford's offense, Livingston County is also a proper venue for prosecuting defendant.

It is important to note that our conclusion goes no further than to say that, when accepting as true the allegations against defendant, venue is proper in Livingston County. Of course, to be prosecuted under MCL 767.39, there must be probable cause to believe that defendant "procure[d], counsel[ed], aid[ed], or abet[ted] in [the] commission" of Hannaford's offense, see *People v Plunkett*, 485 Mich 50, 61; 780 NW2d 280 (2010), and he disputes whether the record supports such a finding. The Court of Appeals correctly held that this is properly challenged as a motion to quash the bindover to circuit court for lack of probable cause, rather than a challenge to venue. Defendant also argues, without citation to authority, that knowledge of the location of the principal offense is an aspect of what the prosecution must prove under *Robinson*; thus, he rephrases *Robinson* as holding that the prosecution must show that the defendant intended to aid the charged offense *in the charged venue*, or that the defendant knew the principal intended to commit the charged offense *in the charged venue*. But this is not a requirement for being charged under this theory. The text of MCL 767.39 does not require that a defendant have any knowledge of the *location* of the offense he aids or abets; having "procure[d], counsel[ed], aid[ed], or abet[ted] in [the] commission" of the offense, the defendant can be prosecuted "as if he had directly committed such offense," such as in the venue where the offense was "directly committed."

The Court of Appeals was correct to hold that venue for this prosecution is properly laid in Livingston

County. It is alleged that Danielle Hannaford delivered a controlled substance to Thomas Whitlow in Livingston County which caused Thomas's death, making Livingston a proper venue for that prosecution. Because defendant is being charged with having aided and abetted Hannaford's delivery, under MCL 767.39 he may "be prosecuted, indicted, [and] tried . . . as if he had directly committed such offense," meaning that if Livingston is a proper venue for prosecuting Hannaford, it is also a proper venue for prosecuting defendant. To the extent that defendant challenges whether there was probable cause to support the bindover to circuit court on this theory of prosecution, the Court of Appeals was correct to hold that this is properly presented as a motion to quash in the circuit court. The judgment of the Court of Appeals is therefore affirmed.

MCCORMACK, C.J., and ZAHRA, VIVIANO, CLEMENT, CAVANAGH, and WELCH, JJ., concurred.

BERNSTEIN, J. (*dissenting*). In this case, defendant was charged with delivery of a controlled substance causing death in Livingston County. MCL 750.317a. Specifically, defendant was charged as an aider and abettor to a delivery that happened between two other individuals in Livingston County. Defendant was not present for the delivery in Livingston County—his actions in this case were limited to Macomb County. We must now determine where venue is appropriate.

Defendant argues that Livingston County is an improper venue. The lower courts held that defendant knew that his actions would have an effect in Livingston County and that venue was thus proper under MCL 762.8. We disagreed, finding that "there is no record evidence that the defendant knew that the person to whom he delivered the controlled substance

had moved from Macomb County to Livingston County and that the controlled substance would be consumed in Livingston County." *People v White*, 505 Mich 1022, 1023 (2020). Following a remand to the Court of Appeals, which once again affirmed the trial court's determination that Livingston County was the proper venue under MCL 762.8, the case came back to this Court for us to consider what impact being charged as an aider and abettor has on the general rules of venue.

"The general venue rule is that defendants should be tried in the county where the crime was committed." *People v Houthoofd*, 487 Mich 568, 579; 790 NW2d 315 (2010). As the majority acknowledges, given that defendant's own acts took place solely in Macomb County, applying the general venue rule would lead to the conclusion that defendant should be tried in Macomb County. However, our Legislature has codified several exceptions to this general rule. Here, the Court of Appeals relied on MCL 762.8 to justify a finding of venue in Livingston County. The majority does not rely on this exception; instead, the majority refers to the general aiding and abetting theory of prosecution, which states that "[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39.

I agree with the majority that, assuming probable cause, defendant can be charged with delivery of a controlled substance causing death under an aiding

and abetting theory of prosecution.[1] The caselaw is clear on how aiding and abetting works with respect to substantive criminal liability. But I am not convinced that it then follows that defendant can be charged with this offense in *Livingston County*. It is not entirely clear to me why and how the aiding and abetting statute leads to a specific conclusion about venue, especially when more traditionally understood exceptions to the general venue rule appear in a different chapter of the Code of Criminal Procedure. See MCL 762.5 and MCL 762.8. Is it because MCL 767.39 speaks in terms of being "prosecuted" and "tried" in a manner similar to a principal? Is it because "as if he had directly committed such offense" modifies the entire list of words, and not just the phrase "shall be punished"? The majority does not explain. Although the majority rightfully points out that defendant also does not explain why "in the charged venue" should be read into the text of MCL 767.39, absent a more detailed explanation, I do not understand why the majority's reading of MCL 767.39 is necessarily correct. It would appear to me that a statute concerning substantive criminal liability, like the aiding and abetting statute, does not necessarily answer questions about venue, as the two concepts are distinct and address distinct concerns.

Because I do not understand MCL 767.39 to direct our conclusion here, and because I disagree with the Court of Appeals' conclusion that MCL 762.8 applied, see *People v McBurrows*, 504 Mich 308, 327-328; 934 NW2d 748 (2019), I would reverse the judgment of the

[1] I also agree with the majority that this conclusion says nothing as to whether the record supports a finding that defendant actually did aid and abet the later delivery.

Court of Appeals and hold that Macomb County is the proper county for the prosecution of this offense under the general venue rule.

FOSTER v FOSTER

Docket No. 161892. Argued November 9, 2021 (Calendar No. 2). Decided April 5, 2022. Opinion as amended by order entered May 27, 2022. 509 Mich 988 (2022).

Plaintiff, Deborah L. Foster, sought to hold defendant, Ray J. Foster, in contempt in the Dickinson Circuit Court, Family Division, for failing to abide by a provision in their consent judgment of divorce. The judgment stated that defendant would pay plaintiff 50% of his military disposable retired pay accrued during the marriage or, if defendant waived a portion of his military retirement benefits in order to receive military disability benefits, that he would continue to pay plaintiff an amount equal to what she would have received had defendant not elected to receive such disability benefits (the offset provision). Defendant subsequently began receiving increased disability benefits, including Combat-Related Special Compensation (CRSC) under 10 USC 1413a. That reduced the amount of retirement pay defendant received, which, in turn, reduced plaintiff's share of the retirement benefits from approximately $800 a month to approximately $200 a month. Defendant did not comply with the offset provision by paying plaintiff the difference. In response to plaintiff's petition seeking to hold him in contempt, defendant argued that, under federal law, CRSC benefits may not be divided in a divorce action. The court, Thomas D. Slagle, J., denied plaintiff's request to hold defendant in contempt but ordered defendant to comply with the consent judgment. Defendant failed to do so, and plaintiff again petitioned for defendant to be held in contempt. Defendant did not appear at the hearing but argued in his written response that the federal courts had jurisdiction over the issue. The court found defendant in contempt, granted a money judgment in favor of plaintiff, and issued a bench warrant for defendant's arrest because of his failure to appear at the hearing. At a show-cause hearing in June 2014, defendant argued that 10 USC 1408 and 38 USC 5301 prohibited him from assigning his disability benefits and that the trial court had erred by not complying with federal law. The court found defendant in contempt and ordered him to pay the arrearage and attorney fees. Defendant appealed in the Court of Appeals, arguing that the trial court erred when it failed to hold that plaintiff's attempts to

enforce the consent judgment were preempted by federal law. In an unpublished per curiam opinion, issued October 13, 2016 (Docket No. 324853), the Court of Appeals, MARKEY, P.J., and MURPHY and RONAYNE KRAUSE, JJ., affirmed the trial court's contempt order, reasoning that the matter was not preempted by federal law. Defendant sought leave to appeal in the Michigan Supreme Court. In lieu of granting leave to appeal, the Michigan Supreme Court vacated the judgment of the Court of Appeals and remanded the case to that Court for reconsideration in light of *Howell v Howell*, 581 US 214 (2017). 501 Mich 917 (2017). On remand, in an unpublished per curiam opinion issued March 22, 2018 (Docket No. 324853), the same panel of the Court of Appeals again affirmed the trial court's contempt finding, reasoning that defendant's appeal was an improper collateral attack on the consent judgment. The Court of Appeals also distinguished *Howell* and determined that it was still bound by *Megee v Carmine*, 290 Mich App 551 (2010), which held that a veteran is obligated to compensate a former spouse in an amount equal to the share of retirement pay that the nonveteran spouse would have received, pursuant to a divorce judgment, had the veteran not elected to waive military retirement pay in favor of CRSC. Defendant again sought leave to appeal in the Michigan Supreme Court, and the Michigan Supreme Court granted the application. 503 Mich 892 (2018). In a unanimous opinion, the Michigan Supreme Court overruled *Megee*, concluding that federal law preempted state law such that the consent judgment was unenforceable to the extent that it required defendant to reimburse plaintiff for the reduction in the amount payable to her because of his election to receive CRSC. The Michigan Supreme Court vacated the portion of the Court of Appeals' opinion regarding collateral attack and remanded to the Court of Appeals for that Court to address the effect of the Michigan Supreme Court's holdings on defendant's ability to challenge the terms of the consent judgment. 505 Mich 151 (2020). On second remand, in an unpublished per curiam opinion issued July 30, 2020 (Docket No. 324853), the Court of Appeals, MARKEY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ., reversed, concluding that the state trial court was deprived of subject-matter jurisdiction because of principles of federal preemption, that defendant had not engaged in an improper collateral attack on the consent judgment, and that the trial court lacked subject-matter jurisdiction to enforce the consent judgment with respect to the offset provision because of federal preemption. Plaintiff sought leave to appeal in the Michigan Supreme Court, and the Michigan Supreme Court granted the application. 506 Mich 1030 (2020).

In a unanimous opinion by Justice VIVIANO, the Michigan Supreme Court *held*:

Federal preemption under 10 USC 1408 and 38 USC 5301 does not deprive Michigan state courts of subject-matter jurisdiction over a divorce action involving the division of marital property. Therefore, while the offset provision in the parties' consent judgment of divorce was a mistake in the exercise of undoubted jurisdiction, that consent judgment was not subject to collateral attack. Because there was no other justification for a collateral attack on the consent judgment, the judgment of the Court of Appeals was reversed, and the case was remanded to the Dickinson Circuit Court for further proceedings. The statement in *Ryan v Brunswick Corp*, 454 Mich 20, 27 (1997), that "[w]here the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction" was disavowed, and *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132 (2010), was overruled to the extent it suggested that all types of federal preemption may deprive a state court of subject-matter jurisdiction; the preemption doctrine does not deprive state courts of subject-matter jurisdiction over claims involving federal preemption unless Congress has given exclusive jurisdiction to a federal forum.

1. The doctrine of res judicata bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. A judgment of divorce dividing marital property is res judicata and not subject to collateral attack even if the judgment may have been wrong or rested on a subsequently overruled legal principle; in other words, the doctrine of res judicata applies to a valid but erroneous judgment. A divorce decree that has become final may not have its property-settlement provisions modified except for fraud or for other such causes as any other final decree may be modified. The doctrine of res judicata in this context is an issue of state law. Thus, a provision in a consent judgment of divorce that divides a veteran's military retirement and disability benefits is generally enforceable under the doctrine of res judicata even though it is preempted by federal law.

2. There is a distinction between a court's jurisdiction of the parties and the subject matter of the action, on the one hand, and the court's erroneous exercise of that jurisdiction. To that end, when a court has personal jurisdiction over the parties and has jurisdiction over the subject matter of the action but erroneously exercises jurisdiction—such as when a property settlement in a

divorce action conflicts with federal law—any error in the exercise of jurisdiction by the trial court can only be corrected by direct appeal. In contrast, when the trial court lacks personal jurisdiction over the parties or subject-matter jurisdiction, any judgment by the court is void and may be assailed by both direct appeal and collateral attack. The preemption doctrine does not deprive state courts of subject-matter jurisdiction over claims involving federal preemption unless Congress has given exclusive jurisdiction to a federal forum. Generally, state law controls matters of domestic relations. For that reason, before state law governing domestic relations will be overridden as preempted by federal law, it must do major damage to clear and substantial federal interests. To determine whether Congress has impliedly preempted state law, a court must (1) determine whether Congress has preempted states from legislating or regulating the subject matter of the instant case and (2) if Congress has, the court must determine whether it has also vested exclusive jurisdiction of that subject matter in the federal court system. Regarding the division of military benefits, 38 USC 511(a) provides that the Secretary of Veterans Affairs shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans and generally precludes review of the Secretary's decision as to any such question by any other official or by any court, with a limited number of exceptions. In turn, 38 USC 5307 provides for a process of requesting apportionment of a veteran's benefits. The trial court in this case did not review a decision of the Secretary of Veterans Affairs under 38 USC 511(a). There is no exclusive federal forum for dividing military disability benefits in divorce actions. Thus, while the Secretary has authority under 38 USC 511 over the distribution of military benefits, 38 USC 511 does not refer to, restrict, or displace state court jurisdiction in divorce actions. Because of that, federal preemption under 10 USC 1408 and 38 USC 5301 does not deprive Michigan state courts of subject-matter jurisdiction over a divorce action involving the division of marital property that includes the division of military retirement pay and disability benefits contrary to federal law.

3. In this case, even though the offset provision in the consent judgment was contrary to federal law, the judgment was not void or subject to collateral attack, because the type of federal preemption at issue does not deprive Michigan courts of subject-matter jurisdiction and there was no other justification for a collateral attack on the consent judgment. Accordingly, the Court of Appeals

erred when it concluded that the type of federal preemption at issue in this case deprived state courts of subject-matter jurisdiction.

Court of Appeals judgment reversed; case remanded to the trial court for further proceedings.

1. STATE COURTS — SUBJECT-MATTER JURISDICTION — FEDERAL PREEMPTION — EXCLUSIVE JURISDICTION TO FEDERAL FORUM.

Not all types of federal preemption deprive a state court of subject-matter jurisdiction; the preemption doctrine does not deprive state courts of subject-matter jurisdiction over claims involving federal preemption unless Congress has given exclusive jurisdiction to a federal forum.

2. DIVORCE — DIVISION OF MARITAL PROPERTY — VETERAN'S MILITARY RETIREMENT PAY AND DISABILITY BENEFITS — SUBJECT-MATTER JURISDICTION OF STATE COURTS — FEDERAL PREEMPTION — CONSENT JUDGMENTS — COLLATERAL ATTACK.

Generally, a divorce decree that has become final may not have its property settlement provisions modified except for fraud or for other such causes as any other final decree may be modified; a provision in a consent judgment of divorce that divides a veteran's military retirement pay and disability benefits is generally enforceable under the doctrine of res judicata even though the provision is preempted by federal law; federal preemption under 10 USC 1408 and 38 USC 5301 does not deprive Michigan state courts of subject-matter jurisdiction over a divorce action involving the division of marital property that includes the division of military retired and disability benefits.

Adam L. Kruppstadt, PC (by *Adam L. Kruppstadt*) for plaintiff.

Lex Fori PLLC (by *Carson J. Tucker*) for defendant.

Amicus Curiae:

Kent L. Weichmann and *Mika Meyers PLC* (by *Elizabeth K. Bransdorfer*) for the Family Law Section of the State Bar of Michigan.

VIVIANO, J. At issue presently in this case is whether defendant can collaterally attack a provision in the

parties' consent judgment of divorce related to the division of defendant's military retirement benefits on the ground that it conflicts with federal law. We previously held, among other things, that "[t]he trial court was preempted under federal law from including in the consent judgment the . . . provision on which plaintiff relies." *Foster v Foster*, 505 Mich 151, 175; 949 NW2d 102 (2020) (*Foster I*). But we "express[ed] no opinion on the effect our holdings have on defendant's ability to challenge, on collateral review, the consent judgment" and, instead, "remand[ed] the case to the Court of Appeals so that the panel [could] address the effect of our holdings on defendants' ability to challenge the terms of the consent judgment." *Id*. at 175, 175-176. On remand, the Court of Appeals held that "[s]tate courts are deprived of subject-matter jurisdiction when principles of federal preemption are applicable." *Foster v Foster (On Second Remand)*, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2020 (Docket No. 324853) (*Foster II*), p 2. Because "an error in the exercise of a court's subject-matter jurisdiction can be collaterally attacked," the Court of Appeals concluded that "defendant did not engage in an improper collateral attack on the consent judgment . . . ." *Id*. We disagree. Instead, we hold that the type of federal preemption at issue in this case does not deprive state courts of subject-matter jurisdiction. As a result, we conclude that defendant's challenge to enforcement of the provision at issue is an improper collateral attack on a final judgment.

I. FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case are adequately set forth in our previous opinion, *Foster I*, 505 Mich at 157-161, and need not be restated in their

entirety here. For purposes of this opinion, it is sufficient to highlight the following points.

The parties' consent judgment of divorce was entered in December 2008. At the time of the divorce, defendant was receiving both military retirement pay and military disability benefits for injuries he sustained during the Iraq War. Pursuant to their property settlement, plaintiff was awarded 50% of defendant's retirement pay, also known as "disposable military retired pay." She was not awarded any of defendant's military disability benefits. To protect plaintiff in the event that defendant became entitled to (and accepted) more disability benefits than he currently received, consequently diminishing the retirement benefits that were divided and awarded to plaintiff, the parties agreed to include a provision in the consent judgment of divorce that has become known as the "offset provision." In the offset provision, if defendant elected to receive an increase in disability pay, he agreed to pay plaintiff an amount equal to what she would have received had defendant not elected to do so.[1]

In February 2010, defendant began receiving increased disability benefits, which included Combat-

[1] The offset provision states as follows:

> If Defendant should ever become disabled, either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled. Defendant shall pay this sum to Plaintiff out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to Plaintiff. If the military merely reduces, but does not entirely stop, direct payment to Plaintiff, Defendant shall be responsible to pay directly to Plaintiff any decrease in pay that Plaintiff should have been awarded had Defendant not become disabled, together with any Cost of Living increases that Plaintiff

Related Special Compensation (CRSC).[2] As a result, the amount plaintiff received each month decreased from approximately $800 to approximately $200. Defendant failed to comply with the offset provision by paying plaintiff the difference.

In May 2010, plaintiff filed a petition seeking to hold defendant in contempt for failing to comply with the consent judgment. A few months later, defendant argued, for the first time, that under federal law, CRSC

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would have received had Defendant not become disabled. Failure of Defendant to pay these amounts is punishable through all contempt powers of the Court.

[2] Under federal law, a retired veteran's retirement pay can be divided with a former spouse in divorce proceedings, but disability pay cannot. See 10 USC 1408(c) (permitting division of "disposable retired pay"); 10 USC 1408(a)(4)(A) (defining "disposable retired pay"). See generally Sullivan & Raphun, *Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension*, 24 J Am Acad Matrimonial L 147, 148-150, 152-153 (2011). In order to prevent retired veterans from double-dipping from retirement and disability entitlements, federal law generally requires that a retired veteran receiving both retirement pay and disability benefits give up an amount of retirement pay equal to the amount of disability benefits the veteran is receiving. See 38 USC 5304 (generally prohibiting duplication of benefits); 38 USC 5305 (allowing waiver of retirement pay to receive other benefits). This waiver is sometimes referred to as the "VA waiver." See *Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension*, 24 J Am Acad Matrimonial L at 152. The VA waiver reduces the amount of retired pay the veteran receives, which reduces the sum of money being divided with a former spouse. *Id*. CRSC is an exception to the antidouble-dipping rule. CRSC payments "are not retired pay." 10 USC 1413a(g). CRSC is an additional payment to a veteran, on top of disability pay, in the same amount as the reduction to the veteran's retired pay as a result of the VA waiver. However, CRSC payments, like disability payments, are also not divisible with a former spouse in divorce proceedings. See *Foster I*, 505 Mich at 171; Defense Finance and Accounting Service, *Comparing CRSC and CRDP* <https://www.dfas.mil/retiredmilitary/disability/comparison.html> (accessed March 9, 2022) [https:perma.cc/77E7-CAS9]. See generally *Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension*, 24 J Am Acad Matrimonial L at 163.

benefits are not subject to division in a divorce action. In an opinion and order dated October 8, 2010, the trial court denied plaintiff's request to hold defendant in contempt but ordered defendant to comply with the provisions of the judgment. The trial court acknowledged that it did not have the power to divide military disability pay but noted that the parties here had agreed upon the division and neither party had moved to set aside the judgment on the ground of mutual mistake. The trial court warned that if defendant failed to comply with the order that he would be held in contempt.

On March 25, 2011, plaintiff filed a petition to hold defendant in contempt, alleging that he had not made any payments as ordered. Although he did not appear at the hearing, defendant filed a response, arguing that he was not in contempt and, for the first time, arguing that the issue was within the jurisdiction of the federal courts. On May 10, 2011, the trial court entered an order holding defendant in contempt, granting a money judgment to plaintiff, and issuing a bench warrant for defendant's arrest because he did not appear at the hearing.

At a show-cause hearing on June 27, 2014, defendant, relying on 10 USC 1408 and 38 USC 5301, argued that he could not assign his disability benefits and that the trial court had erred by not complying with federal law. The trial court observed, "[W]e have litigated this issue and re-litigated this issue and it has not been properly appealed." The trial court ordered plaintiff to pay the arrearage.

On September 22, 2014, the trial court entered an order holding defendant in contempt and ordering him to pay the arrearage and attorney fees. Defendant appealed that order in the Court of Appeals.

The Court of Appeals initially affirmed the trial court order. *Foster v Foster*, unpublished per curiam opinion of the Court of Appeals, issued October 13, 2016 (Docket No. 324853). Defendant sought leave to appeal in this Court. We vacated the judgment and remanded the case to the Court of Appeals for reconsideration in light of *Howell v Howell*, 581 US 214; 137 S Ct 1400; 197 L Ed 2d 781 (2017). *Foster v Foster*, 501 Mich 917 (2017). The Court of Appeals again affirmed. *Foster v Foster (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued March 22, 2018 (Docket No. 324853).

Defendant again sought leave to appeal in this Court. After granting the application, the Court held as follows:

> We conclude that federal law preempts state law such that the consent judgment is unenforceable to the extent that it required defendant to reimburse plaintiff for the reduction in the amount payable to her due to his election to receive CRSC. Although the Court of Appeals indicated its agreement with plaintiff's assertion that defendant was engaging in an improper collateral attack against the consent judgment, the panel did not discuss the effect of federal preemption on the trial court's subject-matter jurisdiction or defendant's ability to challenge the terms of the consent judgment outside of direct appeal. Because these questions remain important, we vacate that portion of the Court of Appeals' opinion agreeing with plaintiff that defendant was engaging in an improper collateral attack and reverse the balance of the Court of Appeals' opinion in this case. Moreover, we overrule the Court of Appeals' opinion in *Megee v Carmine*, [290 Mich App 551, 574-575; 802 NW2d 669 (2010),] which held that a veteran is obligated to compensate a former spouse in an amount equal to the share of retirement pay that the nonveteran spouse would have received, pursuant to a divorce judgment, had the veteran not elected to waive military retirement pay in favor of CRSC. This case is remanded to

> the Court of Appeals so that the panel may address the effect of our holdings on defendant's ability to challenge the terms of the consent judgment. [*Foster I*, 505 Mich at 156 (citation omitted).]

On the second remand, the Court of Appeals reversed in *Foster II*. After a lengthy block quote of this Court's opinion in *Foster I*, the Court of Appeals dedicated a single paragraph to the issue of subject-matter jurisdiction. It cited *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), abrogated in part on other grounds in *Sprietsma v Mercury Marine*, 537 US 51, 63-64 (2002); *People v Kanaan*, 278 Mich App 594, 602; 751 NW2d 57 (2008); and *Konynenbelt v Flagstar Bank, FSB*, 242 Mich App 21, 25; 617 NW2d 706 (2000), for the proposition that state courts are deprived of subject-matter jurisdiction when principles of federal preemption are applicable. The Court concluded that "defendant did not engage in an improper collateral attack on the consent judgment and the trial court lacked subject-matter jurisdiction to enforce the consent judgment with respect to the offset provision due to the principle of federal preemption." *Foster II*, unpub op at 2.

Plaintiff sought leave to appeal in this Court, and we granted plaintiff's application to address

> whether the defendant has the ability to challenge the relevant term of the consent judgment in this case given that federal law precludes a provision requiring that the plaintiff receive reimbursement or indemnification payments to compensate for reductions in the defendant's military retirement pay resulting from his election to receive any disability benefits. See *Howell v Howell*, 581 US 214; 137 S Ct 400; 197 L Ed 2d 781 (2017). [*Foster v Foster*, 506 Mich 1030 (2020).]

II. STANDARD OF REVIEW

The application of the doctrine of res judicata is a question of law that we review de novo. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). Questions of subject-matter jurisdiction are also questions of law that we review de novo. *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017).

III. ANALYSIS

This Court previously held that the offset provision in the parties' consent judgment of divorce impermissibly divides defendant's military disability pay in violation of federal law. See *Foster I*, 505 Mich at 175 ("The trial court was preempted under federal law from including in the consent judgment the offset provision on which plaintiff relies."). We must now answer the question we left open in *Foster I*: whether defendant may challenge this provision of the consent judgment on collateral review.

A. THE DOCTRINE OF RES JUDICATA APPLIES TO JUDGMENTS THAT DIVIDE MILITARY RETIREMENT AND DISABILITY BENEFITS

We have previously explained the doctrine of res judicata as follows:

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exer-

> cising reasonable diligence, could have raised but did not. [*Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004) (citation omitted).]

Importantly for purposes of this case, the doctrine of res judicata applies even if the prior judgment rested on an invalid legal principle. See *Colestock v Colestock*, 135 Mich App 393, 397-398; 354 NW2d 354 (1984) ("A judgment of divorce dividing marital property is res judicata and not subject to collateral attack, even if the judgment may have been wrong or rested on a subsequently overruled legal principle."); *Detwiler v Glavin*, 377 Mich 1, 14; 138 NW2d 336 (1965) (holding that the doctrine of res judicata applies to "a valid but erroneous judgment"). See also *Federated Dep't Stores, Inc v Moitie*, 452 US 394, 398; 101 S Ct 2424; 69 LEd2d 103 (1981) ("Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.").

This Court has long recognized as "a settled rule of law that a divorce decree which has become final may not have its property settlement provisions modified except for fraud or for other such causes as any other final decree may be modified." *Pierson v Pierson*, 351 Mich 637, 645; 88 NW2d 500 (1958).[3] The Court of Appeals has explained why finality in this context is extremely important:

> Public policy demands finality of litigation in the area of family law to preserve surviving family structure. To permit divorce judgments which have long since become final to be reopened so as to award military pensions to the

[3] See also *Keeney v Keeney*, 374 Mich 660, 663; 133 NW2d 199 (1965); *Greene v Greene*, 357 Mich 196, 201; 98 NW2d 519 (1959); and *Roddy v Roddy*, 342 Mich 66, 69; 68 NW2d 762 (1955).

> husband as his separate property would flaunt the rule of res judicata and upset settled property distributions upon which parties have planned their lives. The consequences would be devastating, not only from the standpoint of the litigants, but also in terms of the work load of the courts. [*McGinn v McGinn*, 126 Mich App 689, 693; 337 NW2d 632 (1983) (citation omitted).][4]

The United States Supreme Court has recognized that the application of the doctrine of res judicata in this context is an issue of state law. See *Mansell v Mansell*, 490 US 581, 586 n 5; 109 S Ct 2023; 104 L Ed 2d 675 (1989) ("Whether the doctrine of res judicata . . . should have barred the reopening of pre-*McCarty* [*v McCarty*, 453 US 210; 101 S Ct 2728; 69 L Ed 2d 589 (1981),] settlements is a matter of state law over which we have no jurisdiction."). See also 2 Turner, Equitable Distribution of Property (4th ed), § 6:6, p 49 (noting that the Court had dismissed in *Sheldon v Sheldon*, 456 US 941 (1982), for want of a substantial federal question, a petition raising the issue of whether " 'federal preemption of state community property laws regarding division of military retirement pay render state judgments void for lack of subject matter jurisdiction where such judgments were entered after Congress had preempted area of law' ").[5]

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[4] See also *Staple v Staple*, 241 Mich App 562, 579; 616 NW2d 219 (2000) ("The Family Law Section of the State Bar, representing more than three thousand family law specialists, elaborates on the public policy value of finality in divorce cases: 'There is probably not a single family law practitioner in the State of Michigan who would not advocate the importance of finality in their divorce cases. Divorce cases, by their nature, involve parties coming together and resolving contentious matters. . . . The parties, after the divorce, wish to go on in their separate lives and not . . . be subject to future petitions for relief . . . .' ").

[5] As this Court has recognized, this type of dismissal indicates "that all the issues properly presented to the Supreme Court have been considered on the merits and held to be without substance; for this

Applying these principles, the provision of the parties' consent judgment of divorce that divides defendant's military retirement and disability benefits is generally enforceable under the doctrine of res judicata even though it is preempted by federal law. See generally *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998) (noting that "[a] party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt").[6]

B. THE PARTIES' DIVORCE JUDGMENT IS NOT VOID AND THEREFORE IS NOT SUBJECT TO COLLATERAL ATTACK

Even though it is otherwise enforceable, defendant argues that because the offset provision is preempted by federal law, it is automatically void and, therefore, subject to collateral attack at any time.[7] As an initial

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reason, the adjudication is binding precedent under the doctrine of stare decisis with respect to those issues when raised in subsequent matters." *Gora v Ferndale*, 456 Mich 704, 713; 576 NW2d 141 (1998) (quotation marks and citations omitted).

[6] It is worth noting that our holding places us in good company because the majority of state courts have held that "military benefits of all sorts can be divided under the law of res judicata." Turner, § 6:9, p 72. See *id*. at 72-73 n 4 (listing cases). A minority of state courts hold to the contrary. See *id*. at 74 n 9 (listing cases and text accompanying). However, as the author observes, "[n]one of these decisions cite either *Sheldon* or footnote 5 in *Mansell*," and "[n]one have showed any awareness of the postremand history of *Mansell*[.]" *Id*. at 74.

[7] This Court has long recognized a distinction between a judgment that is void and one that is voidable. See *Clark v Holmes*, 1 Doug 390, 393 (1844) ("It is a well settled doctrine that, when proceeding to exercise the powers conferred, [inferior courts of special and limited jurisdiction] must have jurisdiction of the person, by means of the proper process or appearance of the party, as well as of the subject matter of the suit; and when they thus have jurisdiction of the person and the cause, if in the further proceedings they commit error, the proceedings are not void, but only voidable, and may be reversed for

matter, defendant asserts that a judgment containing a provision that exceeds the limits of the trial court's authority is void. However, as we explained in *Buczkowski v Buczkowski*, 351 Mich 216, 221-222; 88 NW2d 416 (1958), there is an important distinction between the court's jurisdiction of the parties and the subject matter of the suit, on the one hand, and the court's erroneous exercise of that jurisdiction, on the other:

> The failure to distinguish between "the erroneous exercise of jurisdiction" and "the want of jurisdiction" is a fruitful source of confusion and errancy of decision. In the first case the errors of the trial court can only be corrected by appeal or writ of error. In the last case its judgments are void, and may be assailed by indirect as well as direct attack. The judgment of a court of general jurisdiction, with the parties before it, and with power to grant or refuse relief in the case presented, though (the judgment is) contrary to law as expressed in the decisions of the supreme court or the terms of a statute, is at most only an erroneous exercise of jurisdiction, and as such is impregnable to an assault in a collateral proceeding.
>
> The loose practice has grown up, even in some opinions, of saying that a court had no "jurisdiction" to take certain legal action when what is actually meant is that the court had no legal "right" to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of *res judicata* to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity. It must constantly be

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error by the proper court of review where a power of review is given; . . . but on the contrary, when they have not such jurisdiction of the cause and of the person, their proceedings are absolutely void, and cannot afford any justification or protection, and they became trespassers by any act done to enforce them."). See also 3 Longhofer, Michigan Court Rules Practice (7th ed), § 2612.13, pp 624-625 (discussing the distinction between void and voidable judgments).

> borne in mind, as we have pointed out in *Jackson City Bank & Trust Co. v. Fredrick*, 271 Mich 538, 544[; 260 NW 908 (1935)], that:
>
> > There is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void although it may be subject to direct attack on appeal. This fundamental distinction runs through all the cases.[8]

In *In re Ferranti*, 504 Mich 1, 22; 934 NW2d 610 (2019), again quoting from *Jackson City Bank*, we explained that only judgments entered without personal jurisdiction or subject-matter jurisdiction are void and subject to collateral attack:

> "[W]hen there is a want of jurisdiction over the parties, or the subject-matter, no matter what formalities may have been taken by the trial court, the action thereof is void because of its want of jurisdiction, and consequently its proceedings may be questioned collaterally as well as directly. They are of no more value than as though they did not exist. But in cases where the court has undoubted jurisdiction of the subject matter, and of the parties, the action of the trial court, though involving an erroneous exercise of jurisdiction, which might be taken advantage of by direct appeal, or by direct attack, yet the judgment or decree is not void though it might be set aside for the irregular or erroneous exercise of jurisdiction if appealed

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[8] *Buczkowski*, 351 Mich at 221-222 (cleaned up). See also *People v Washington*, 508 Mich 107, 123-124; 972 NW2d 767 (2021) ("The prosecutor is correct that there is a widespread and unfortunate practice among both state and federal courts of using the term 'jurisdiction' imprecisely, to refer both to the subject-matter and the personal jurisdiction of the court, and to the court's general authority to take action."); *id*. at 125 n 5 (noting that "the terms 'power' and 'authority' are generally used to refer to errors in the exercise of jurisdiction and other nonjurisdictional errors").

> from. It may not be called in question collaterally." [*Ferranti*, 504 Mich at 22, quoting *Jackson City Bank*, 271 Mich at 544-545.]

As these authorities make clear, defendant's assertion that the judgment is void and subject to collateral attack simply because it conflicts with federal law is "manifestly in error." *Buczkowski*, 351 Mich at 221.

Next, defendant argues that the judgment is void and subject to collateral attack because Congress deprived state courts of subject-matter jurisdiction over the division of military disability benefits.[9] To prevail on this argument, defendant must demonstrate that Congress has given exclusive jurisdiction over the division of military disability benefits in a divorce action to a federal forum. See, e.g., 21 CJS, Courts, § 272, p 288 ("The preemption doctrine does not deprive state courts of subject matter jurisdiction over claims involving federal preemption unless Congress

[9] To the extent defendant continues to assert that all types of federal preemption deprive state courts of subject-matter jurisdiction—the position he advanced during his prior trip to this Court—we disagree with this assertion. Instead, we adopt the analysis on this point in the concurring opinion in *Foster I* and clarify our caselaw in this area. See *Foster I*, 505 Mich at 181-188 (VIVIANO, J., concurring). In particular, although in *Henry v Laborers' Local 1191*, 495 Mich 260, 287 n 82; 848 NW2d 130 (2014), we asserted that "preemption is a question of subject-matter jurisdiction," it is clear that "our assertion was made in the context of *Garmon* preemption [see *San Diego Bldg Trades Council v Garmon*, 359 US 236; 79 S Ct 773; 3 L Ed 2d 775 (1959),] and was indisputably correct in that context given that Congress has established an exclusive federal forum, the National Labor Relations Board, to adjudicate certain claims under the National Labor Relations Act . . . ." *Foster I*, 505 Mich at 184. We also disavow our statement in *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), that "[w]here the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction." Finally, to the extent it reached a different conclusion, we overrule *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132; 796 NW2d 94 (2010).

has given exclusive jurisdiction to a federal forum.").[10] However, as discussed later in this opinion, defendant has failed to persuade us that the Department of Veterans Affairs or any other federal forum has exclusive jurisdiction over the division of military disability benefits in a divorce action.

The United States Supreme Court rejected a similar argument in *Rose v Rose*, 481 US 619; 107 S Ct 2029; 95 L Ed 2d 599 (1987), after first observing:

> We have consistently recognized that the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has posi-

[10] See also *Marshall v Consumers Power Co*, 65 Mich App 237, 245; 237 NW2d 266 (1976) (setting out a two-part test for determining whether Congress has impliedly preempted state law, under which a court must (1) "determine whether Congress has preempted states from legislating or regulating the subject matter of the instant case," and (2) "if it has, [determine] whether it has also vested exclusive jurisdiction of that subject matter in the Federal court system"). The second part of the test is not satisfied in this case because Congress has not "vested exclusive jurisdiction of th[is] subject matter," i.e., division of military disability benefits in a divorce action, in a federal forum. See *Veterans for Common Sense v Shinseki*, 678 F3d 1013, 1025-1026 (CA 9, 2012) (en banc) ("[W]e conclude that [38 USC 511] precludes jurisdiction over a claim if it requires the district court *to review VA decisions that relate to benefits decisions*, including any decision made by the Secretary in the course of making benefits determinations . . . . If that test is met, then the district court must cede any claim to jurisdiction over the case, and parties must seek a forum in the Veterans Court and the Federal Circuit.") (quotation marks and citations omitted; emphasis added). And *Kalb v Feuerstein*, 308 US 433, 438-439; 60 S Ct 343; 84 L Ed 370 (1940), cited by defendant, only serves to confirm this point. At issue in *Kalb* was whether a state court had jurisdiction in a foreclosure matter over property that fell under the jurisdiction of the bankruptcy court. But Congress has established an exclusive federal forum for bankruptcy matters. *Id*. at 439.

> tively required by direct enactment that state law be pre-empted. Before a state law governing domestic relations will be overridden, it must do major damage to clear and substantial federal interests. [*Id*. at 625 (cleaned up).]

Relying on 38 USC 3107(a)(2), the veteran spouse argued that the Veterans Affairs administrator had exclusive authority over all issues involving the disposition of military disability benefits. Rejecting that argument, the Court explained:

> This jurisdictional framework finds little support in the statute and implementing regulations. Neither [38 USC 3107(a)(2) nor 38 CFR 3.450 through 3.461 (1986)] mentions the limited role appellant assigns the state court's child support order or the restrictions appellant seeks to impose on that court's ability to enforce such an order. . . . Nor is it clear that Congress envisioned the Administrator making independent child support determinations in conflict with existing state-court orders. . . .
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> . . . Given the traditional authority of state courts over the issue of child support, their unparalleled familiarity with local economic factors affecting divorced parents and children, and their experience in applying state statutes . . . that do contain detailed support guidelines and established procedures for allocating resources following divorce, we conclude that Congress would surely have been more explicit had it intended the Administrator's apportionment power to displace a state court's power to enforce an order of child support. Thus, we do not agree that the implicit pre-emption appellant finds in § 3107(a)(2) is "positively required by direct enactment," or that the state court's award of child support from appellant's disability benefits does "major damage" to any "clear and substantial" federal interest created by this

> statute. [*Rose*, 481 US at 627-628, quoting *Hisquierdo v Hisquierdo*, 439 US 572, 581; 99 S Ct 802; 59 L Ed 2d 1 (1979).][11]

Although the Court in *Rose* found that the state child support statute was not preempted by federal law, its analysis is still helpful in determining whether Congress has established an exclusive forum for dividing military disability benefits in a divorce action. Defendant here contends that the Secretary of Veterans Affairs has exclusive jurisdiction over all issues concerning veteran's benefits, including the division of those benefits in a state court divorce action. Defendant correctly notes that appellate jurisdiction from a decision by the Secretary is limited to the federal courts.[12] 38 USC 511(a) establishes that "[t]he Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects

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[11] The Court further described the purpose of the federal statutes as follows:

> The interest in uniform administration of veterans' benefits focuses, instead, on the technical interpretations of the statutes granting entitlements, particularly on the definitions and degrees of recognized disabilities and the application of the graduated benefit schedules. These are the issues Congress deemed especially well-suited for administrative determination insulated from judicial review. Thus, even assuming that [38 USC] 211(a) covers a contempt proceeding brought in state court against a disabled veteran to enforce an order of child support, *that court is not reviewing the Administrator's decision finding the veteran eligible for specific disability benefits*. [*Rose*, 481 US at 629 (cleaned up; emphasis added).]

[12] Specifically, 38 USC 7104(a) provides for an appeal from the Secretary's decision under 38 USC 511(a) to the Board of Veterans' Appeals. In turn, the United States Court of Appeals for Veterans Claims has exclusive jurisdiction to review decisions of the Board of Veterans' Appeals, 38 USC 7252(a), and the United States Court of Appeals for the Federal Circuit has jurisdiction to review a decision of the Court of Appeals for Veterans Claims, 38 USC 7292.

the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans" and generally precludes review of the Secretary's decision "as to any such question" "by any other official or by any court," with a limited number of exceptions. And 38 USC 5307 provides for a process of requesting apportionment of a veteran's benefits. But just as the Court in *Rose* was "not reviewing the Administrator's decision finding the veteran eligible for specific disability benefits," *Rose*, 481 US at 629, the trial court in this case was not reviewing a decision of the Secretary of Veterans Affairs under 38 USC 511(a). Therefore, contrary to defendant's assertion, there is no exclusive federal forum for dividing military disability benefits in divorce actions. We agree with plaintiff that 38 USC 511—just like 38 USC 211(a), which was at issue in *Rose*—does not refer to, restrict, or displace state court jurisdiction.

In sum, we hold that federal preemption under 10 USC 1408 and 38 USC 5301 does not deprive our state courts of subject-matter jurisdiction over a divorce action involving the division of marital property. Therefore, while the offset provision in the parties' consent judgment of divorce was "a mistake in the exercise of undoubted jurisdiction," *Jackson City Bank*, 271 Mich at 544, that judgment is not subject to collateral attack.[13]

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[13] We believe the law in this area is correctly described in Turner, § 6:6, p 50:

> Initial division of military benefits must be made under federal substantive law, which requires that the benefits be awarded only to the service member and not to the former spouse. If the service member requests that the state court apply federal substantive law, and the state court instead applies state substantive law, *McCarty* requires that the state court decision be reversed. But if the service member never raises the issue—if he or she allows the

IV. CONCLUSION

Because the Court of Appeals erroneously concluded that the type of federal preemption at issue in this case deprives state courts of subject-matter jurisdiction, and because there is no other justification for a collateral attack on the consent judgment in this case, we reverse the judgment of the Court of Appeals and remand this case to the Dickinson Circuit Court for further proceedings not inconsistent with this opinion.

MCCORMACK, C.J., and ZAHRA, BERNSTEIN, CLEMENT, CAVANAGH, and WELCH, JJ., concurred with VIVIANO, J.

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state court to enter an erroneous order dividing military benefits under state substantive law, as happened in most of the pre-*McCarty* cases—*Sheldon* recognizes that *McCarty* does not support reversal of the state court judgment. Federal *substantive* law controls the issue, but under either federal or state procedural rules, a decision which is based upon the wrong substantive law cannot be collaterally attacked after it becomes final.

MURPHY v INMAN

Docket No. 161454. Argued on application for leave to appeal December 9, 2021. Decided April 5, 2022.

Leslie J. Murphy, a former shareholder of Covisint Corporation, brought an action in the business division of the Oakland Circuit Court against Samuel M. Inman III and other former Covisint directors, alleging that they had breached their statutory and common-law fiduciary duties owed to plaintiff when Covisint entered into a cash-out merger agreement with OpenText Corporation in 2017. Defendants moved for summary disposition, arguing that plaintiff lacked standing because his claim was derivative in nature and he did not satisfy the requirements for bringing a derivative shareholder action under MCL 450.1493a. Plaintiff responded that he was permitted to bring a direct shareholder action under MCL 450.1541a and that defendants owed common-law fiduciary duties to plaintiff as a shareholder. The trial court, Wendy L. Potts, J., granted defendants' motion for summary disposition, ruling that plaintiff lacked standing to bring a direct shareholder action because he could not demonstrate an injury to himself without showing injury to the corporation, nor could he show harm separate and distinct from that of other Covisint shareholders. The court also rejected plaintiff's common-law theory because it arose out of the same alleged injury as his statutory claim. The Court of Appeals, GLEICHER, P.J., and GADOLA and LETICA, JJ., affirmed in an unpublished per curiam opinion issued April 30, 2020. Plaintiff applied for leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 507 Mich 906 (2021).

In a unanimous opinion by Justice ZAHRA, the Supreme Court, in lieu of granting leave to appeal, *held*:

Corporate directors owe common-law fiduciary duties directly to the shareholders of the corporation, and these duties were not abrogated by the enactment of the Business Corporation Act (BCA), MCL 450.1101 *et seq*. In the context of a cash-out merger transaction in which the decision to sell the target corporation has been made, directors must disclose to the shareholders all

material facts within their knowledge regarding the merger and must exercise their fiduciary duties to the shareholders with one goal in mind: to maximize shareholder value by securing the highest value share price reasonably available. In order to distinguish between direct and derivative actions brought by shareholders of a corporation in Michigan, courts must ask (1) who suffered the alleged harm, and (2) who would receive the benefit of any remedy recovered. If the answer to both questions is the corporation, the action is derivative. If the shareholder suffers the harm independently from the corporation and receives the remedy rather than the corporation, the action is direct. Under that framework, a shareholder who alleges that the directors of the target corporation breached their fiduciary duties owed to the shareholder in handling a cash-out merger may bring that claim as a direct shareholder action. The Court of Appeals erred by concluding that plaintiff's claim was derivative.

1. Corporate directors owe their shareholders fiduciary duties under Michigan common law that exist independently of the duties prescribed in the BCA. A fiduciary relationship is one in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Directors of a corporation are understood to be fiduciaries because they are required to use their acumen for the corporation's benefit rather than their own. The BCA provides in MCL 450.1541a that directors must discharge their duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner they reasonably believe to be in the best interests of the corporation. While this provision does not address whether directors owe fiduciary duties directly to the shareholders, such duties have been held to exist under Michigan's common law. The essence of these duties is to produce the best possible return for the shareholders' investment, although courts' expectations of directors acting as fiduciaries depend heavily upon context. The Michigan Supreme Court has not addressed directors' fiduciary duties to their shareholders in sale-of-control transactions, but the courts in Delaware, which is commonly understood to be the leading state on matters of corporate law, have held that once the decision to sell the target corporation has been made, directors of the target corporation no longer perform purely managerial duties on behalf of the corporation; instead, they are charged with negotiating the share price that the target corporation's shareholders will receive as cash. Thus, in the context of a cash-out merger transaction, directors of the target corporation must disclose all material facts regarding the merger and must discharge their fiduciary duties to maximize

shareholder value by securing the highest value share price reasonably available. This is consistent with the understanding that directors' fiduciary duties run primarily to the shareholders of a corporation and that the essence of those duties is to obtain the best possible return on the shareholders' investments. Further, in the context of a cash-out merger or other sale-of-control transaction, the sale or dissolution of the target corporation is a foregone conclusion, and the long-term interests of the target corporation as an entity are therefore of no concern. In this case, plaintiff's challenge to the validity and fairness of the merger assumes that the sale of Covisint was a foregone conclusion, and thus defendants' business decision to sell Covisint in the first place was not at issue.

2. The Legislature did not abrogate the common-law fiduciary duties that corporate directors owe their shareholders when it enacted the BCA. The Michigan Supreme Court has continued to recognize that directors owe fiduciary duties to their shareholders since the enactment of the BCA, and the statutory history of the BCA and its predecessor, the General Corporation Act, 1931 PA 327, supports a conclusion that the Legislature did not abrogate these common-law duties. The Legislature has never created or codified a direct cause of action for shareholders, and it has never expressly or even impliedly rejected the common-law fiduciary duties running from corporate directors to their shareholders. Therefore, none of the changes to MCL 450.1541a(1) or its predecessor can reasonably be read to abrogate corporate directors' common-law fiduciary duties to their shareholders. Contrary to defendants' argument, the BCA does not set forth a comprehensive legislative scheme in which the Legislature intended the statutory duties codified in MCL 450.1541a(1) to supersede and replace all common-law fiduciary duties. That provision discusses the standard by which corporate directors are to discharge their managerial duties owed to the corporation, but it is silent as to the fiduciary duties that corporate directors owe their shareholders. The Legislature is presumed to know that duties to shareholders exist at common law, and absent a clear legislative intent, it cannot be presumed that the Legislature, in enacting the BCA, exercised its authority to abrogate those duties.

3. While corporate directors and officers owe fiduciary duties to the shareholders, a suit to enforce corporate rights or to redress or prevent injury to the corporation must be brought in the name of the corporation and not that of a stockholder, officer, or employee. Michigan courts have recognized two exceptions to this general rule: (1) where the individual has sustained a loss

separate and distinct from that of other stockholders generally, and (2) where the individual shows a violation of a duty owed directly to the individual that is independent of the corporation. The Court of Appeals correctly recognized that a suit to enforce corporate rights or to redress injury to the corporation is a derivative suit; although it may be brought by the shareholder, the action itself belongs to the corporation. If a claim is derivative, a shareholder has no standing to sue except on behalf of the corporation, and the shareholder must comply with numerous statutory requirements before bringing that action. A direct action, on the other hand, belongs to the shareholder; it seeks redress for harm done to the shareholder or to enforce a personal right belonging to the shareholder independently from the corporation. In other words, when the shareholder suffers the harm or seeks to enforce a personal right, the general rule articulated by the Court of Appeals that an action is derivative does not apply. However, the general rule-exception framework that Michigan courts have applied to distinguish direct and derivative actions brought by shareholders assumes that the claim belongs to the corporation and then inquires whether an exception exists to permit the claim to be brought directly and thus overlooks the fundamental inquiry at the heart of the distinction between direct and derivative shareholder actions: the nature of the wrong alleged by the complaining shareholder. Accordingly, the Supreme Court adopted the framework set forth in *Tooley v Donaldson, Lufkin & Jenrette, Inc*, 845 A2d 1031, 1033 (Del, 2004), which held that the proper analytical distinction between direct and derivative actions turns solely on who suffered the alleged harm and who would receive the benefit of any recovery or other remedy. Under this framework, a stockholder must demonstrate that the duty breached was owed to the stockholder and that the stockholder can prevail without showing an injury to the corporation. The decision in *Christner v Anderson, Nietzke & Co, PC*, 433 Mich 1; 444 NW2d 779 (1989), did not prevent the Court from adopting the *Tooley* framework for distinguishing between direct and derivative actions.

4. Under the *Tooley* framework, plaintiff has standing to bring a direct shareholder action against defendants for an alleged breach of their common-law fiduciary duties in handling the Covisint-OpenText merger. Plaintiff alleged that defendants breached their fiduciary duties in handling the cash-out merger transaction by negotiating an inadequate and unfair price for outstanding Covisint stock, engaging in self-dealing while arranging the merger, and issuing a materially incomplete and misleading proxy statement that omitted information necessary

to enable the shareholders to cast an informed vote. These allegations challenged the validity and fairness of the merger itself, and any harm resulting from a breach of defendants' fiduciary duties in handling the merger would have injured plaintiff directly as a shareholder. Further, assuming plaintiff's allegations have merit, any remedy for defendants' breach of their fiduciary duties would flow directly to plaintiff. In a cash-out merger transaction, the target corporation itself does not receive any of the cash that constitutes the merger consideration. Rather, the acquiring corporation delivers the cash directly to the shareholders of the target corporation. Therefore, if there is a discrepancy between the amount the shareholders received and the amount found to be a fair value for their shares, that difference would belong to the shareholders, not the target corporation. To conclude that plaintiff's claim is derivative would necessarily mean that Covisint was harmed and should recover any remedy. Such a conclusion defies logic because Covisint suffered no harm and is now a wholly owned subsidiary of OpenText. The lower courts' holding that plaintiff's claim was derivative failed to appreciate that, once the merger was consummated, plaintiff no longer owned stock in Covisint and that any derivative action belonging to Covisint passed to OpenText; therefore, plaintiff simply could not file a derivative action on Covisint's behalf. Further, labeling plaintiff's claim as derivative would result in a windfall for OpenText, as it would have paid a reduced price for the Covisint shares and received a damage award payable to itself as a result of defendants' breach, and plaintiff would have been left with no avenue for relief.

Reversed and remanded to the Oakland County business court for further proceedings.

1. CORPORATIONS — FIDUCIARY DUTIES — SHAREHOLDERS.

Corporate directors owe common-law fiduciary duties directly to the shareholders of the corporation, and these duties were not abrogated by the enactment of the Business Corporation Act, MCL 450.1101 *et seq*.

2. CORPORATIONS — FIDUCIARY DUTIES — SHAREHOLDERS — CASH-OUT MERGER TRANSACTIONS.

In the context of a cash-out corporate merger transaction in which the decision to sell the target corporation has been made, the corporate directors must disclose to the shareholders all material facts within their knowledge regarding the merger and must exercise their fiduciary duties to the shareholders with the goal of

maximizing shareholder value by securing the highest value share price reasonably available.

3. CORPORATIONS — FIDUCIARY DUTIES — SHAREHOLDERS — DIRECT AND DERIVATIVE SHAREHOLDER ACTIONS.

In order to distinguish between direct and derivative actions brought by shareholders of a corporation in Michigan, courts must ask who suffered the alleged harm and who would receive the benefit of any remedy recovered; if the answer to both questions is the corporation, then the action is derivative, and if the shareholder independently suffers the harm and receives the remedy rather than the corporation, then the action is direct.

4. CORPORATIONS — FIDUCIARY DUTIES — SHAREHOLDERS — CASH-OUT MERGER TRANSACTIONS — DIRECT AND DERIVATIVE SHAREHOLDER ACTIONS.

A shareholder who alleges that the directors of the target corporation breached their fiduciary duties owed to the shareholder in handling a cash-out merger may bring that claim as a direct shareholder action.

MacWilliams Law, PC (by *Sara K. MacWilliams*) and *Monteverde & Associates, PC* (by *Miles D. Schreiner*) for plaintiff.

Brooks Wilkins Sharkey & Turco PLLC (by *Jason D. Killips*) and *Paul Hastings LLP* (by *Christopher H. McGrath*) for defendants.

Amici Curiae:

Ian Williamson, *William Horton*, *Justin G. Klimko*, *Douglas L. Toering*, *Marguerite Donahue*, *Michael Molitor*, *Jennifer M. Grieco*, and *Brian P. Markham* for the Business Law Section of the State Bar of Michigan.

Fatima M. Bolyea, *Joel C. Bryant*, *Emily Fields*, and *Amanda Rauh-Bieri* for the Litigation Section of the State Bar of Michigan.

ZAHRA, J. This litigation arises from a cash-out merger agreement[1] executed between Covisint Corporation and OpenText Corporation. Leslie J. Murphy, a former shareholder of Covisint, brought this action against the eight named defendants in this case, all of whom are former Covisint directors, alleging that they breached their statutory and common-law fiduciary duties owed to plaintiff with regard to the merger. The questions before this Court are: (1) whether corporate directors owe fiduciary duties directly to the shareholders of the corporation under Michigan law and, if so, what those duties entail with respect to a cash-out merger transaction; and (2) whether a shareholder alleging that corporate directors breached their fiduciary duties in handling a cash-out merger must bring that claim as a direct or derivative[2] shareholder action.

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[1] In a simple two-party corporate merger, one corporate entity (the "acquiring" corporation) succeeds to all rights, privileges, and liabilities of the other corporate entity (the "target" corporation), whose existence terminates upon completion of the merger; the corporation resulting from the merger is the "surviving corporation." See MCL 450.1724; Schulman, Moscow, and Lesser, *Michigan Corporation Law & Practice* (rev ed, 2022 supp), §§ 7.01 to 7.04, 7.06. Shareholders of the extinct target corporation are offered consideration for their shares, including shares, bonds, or other securities in the surviving corporation, or cash. See MCL 450.1701(2)(c). Unlike a merger involving an exchange of shares or other securities, this case involves a "cash-out" merger transaction, in which shareholders of the target corporation must accept cash payment for their shares, thereby eliminating their interest in the target corporation. See *Black's Law Dictionary* (11th ed), p 1184 (defining "cash merger"). The mechanics of cash-out mergers under the Business Corporation Act, MCL 450.1101 *et seq*., will be discussed in further detail later in this opinion.

[2] A "derivative proceeding" is a civil suit brought "in the right of" the corporation to redress harm done to the corporation rather than the individual shareholder. MCL 450.1491a(1). See also *Black's Law Dictionary* (11th ed) (defining "derivative action"). A direct action, on the other hand, is an action brought by a shareholder, or a group of

We hold that corporate directors owe common-law fiduciary duties directly to the shareholders of the corporation. In the context of a cash-out merger transaction in which the decision to sell the target corporation has been made, directors must disclose to the shareholders all material facts within their knowledge regarding the merger and must exercise their fiduciary duties to the shareholders with one goal in mind: to maximize shareholder value by securing the highest value share price reasonably available. We conclude that directors' common-law fiduciary duties to shareholders were not abrogated by the enactment of the Business Corporation Act (BCA).[3] We also hold that a shareholder who alleges that the directors of the target corporation breached their fiduciary duties owed to the shareholder in handling a cash-out merger may bring that claim as a direct shareholder action. The Court of Appeals therefore erred by concluding that plaintiff's claim was derivative. For reasons more fully developed in this opinion, we reverse the decision of the Court of Appeals and remand this case to the Oakland County business court for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

On June 5, 2017, Covisint, a corporation headquartered in Southfield, Michigan, publicly announced that it had entered into a merger agreement with OpenText. Under this agreement, OpenText acquired all outstanding shares of Covisint stock for $2.45 per share and a wholly owned subsidiary of OpenText

shareholders, to enforce a personal right or seek redress for harm done to the shareholder independent of the corporation. See 19 Am Jur 2d, Corporations, § 1923, pp 94-95.

[3] MCL 450.1101 *et seq*.

merged with and into Covisint.[4] Covisint issued a preliminary proxy statement on June 15, 2017, and a definitive proxy statement on June 26, 2017, both of which detailed the transaction and the negotiation process leading up to the merger agreement.

On June 30, 2017, before the merger was consummated, plaintiff filed this action in the business court of the Oakland Circuit Court.[5] Plaintiff alleged that defendants breached their fiduciary duties of care, loyalty, good faith, independence, and candor owed to all Covisint shareholders. Plaintiff sought damages and rescission of the merger agreement.

On July 25, 2017, a majority of Covisint shareholders voted to approve the merger, which was consummated the next day. Plaintiff then filed an amended complaint, raising the same claim for breach of fiduciary duty. More specifically, plaintiff alleged, in relevant part, that defendants failed to maximize shareholder value when they sold Covisint at an inadequate and unfair price; engaged in a flawed sales process by favoring OpenText, neglecting other bidders, and failing to adequately pursue higher offers; acted in their

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[4] In this way, Covisint became the wholly owned subsidiary of OpenText. This type of merger is known as a "reverse triangular merger," in which the target corporation merges into a wholly owned subsidiary of the acquiring corporation created for the purpose of the merger. *Black's Law Dictionary* (11th ed), p 1185.

[5] At least three other lawsuits were filed individually and on behalf of a putative class of Covisint shareholders in the United States District Court for the Eastern District of Michigan related to Covisint-OpenText merger. According to the parties' filings in this case, those federal lawsuits were dismissed without prejudice as to the putative class, and notice to the putative class of the dismissal was not required. See *In re Covisint Corp Shareholder Litigation*, unpublished order of the United States District Court for the Eastern District of Michigan, entered September 28, 2017 (Case Nos. 2:17-cv-11958-RHC-DRG, 2:17-cv-1200-SJM-APP, and 2:17-cv-12183-SJM-RSW), p 4.

self-interest and received personal financial benefits as a result of the merger; and breached their duty of candor when they issued a materially incomplete and misleading proxy statement that omitted information necessary to enable the shareholders to cast an informed vote.[6]

Defendants moved for summary disposition, arguing that plaintiff lacked standing because his claim was derivative in nature and he did not satisfy the requirements for bringing a derivative shareholder action under MCL 450.1493a.[7] Plaintiff responded that he was permitted to bring a direct shareholder action under MCL 450.1541a[8] and, additionally, that defendants owed common-law fiduciary duties to plaintiff as a shareholder such that he could bring a direct shareholder action. Defendants replied that plaintiff's action is derivative regardless of how he characterized his claim.

The trial court granted defendants' motion for summary disposition, holding that plaintiff lacked standing to bring a direct shareholder action. The trial court determined that plaintiff's allegations—that defen-

[6] Defendants unsuccessfully attempted to remove this action to federal court. *Murphy v Inman*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued February 21, 2018 (Case No. 17-1329).

[7] MCL 450.1493a requires a shareholder to make a written demand upon the corporation to take suitable action 90 days before bringing a derivative claim unless certain circumstances, none of which are relevant here, exist. There is no dispute that plaintiff did not comply with this demand requirement.

[8] MCL 450.1541a(1)(a) to (c) provide that corporate officers and directors shall discharge their duties "[i]n good faith," "[w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances," and "[i]n a manner [they] reasonably believe[] to be in the best interests of the corporation."

dants' breach of their fiduciary duties in handling the merger resulted in plaintiff receiving an inadequate and unfair price for his shares—affected both plaintiff and Covisint in the same manner. The trial court held that because plaintiff could not demonstrate an injury to himself without showing injury to the corporation, nor could he show harm separate and distinct from that of other Covisint shareholders, plaintiff's action was derivative. The court also rejected plaintiff's common-law theory because it arose out of the same alleged injury as his statutory claim. Because plaintiff failed to comply with the requirements for bringing a derivative action, the trial court dismissed his claim.

In an unpublished per curiam opinion, the Court of Appeals affirmed, agreeing with the trial court that plaintiff's action was derivative under both MCL 450.1541a and the common law.[9] Plaintiff sought leave to appeal in this Court. We directed the Clerk to schedule oral argument on the application to address:

> (1) whether, with respect to Covisint Corporation's cash-out merger with OpenText Corporation, corporate officers and directors owed cognizable common law fiduciary duties to the corporation's shareholders independent of any statutory duty; and (2) whether the appellant has standing to bring a direct cause of action under either the common law or MCL 450.1541a.[10]

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[9] *Murphy v Inman*, unpublished per curiam opinion of the Court of Appeals, issued April 20, 2020 (Docket No. 345758).

[10] *Murphy v Inman*, 507 Mich 906 (2021).

II. STANDARD OF REVIEW AND APPLICABLE RULES OF STATUTORY INTERPRETATION

This Court reviews de novo a trial court's decision on a motion for summary disposition.[11] Whether a party has standing is a question of law reviewed de novo.[12] This case also requires us to interpret applicable provisions of the BCA and determine whether the Legislature has abrogated, amended, or preempted the common law. These are also questions of law reviewed de novo.[13]

"The role of this Court in interpreting statutory language is to ascertain the legislative intent that may reasonably be inferred from the words in a statute."[14] Our analysis must focus on "the statute's express language, which offers the most reliable evidence of the Legislature's intent. When the statutory language is clear and unambiguous, judicial construction is limited to enforcement of the statute as written."[15]

III. ANALYSIS

Our analysis proceeds in four parts. First, we discuss the mechanics of a cash-out merger transaction. Second, we identify the fiduciary duties at issue and their source under Michigan common law. Third, we explain our conclusion that the Legislature's enactment of the BCA did not abrogate those common-law

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[11] *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 211; 934 NW2d 713 (2019).

[12] *Id*. at 212.

[13] *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 7; 779 NW2d 237 (2010).

[14] *Sanford v Michigan*, 506 Mich 10, 14-15; 954 NW2d 82 (2020) (quotation marks and citation omitted).

[15] *Id*. at 15 (quotation marks and citations omitted).

fiduciary duties. Finally, we clarify the distinction between direct and derivative shareholder actions under Michigan law and, applying that framework, conclude that plaintiff has standing to bring a direct shareholder action against defendants for an alleged breach of their common-law fiduciary duties owed to him in their handling of the cash-out merger agreement with OpenText.

A. CASH-OUT MERGER TRANSACTION

This case involves a "cash-out merger," in which the shareholders of the target corporation must accept cash for their shares and lose their ownership interest in the target corporation.[16] To initiate a merger under the BCA, the board of directors for each constituent corporation must adopt a merger plan.[17] The plan must include, among other things, "the manner and basis of converting the shares of each constituent corporation into shares, bonds, or other securities of the surviving corporation, or into cash or other consideration . . . ."[18] This conversion constitutes the consideration used to facilitate the merger, i.e., the "merger consideration." The amount and form of the merger consideration is a matter of negotiation between the directors of the corporations being merged. After the plan's adoption by each corporation's board of directors, the plan is generally submitted to the shareholders of each corpo-

[16] *Black's Law Dictionary* (11th ed), p 1184 (defining "cash merger"); 2 McLaughlin on Class Actions (18th ed), § 9:5 ("Upon consummation of a merger, . . . shareholders in the target company generally are cashed-out and lose their status as shareholders.").

[17] MCL 450.1701(2).

[18] MCL 450.1701(2)(c).

ration for approval.[19] Once the plan is approved and the merger takes effect, the target corporation ceases to exist and the outstanding shares of the target corporation are converted into the merger consideration provided for in the merger plan.[20] All property and rights of the target corporation, including any existing derivative claims, pass to the surviving corporation once the merger is consummated.[21] In this case, plaintiff received merger consideration from OpenText of $2.45 for each Covisint share he owned. His ownership in Covisint ceased, and Covisint became a wholly owned subsidiary of OpenText.

B. SOURCE OF CORPORATE DIRECTORS' FIDUICARY DUTIES

As a former shareholder of Covisint, plaintiff argues that the named defendants, all of whom are former members of Covisint's board of directors, owed him fiduciary duties related to the cash-out merger agreement with OpenText under § 541a(1) of the BCA and Michigan's common law.[22] Defendants respond that the BCA superseded and replaced the common law such that no common-law fiduciary duties exist indepen-

[19] MCL 450.1703a(1).

[20] MCL 450.1724(1)(a) and (g).

[21] MCL 450.1724(1)(b). Although a target shareholder may have a right to dissent from the merger and obtain payment of fair value for his or her shares, see MCL 450.1762(1)(a), whether plaintiff possessed dissenters' rights is not before us. And, in any event, the BCA does not provide shareholders with dissenters' rights where either the target shares are listed on the national securities exchange or the merger consideration is cash. See MCL 450.1762(2)(a) and (b). Both of those conditions are met here.

[22] Given that only directors can vote to adopt a merger plan, our inquiry is limited to the fiduciary duties owed by directors in the context of a cash-out merger. We need not address fiduciary duties owed by corporate officers.

dently of § 541a(1). Amici curiae have also submitted briefs, advocating that directors owe their shareholders common-law fiduciary duties that were not abrogated by the BCA. We conclude that corporate directors owe their shareholders fiduciary duties under Michigan common law that exist independently of the duties prescribed in the BCA.

A fiduciary relationship is one "in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship."[23] Directors of a corporation are understood to be fiduciaries because they are required to use their "acumen for [the] corporation's benefit rather than [their] own . . . ."[24] The BCA provides that "[t]he business and affairs of a corporation shall be managed by or under the direction of its board . . . ."[25] MCL 450.1541a sets forth the manner in which directors are to discharge their duties, providing, in relevant part:

> (1) A director or officer shall discharge his or her duties as a director or officer including his or her duties as a member of a committee in the following manner:
>
> (a) In good faith.
>
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.
>
> (c) In a manner he or she reasonably believes to be in the best interests of the corporation.[26]

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[23] *In re Karney Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003) (quotation marks and citation omitted).

[24] *Thomas v Satfield Co*, 363 Mich 111, 123; 108 NW2d 907 (1961).

[25] MCL 450.1501.

[26] Although MCL 450.1545a addresses the duty of loyalty in the context of transactions in which corporate directors or officers have an interest, plaintiff does not allege a breach of defendants' fiduciary duties under § 545a.

While § 541a(1) clearly recognizes directors' fiduciary relationship to the "corporation" as an entity, nowhere in the statute's plain text does it address whether directors owe fiduciary duties directly to the "shareholder[s]" of the corporation.[27] However, we have understood such duties to exist in our state's common law:

> The rule is thoroughly embedded in the general jurisprudence of both America and England that *the status of directors is such that they occupy a fiduciary relation toward the corporation and its stockholders*, and are treated by courts of equity as trustees. They are regarded as agents entrusted with the management of the corporation, *for the benefit of the stockholders collectively*, and as occupying a fiduciary relation in the sense that the relation is one of trust; and are held to the utmost good faith in their dealings with the corporation. They must manage the affairs of the corporation solely in the interest of the corporation.[28]

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[27] The BCA defines "corporation" simply as "a corporation formed under this act, or existing on January 1, 1973 and formed under any other statute of this state for a purpose for which a corporation may be formed under this act," MCL 450.1106(1), and defines "shareholder" as "a person that holds units of proprietary interest in a corporation and is considered to be synonymous with 'member' in a nonstock corporation," MCL 450.1109(2). Although a corporation is composed of shareholders, the two exist separately for purposes of the BCA.

[28] *Thomas*, 363 Mich at 118 (emphasis added; quotation marks and citation omitted), citing *LA Young Spring & Wire Corp v Falls*, 307 Mich 69, 101; 11 NW2d 329 (1943). See also *Wagner Electric Corp v Hydraulic Brake Co*, 269 Mich 560, 564; 257 NW 884 (1934) ("Under the law of this State and elsewhere, the directors of a private corporation stand in a fiduciary relation to its stockholders, and are bound to act in good faith for the benefit of the corporation."); *Thompson v Walker*, 253 Mich 126, 134-135; 234 NW 144 (1931) ("The officers and directors of a corporation have its affairs committed to their charge upon the trust and confidence they will be cared for and managed, within the limits of the powers

As we stated in *Dodge v Ford Motor Company*, "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[29] In other words, under this state's common law, directors owe fiduciary duties first and foremost to the shareholders of the corporation; their roles within, and obligations to, the corporation cannot be properly understood without first recognizing this fundamental tenet of corporate law in Michigan.

Having recognized the existence of a fiduciary relationship between a corporation's directors and its shareholders under Michigan common law, we must next determine the scope of this relationship. Colloquially, directors are required to act with due care, with loyalty, and in good faith.[30] These amorphous concepts do not, strictly speaking, encapsulate all that is required of directors acting in their fiduciary capacity. For example, directors are required to exercise candor toward the corporation's shareholders and must disclose all material facts within their knowledge that may influence shareholder action.[31] And, given that a

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conferred by law upon the corporation, for the common benefit of all the stockholders."), citing *Ten Eyck v Pontiac, O & PAR Co*, 74 Mich 226, 232; 41 NW 905 (1889).

[29] *Dodge v Ford Motor Co*, 204 Mich 459, 507; 170 NW 668 (1919).

[30] See *Ten Eyck*, 74 Mich at 232 (explaining that corporate directors are required to act "for the common benefit of the stockholders, . . . in the utmost good faith, and in accepting the office they impliedly undertake to give to the enterprise the benefit of their best care and judgment, and exercise the powers conferred solely in the interest of the corporation"); Schulman, § 5.09[A], p 5-21 ("Directors and officers are frequently said to serve in a fiduciary relationship to the corporation and its shareholders. This fiduciary relationship includes a duty of care and a duty of loyalty.").

[31] *Reed v Pitkin*, 231 Mich 621, 627; 204 NW 750 (1925) (holding that defendant—a stockholder, member of the board of directors, secretary,

corporation is carried on primarily for the profit of its shareholders, we have stated that the "essence" of directors' fiduciary duties is to "produce to each stockholder the best possible return for his [or her] investment."[32]

Of course, courts' expectations of directors acting as fiduciaries depend heavily upon context. Although this Court has not had occasion to address directors' fiduciary duties to their shareholders in sale-of-control transactions, caselaw from Delaware provides meaningful guidance.[33] The seminal case discussing directors' duties in sale-of-control transactions is *Revlon, Incorporated v MacAndrews & Forbes Holdings, Incorporated*.[34] In that case, the Revlon board of directors used several defensive measures to fend off takeover attempts. Eventually, the sale of Revlon became inevitable. The Delaware Supreme Court explained that once it became clear that Revlon was for sale, its board of directors was no longer tasked with preserving Revlon as a corporate entity: "The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the

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treasurer, and general manager of the corporation—"[a]s agent and trustee [had a] legal duty to act towards the other stockholders in entire good faith, and he was bound to disclose to them all facts within his knowledge which were or might have been material to them, or which might influence them in their action") (quotation marks and citations omitted). See also *Lumber Village, Inc v Siegler*, 135 Mich App 685, 695; 355 NW2d 654 (1984) ("[T]here is an affirmative duty to disclose where the parties are in a fiduciary relationship.").

[32] *Thompson*, 253 Mich at 135, citing *Miner v Belle Isle Ice Co*, 93 Mich 97, 116; 53 NW 218 (1892).

[33] Delaware is commonly understood to be the leading state on matters of corporate law, and although not binding, the opinions of its courts on such matters may be persuasive.

[34] *Revlon, Inc v MacAndrews & Forbes Holdings, Inc*, 506 A2d 173 (Del, 1986).

stockholders at a sale of the company."[35] Thus, "[i]n the sale of control context, the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders—and they must exercise their fiduciary duties to further that end."[36] To be sure, " '*Revlon* neither creates a new type of fiduciary duty in the sale-of-control context nor alters the nature of the fiduciary duties that generally apply. Rather, *Revlon* emphasizes that the board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise.' "[37]

Similarly, in a cash-out merger transaction in which the decision to sell the target corporation has been made, directors of the target corporation no longer perform purely managerial duties on behalf of the corporation; instead, they are charged with negotiating the share price that the target corporation's shareholders will receive as cash.[38] Thus, in the context of a

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[35] *Id*. at 182.

[36] *Paramount Communications Inc v QVC Network Inc*, 637 A2d 34, 44 (Del, 1994). See also *Plaza Securities Co v Fruehauf Corp*, 643 F Supp 1535, 1543 (ED Mich, 1986) ("In a contest for corporate control, when directors have determined that it is inevitable that the corporation be sold, . . . the directors' cardinal fiduciary obligation to the corporation and its shareholders is to ensure 'maximization of the company's value at a sale for the stockholders' benefit.' "), quoting *Revlon*, 506 A2d at 182.

[37] *RBC Capital Markets, LLC v Jervis*, 129 A3d 816, 849 (Del, 2015), quoting *Malpiede v Townson*, 780 A2d 1075, 1083 (Del, 2001).

[38] As Maryland's highest court has explained:

> When directors undertake to negotiate a price that shareholders will receive in the context of a cash-out merger transaction, . . . they assume a different role than solely managing the business and affairs of the corporation. Duties concerning the management of the corporation's affairs change after the decision is made to sell the corporation. Beyond that point, in negotiating a share price that shareholders will receive in a cash-out merger,

cash-out merger transaction, directors of the target corporation must disclose all material facts regarding the merger and must discharge their fiduciary duties to maximize shareholder value by securing the highest value share price reasonably available.[39] This is consistent with our understanding that directors' fiduciary duties run primarily to the shareholders of a corporation and that the essence of those duties is to obtain the best possible return on the shareholders' investments.

We emphasize, however, the narrow context in which the instant case is presented. Unlike our decision in *Dodge*,[40] which involved this Court's review of the directors' decision to reinvest profits into a thriving corporation rather than declare a sizable dividend to the shareholders, the sale or dissolution of the target corporation in a cash-out merger or other sale-of-control transaction is a foregone conclusion: the long-term interests of the target corporation as an entity are of no concern. Instead, the sole focus of the board of directors is to maximize the sale price of the target corporation for the *shareholders*' benefit—not to preserve the target corporation, reinvest corporate profits for long-term returns, or further any other purpose

directors act as fiduciaries on behalf of the shareholders. As a result of the confidence and trust reposed in them during the price negotiation, their ability to affect significantly the financial interests of the shareholders, and the inherent conflict of interest that arises between directors and shareholders in any change-of-control situation, the common law imposes on those directors duties to maximize shareholder value and make full disclosure of all material facts concerning the merger to the shareholders. [*Shenker v Laureate Ed, Inc*, 411 Md 317, 338-339; 983 A2d 408 (2009) (quotation marks and some citations omitted), citing *Revlon*, 506 A2d at 182, and *Paramount*, 637 A2d at 48-49.]

[39] See *Shenker*, 411 Md at 339-341.

[40] *Dodge*, 204 Mich 459.

aimed at serving the interests of the *corporation*. Here, plaintiff alleges that defendants breached their fiduciary duties owed to him in handling the cash-out merger such that he may bring a direct shareholder action. This challenge to the validity and fairness of the merger assumes that the sale of Covisint was a foregone conclusion. Therefore, we are not tasked with reviewing defendants' business decision to sell Covisint in the first place.

Accordingly, we conclude that, under Michigan common law, corporate directors owe fiduciary duties directly to their shareholders. In the context of a cash-out merger transaction in which the decision to sell the target corporation has been made, directors of the target corporation must disclose all material facts to shareholders regarding the merger and must exercise their fiduciary duties with one goal in mind: maximizing shareholder value by securing the highest value share price reasonably available.[41]

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[41] The Delaware Supreme Court has stated that the board of directors' "fiduciary duty of disclosure, like the board's duties under *Revlon* and its progeny, is not an independent duty but the application in a specific context of the board's fiduciary duties of care, good faith, and loyalty." *RBC Capital Markets*, 129 A3d at 849 (quotation marks, citations, and brackets omitted). We do not purport to define the precise contours of the common-law fiduciary duties that directors owe to the shareholders of the corporation or how those duties relate to one another. To attempt to do so would be an exercise in futility given the complexity of these fluid concepts in the dynamic world of corporate law. For purposes of this case, it is enough to conclude that, under this state's common law, corporate directors owe fiduciary duties directly to the shareholders and, in the context of a cash-out merger transaction, are required to discharge those duties toward a specific objective: maximizing the sale price of the target corporation for the benefit of its shareholders.

C. ABROGATION

Having concluded that corporate directors owe their shareholders certain fiduciary duties under this state's common law, this Court, as "the principal steward of Michigan's common law,"[42] must determine whether the Legislature abrogated these duties when it enacted the BCA. "The common law remains in force until 'changed, amended or repealed.' "[43] The Legislature may alter or abrogate the common law through its legislative authority.[44] Yet the mere existence of a statute does not necessarily mean that the Legislature has exercised this authority. We presume that the Legislature "know[s] of the existence of the common law when it acts."[45] Therefore, we have stated that "[w]e will not lightly presume that the Legislature has abrogated the common law" and that "the Legislature should speak in no uncertain terms when it exercises its authority to modify the common law."[46] As with other issues of statutory interpretation, the overriding question is whether the Legislature intended to abrogate the common law.[47] As discussed, this Court has consistently recognized that directors owe fiduciary duties directly to the shareholders of the corporation,

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[42] *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 258; 828 NW2d 660 (2013) (quotation marks and citation omitted).

[43] *Velez v Tuma*, 492 Mich 1, 11; 821 NW2d 432 (2012), quoting Const 1963, art 3, § 7.

[44] *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 473; 952 NW2d 434 (2020); Const 1963, art 4, § 1.

[45] *Wold Architects & Engineers v Strat*, 474 Mich 223, 234; 713 NW2d 750 (2006).

[46] *Velez*, 492 Mich at 11-12 (quotation marks and citations omitted).

[47] *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) ("Whether a statutory scheme . . . preempts the common law is a question of legislative intent.").

both before and after the adoption of the BCA.[48] This is, of course, compelling evidence that the Legislature did not abrogate those common-law duties. But even more compelling is a review of the relevant statutory history, which offers critical textual clues in support of this conclusion.[49]

In 1931, the Legislature enacted the General Corporation Act, the predecessor to the BCA.[50] Section 47 of the General Corporation Act codified directors' fiduciary duties to provide, in relevant part:

> The directors of every corporation, and each of them, *in the management of the business, affairs, and property of the corporation*, and in the selection, supervision and control of its committees and of the officers and agents of the corporation, shall give the attention and exercise the vigilance, diligence, care and skill, that prudent men use in like or similar circumstances.

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[48] See *In re Butterfield Estate*, 418 Mich 241, 255-256; 341 NW2d 453 (1983) ("[W]hen a board's refusal to declare a dividend constitutes a breach of its fiduciary duty to the shareholders, this amounts to a breach of trust and is ground for court intervention."); *Thomas*, 363 Mich at 118.

[49] See *Dep't of Talent & Economic Dev v Great Oaks Country Club, Inc*, 507 Mich 212, 227; 968 NW2d 336 (2021) ("A statute's history—the narrative of the statutes repealed or amended by the statute under consideration—properly forms part of its context[.]") (quotation marks, citations, and brackets omitted).

[50] 1931 PA 327. Before this act, in regard to domestic corporations, the Legislature provided that "[t]he board of directors shall exercise good faith in the conduct of the affairs of the corporation, and shall do no acts nor pay any salaries or bonuses which would tend to impair the company's business or to destroy the value of any part of its capital stock or securities; and the courts shall have full power to afford the protection provided for herein upon proper application thereto." 1921 PA 84, part 2, ch 3, § 3.

* * *

> *Action may be brought by the corporation, though or by a* director, officer, or *shareholder*, or a creditor, or receiver or trustee in bankruptcy, or by the attorney general of the state, *on behalf of the corporation against one or more of the delinquent directors*, officers, or agents, *for the violation of, or failure to perform, the duties above prescribed or any duties prescribed by this act, whereby the corporation has been or will be, injured or damaged*, or its property lost, or wasted, or transferred to one or more of them, or to enjoin a proposed, or set aside a completed, unlawful transfer of the corporate property to one knowing the purpose thereof. *The foregoing shall in no way preclude or affect any action any individual shareholder or creditor or other person may have against any director, officer, or agent for any violation of any duty owed by them or any of them to such shareholder*, creditor, or other person.[51]

Although the statute did not specify *to whom* directors owed their fiduciary duties, the language emphasized above makes clear that the Legislature intended to prescribe directors' managerial duties performed on behalf of the corporation. Indeed, § 47 allowed for derivative actions seeking redress for injuries *to the corporation* and, at the same time, expressly did not "preclude or affect any action any individual shareholder" may have for a breach of fiduciary duties owed *to the shareholder*. Section 47 did not create a statutory cause of action for any individual shareholder alleging a breach of fiduciary duties owed to shareholders; it merely recognized that direct shareholder actions alleging a breach of those duties may exist independently of the statute.[52]

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[51] 1931 PA 327, § 47 (emphasis added).

[52] See generally *Bergy Bros, Inc v Zeeland Feeder Pig, Inc*, 415 Mich 286, 292; 327 NW2d 305 (1982) (noting that MCL 450.47, repealed by 1972 PA 284, "enabled a creditor to sue a director *on behalf of the*

This statutory language remained intact until the Legislature enacted § 541 of the BCA in 1972.[53] But while that statute continued to recognize directors' fiduciary duties, it no longer included the language from § 47 of the General Corporation Act indicating that directors' breach of their statutory fiduciary duties could be brought derivatively, nor did the statute reference any duties owed to the shareholders that could be enforced through a direct shareholder action.[54] In 1989, the Legislature repealed § 541 and added § 541a in its stead,[55] but it too does not prescribe any duties owed to the shareholders, nor does it detail the manner in which actions alleging a breach of the prescribed statutory duties are to proceed, either directly or derivatively. Instead, § 541a(1) states that directors shall discharge their duties "[i]n good faith," "[w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances," and "[i]n a manner [they] reasonably believe[] to be in the best interests of the corporation."

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corporation for a breach of duty *to the corporation*" and thus "has no application in this suit by a creditor *on his own behalf*") (emphasis added).

[53] 1972 PA 284, § 541 (codified as MCL 450.1541).

[54] MCL 450.1541 provided, in relevant part:

> (1) A director or an officer shall discharge the duties of his position in good faith and with that degree of diligence, care and skill which an ordinarily prudent man would exercise under similar circumstances in a like position. . . .
>
> (2) An action against a director or officer for failure to perform the duties imposed by this section shall be commenced within 3 years after the cause of action has accrued, or within 2 years after the time when the cause of action is discovered, or should reasonably have been discovered, by a person complaining thereof, whichever sooner occurs.

[55] 1989 PA 121.

Given this statutory history, we conclude that the Legislature, in enacting the BCA, did not abrogate directors' common-law fiduciary duties owed to the shareholders of a corporation. Had the Legislature created a direct cause of action under § 47 of the General Corporation Act through which individual shareholders could bring their claims alleging a breach of directors' fiduciary duties owed to shareholders, then perhaps an argument could be made that the Legislature, by repealing § 47 and not replacing that statutory action, intended to abrogate common-law actions alleging the same. This scenario would present a difficult question as to whether the Legislature, by not including this now statutory action in the BCA, spoke in "no uncertain terms"[56] and wholly abrogated the common-law duties at issue.

But that is not the case here. The Legislature neither created nor repealed a direct shareholder action for directors' breach of their fiduciary duties owed directly to the shareholders. Absent the creation of such a statutory right or the abrogation of a statutory right that had been codified, there is no textual or other basis to conclude that the Legislature intended to abrogate the common law. Instead, in enacting the BCA, the Legislature simply stripped the language from § 47 of the General Corporation Act delineating between, on the one hand, derivative actions brought on behalf of the corporation under the statute and, on the other hand, direct shareholder actions that could exist independently of the statute. And, with its more recent changes, the Legislature provided that directors must act "in the best interests of the *corporation*."[57] Consequently, the Legislature has never created or

[56] *Velez*, 492 Mich at 11-12 (quotation marks and citations omitted).

[57] MCL 450.1541a(1)(c) (emphasis added).

codified a direct cause of action for shareholders, and it has never expressly or even impliedly rejected the common-law fiduciary duties running from corporate directors to their shareholders. Thus, none of the changes to § 541a(1) or its predecessor can reasonably be read to abrogate corporate directors' common-law fiduciary duties to their shareholders.[58]

We also disagree with defendants' contention that the BCA sets forth a comprehensive legislative scheme in which the Legislature intended the statutory duties codified in § 541a(1) to supersede and replace all common-law fiduciary duties. "In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter."[59] We, however, are not dealing with the same subject matter. Consistent with the statutory history outlined earlier, MCL 450.1541a(1) discusses the standard by which corporate directors are to discharge their managerial duties owed *to the corporation*. It does not inform us about the fiduciary duties that directors owe *to the shareholders*, particularly in a cash-out merger or other sale-of-control transaction, in which the focus of directors shifts away from preserving and furthering the interests of the corporation and moves toward maximizing the sale price of the target corporation for the benefit of its shareholders.[60] In fact, the current statutory language reflects the Legislature's continuing focus on directors'

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[58] *Velez*, 492 Mich at 11.

[59] *Wold Architects*, 474 Mich at 233 (quotation marks and citations omitted).

[60] *Revlon*, 506 A2d at 182.

duties owed to the "corporation" rather than to the shareholders.[61] Thus, the Court of Appeals' conclusion that "an action brought under § 541a seeks to redress wrongs to the corporation . . . [and] should generally be brought by the corporation or a shareholder on behalf of the corporation" is not clearly erroneous.[62]

Put simply, § 541a(1) is silent as to the fiduciary duties that corporate directors owe their shareholders. Because the Legislature is presumed to know that such duties exist at common law, we will not infer wholesale abrogation of all common-law fiduciary duties from this silence. Contrary to defendants' argument, § 541a(1) does not provide the sole source of directors' fiduciary duties. MCL 450.1541a(1) only encompasses directors' managerial duties owed to the corporation, leaving the common-law fiduciary duties that directors owe to their shareholders untouched.[63] Absent a clear

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[61] MCL 450.1541a(1)(c).

[62] *Murphy*, unpub op at 4, citing *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270, 283; 659 NW2d 84 (2002) (stating in dicta that "plaintiffs in § 541a suits typically represent the corporation and bring their suits as derivative actions pursuant to § 492a," MCL 450.1492a).

[63] This Court has recognized that statutes and common-law rules governing the same *general* subject matter may coexist absent the Legislature's intent to change the latter. See, e.g., *Wold Architects*, 474 Mich at 234 (explaining that the Legislature's enactment of the since-repealed Michigan arbitration act (MAA), MCL 600.5001 *et seq*., did not abrogate common-law arbitration because "[s]tatutory and common-law agreements to arbitrate have long coexisted," "[n]othing in the MAA indicates that the Legislature intended to change this existing law," and "[w]hen wording the MAA, the Legislature could easily have stated an intent to abrogate common-law arbitration"). Such is the case here. The statutory duties that directors owe to the corporation under MCL 450.1541a coexist with the common-law fiduciary duties that directors owe to the corporation's shareholders recognized in various judicial decisions. Had the Legislature intended to abrogate all common-law fiduciary duties, it could have easily done so.

legislative intent, we will not presume that the Legislature, in enacting the BCA, exercised its authority to abrogate those common-law duties.

D. DISTINCTION BETWEEN DIRECT AND DERIVATIVE SHAREHOLDER ACTIONS

Having recognized the precise fiduciary duties at issue and their source under Michigan common law, we must now determine whether a claim for breach of these fiduciary duties must be brought directly or derivatively. In framing the distinction between direct and derivative actions under Michigan law, the Court of Appeals stated:

> While corporate directors and officers owe fiduciary duties to the shareholders, "a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer, or employee." *Michigan National Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989); see also *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 474; 666 NW2d 271 (2003). Our Courts, in distinguishing between a direct and derivative shareholder suit, have recognized two exceptions to this general rule where (1) the individual "has sustained a loss separate and distinct from that of other stockholders generally," *Christner v Anderson, Nietzke & Co, PC*, 433 Mich 1, 9; 444 NW2d 779 (1989) (quotation marks omitted), or where (2) the individual shows a "violation of a duty owed directly to the individual that is independent of the corporation," *Belle Isle Grill*, 256 Mich App at 474; see also *Mudgett*, 178 Mich App at 679-680.[64]

The Court of Appeals correctly recognized that a suit to enforce corporate rights or to redress injury to the corporation is a derivative suit; although it may be

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[64] *Murphy*, unpub op at 4.

brought by the shareholder, the action itself belongs to the corporation.[65] If a claim is derivative, a shareholder has no standing to sue except on behalf of the corporation. Further, a shareholder bringing a derivative action must comply with numerous statutory requirements before bringing that action, including making a showing that the corporation has refused to proceed after suitable demand by the shareholder, which plaintiff has undisputedly not done here.[66] A direct action, on the other hand, belongs to the shareholder; it seeks redress for harm done to the shareholder or to enforce a personal right belonging to the shareholder independently from the corporation.[67] In other words, when the shareholder suffers the harm or seeks to enforce a personal right, the "general rule" articulated by the Court of Appeals that an action is derivative does not apply.

Therein lies the problem with the general rule-exception framework that Michigan courts have applied to distinguish direct and derivative actions brought by shareholders. By assuming that the claim belongs to the corporation and then looking to whether an exception exists to permit the claim to be brought directly, our courts overlook the fundamental inquiry at the heart of the distinction between direct and derivative shareholder actions: the nature of the wrong

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[65] *Dean v Kellogg*, 294 Mich 200, 207; 292 NW 704 (1940) (explaining that derivative suits seek "to enforce a claim of the corporation," "[a]ny recovery runs in favor of the corporation, for the shareholders do not sue in their own right," and shareholders "derive only an incidental benefit").

[66] MCL 450.1493a. See also MCL 450.1492a (detailing the criteria that a shareholder must meet before commencing and maintaining a derivative action).

[67] See 19 Am Jur 2d, Corporations, § 1923, p 94.

alleged by the complaining shareholder.[68] In *Tooley v Donaldson, Lufkin & Jenrette, Inc*, the Delaware Supreme Court stated that the proper analytical distinction between direct and derivative actions "turn[s] *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"[69] In clarifying its framework, the Court in *Tooley* rejected its prior caselaw requiring a plaintiff-shareholder seeking to bring a direct claim to allege a "special injury," i.e., "a wrong that is separate and distinct from that suffered by other shareholders, or a wrong involving a contractual right of a shareholder, such as the right to vote, or to assert majority control, which exists independently of any right of the corporation."[70] The *Tooley* Court explained that the "special injury" concept can be confusing in identifying the nature of the action and that it improperly limits direct shareholder claims because "a direct, individual claim of stockholders that does not depend on harm to the corporation can also fall on all stockholders equally, without the claim thereby becoming a derivative claim."[71] As a result, the Delaware Supreme Court in *Tooley* disapproved of the "special

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[68] *Id*. at 95 ("[I]t is the body of the complaint or the nature of the wrong alleged that determines whether a claim against a corporation is direct or derivative; courts distinguish between direct and derivative claims by shareholders, by looking at the nature of the right claimed to be violated, and the remedy sought."); McLaughlin, § 9:1 ("The distinction between a derivative and direct claim turns on the nature of the wrong alleged in the complaint regardless of the plaintiff's designation.").

[69] *Tooley v Donaldson, Lufkin & Jenrette, Inc*, 845 A2d 1031, 1033 (Del, 2004).

[70] *Id*. at 1035 (quotation marks, citations, and ellipsis omitted).

[71] *Id*. at 1037.

injury" concept as a useful tool in analyzing the direct-derivative distinction and instead described the relevant inquiry as follows:

> [A] court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.[72]

We find persuasive this method of distinguishing between direct and derivative shareholder actions. Rather than framing the inquiry as a general rule that an action brought by a shareholder is derivative and determining whether any exceptions apply so as to render the action direct, we adopt the framework set forth by the Delaware Supreme Court in *Tooley*, which clearly and concisely captures the pertinent inquiry regarding the nature of the wrong alleged by the complaining shareholder.[73] This framework is similar to the "exception" to the general rule recognized by the Court of Appeals in *Belle Isle Grill* and *Mudgett*; however, rather than focusing strictly on the duty allegedly breached and asking to whom that duty is owed,[74] the *Tooley* framework streamlines the inquiry by asking (1) who suffered the harm, and (2) who will receive the benefit of any remedy. In answering the first question, the relevant inquiry is: "Looking at the

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[72] *Id*. at 1039.

[73] We are not alone in this observation. See *Keller v McRedmond Estate*, 495 SW3d 852, 876 (Tenn, 2016) (collecting cases adopting *Tooley* as a clear and simple framework to determine whether a shareholder claim is direct or derivative).

[74] *Belle Isle Grill*, 256 Mich App at 474; *Mudgett*, 178 Mich App at 679-680.

body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation?"[75] The second question, whether the benefit of any recovery will go to the corporation or the shareholders individually, logically follows from the first.[76]

Our decision in *Christner* does not alter this inquiry. Although this Court in *Christner* agreed with the Court of Appeals' articulation of an aspect of the "special injury" concept—i.e., that " '[a] stockholder may individually sue corporate directors, officers, or other persons when he has sustained a loss separate and distinct from that of other stockholders generally' "[77]—that the Delaware Supreme Court appeared to reject in *Tooley*, our decision in *Christner* did not purport to adopt an explicit or exclusive test for distinguishing between direct and derivative actions. Instead, *Christner* simply recognized one avenue through which a shareholder may bring a direct shareholder action.[78] Further, we did not hold in *Christner* that a harm suffered by *all* stockholders is necessarily derivative. Thus, the Delaware Supreme Court's rejection of "the concept that a claim is necessarily derivative if it

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[75] *Tooley*, 845 A2d at 1036 (quotation marks and citation omitted).

[76] *Id*.

[77] *Christner*, 433 Mich at 9, quoting *Christner v Anderson, Nietzke & Co, PC*, 156 Mich App 330, 344-345; 401 NW2d 641 (1986) (quotation marks and citation omitted).

[78] Indeed, unlike the prior Delaware caselaw rejected in *Tooley*, 845 A2d at 1035, that *required* a plaintiff-shareholder to sustain a "special injury" in order to bring a direct action, our decision in *Christner* does not stand for the proposition that showing a loss separate and distinct from other shareholders generally is the *only* way in which a shareholder may bring a direct action.

affects all stockholders equally"[79] is not inconsistent with our holding in *Christner*. In any event, our conclusion in *Christner* that the plaintiff-shareholder was permitted to bring a direct action was supported by additional statutory authority,[80] rendering our acceptance of the Court of Appeals' partial articulation of the "special injury" concept obiter dicta.[81] Accordingly, our decision in *Christner* does not prevent us from clarifying the proper analytical distinction between direct and derivative actions, which turns solely on who suffered the alleged harm and who would receive the benefit of any recovery.

In sum, we hold that in order to distinguish between direct and derivative actions brought by shareholders of a corporation in Michigan, courts must ask (1) who suffered the alleged harm, and (2) who would receive the benefit of any remedy recovered. The second question logically follows from the first. If the answer to both questions is the corporation, the action is derivative. If the shareholder suffers the harm independent of the corporation and receives the remedy rather than the corporation, the action is direct.

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[79] *Id*. at 1039.

[80] See *Christner*, 433 Mich at 9-11 (concluding that the plaintiff, a former employee and shareholder of the defendant corporation, was authorized by statute to maintain an individual action alleging that the other shareholder-directors breached their fiduciary duties by misappropriating the corporation's assets during the dissolution process of the corporation) (citations omitted).

[81] *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, 497 Mich 13, 21 n 15; 857 NW2d 520 (2014) ("Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication.") (quotation marks and citation omitted).

E. APPLICATION

Applying this framework, we conclude that plaintiff has standing to bring a direct shareholder action against defendants for an alleged breach of their common-law fiduciary duties in handling the Covisint-OpenText merger. As discussed, in the context of a cash-out merger transaction in which the decision to sell the target corporation has been made, directors of the target corporation must disclose to their shareholders all material facts regarding the merger and must discharge their fiduciary duties to maximize shareholder value by securing the highest value share price reasonably available. Plaintiff alleges that defendants breached their fiduciary duties in handling the cash-out merger transaction by negotiating an inadequate and unfair price for outstanding Covisint stock, engaging in self-dealing while arranging the merger, and issuing a materially incomplete and misleading proxy statement that omitted information necessary to enable the shareholders to cast an informed vote. That is, plaintiff challenges the validity and fairness of the merger itself, and any harm resulting from a breach of defendants' fiduciary duties in handling the merger injures plaintiff directly as a shareholder.[82] Indeed, ownership of shares in a corporation are the personal

[82] See *Rael v Page*, 147 NM 306, 311; 2009-NMCA-123; 222 P3d 678 (2009) ("[A] stockholder who directly attacks the fairness or validity of a merger alleges a direct injury to the stockholders, not the corporation."), citing *Parnes v Bally Entertainment Corp*, 722 A2d 1243, 1245 (Del, 1999) ("In order to state a direct claim with respect to a merger, a stockholder must challenge the validity of the merger itself, usually by charging the directors with breaches of fiduciary duty resulting in unfair dealing and/or unfair price."); *Cohen v Mirage Resorts, Inc*, 119 Nev 1, 19; 62 P3d 720 (2003) ("A claim brought by a dissenting shareholder that questions the validity of a merger as a result of wrongful conduct on the part of majority shareholders or directors is properly classified as an individual or direct claim.").

property of the shareholder,[83] and "[a] higher or lower price received by shareholders for their shares in the cash-out merger in no way implicate[s] [the corporation's] interests and causes no harm to the corporation."[84] Instead, the shareholders of the target corporation suffer the harm directly and exclusively.

Further, assuming plaintiff's allegations have merit, any remedy for defendants' breach of their fiduciary duties would flow directly to plaintiff. In a cash-out merger transaction, the target corporation itself does not receive any of the cash that constitutes the merger consideration. Rather, the acquiring corporation delivers the cash directly to the shareholders of the target corporation. Therefore, if there is a discrepancy between the amount the shareholders received and the amount found to be a fair value for their shares, that difference would belong to the shareholders, not the target corporation.

To conclude that plaintiff's claim is derivative would necessarily mean that Covisint was harmed and should recover any remedy. Such a conclusion defies logic because Covisint suffered no harm and, at this point, Covisint is a wholly owned subsidiary of OpenText. The lower courts' holding that plaintiff's claim was derivative failed to appreciate that, once the merger was consummated, plaintiff no longer owned stock in Covisint and that any derivative action belonging to Covisint passed to OpenText; therefore, plaintiff simply could not file a derivative action on Covisint's behalf.[85] Indeed, labeling plaintiff's claim as derivative

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[83] *Toles v Duplex Power Co*, 202 Mich 224, 229; 168 NW 495 (1918).

[84] *Shenker*, 411 Md at 346-347.

[85] MCL 450.1724(1)(b). See also McLaughlin, § 9:5 ("Generally, the loss of shareholder status as a result of a merger of the corporation into

would result in a windfall for OpenText, as it would have paid a reduced price for the Covisint shares *and* received a damage award payable to itself as a result of defendants' breach.[86] This scenario would leave plaintiff with no avenue for relief.[87]

IV. CONCLUSION

We hold that corporate directors owe common-law fiduciary duties directly to the shareholders of the corporation and that the BCA did not abrogate those duties. We further hold that a shareholder who alleges that directors breached their fiduciary duties owed to

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another corporation or through the dissolution of the corporation deprives the former shareholder of standing to prosecute a derivative claim on behalf of the merged or dissolved corporation. Any existing derivative claims upon consummation of the merger pass to the surviving corporation in the merger.").

[86] See *Shenker*, 411 Md at 347 ("Were Petitioners required to bring their action derivatively, any recovery would go to the corporation. Such a result demonstrates the error of labeling Petitioners' action a derivative claim, as Board Respondents retaining control of Laureate, the defendants who allegedly breached their fiduciary duties to the shareholders, would share in any potential recovery."). See also Kleinberger, *Direct Versus Derivative and the Law of Limited Liability Companies*, 58 Baylor L Rev 63, 90 (2006) (explaining that claims that corporate "management has sold out too cheaply in a merger" are direct claims because "any consideration 'left on the table' would not have benefited the [target] entity" and instead benefited the acquiring entity, which received a reduced price for the shares).

[87] See *Moore v Macquarie Infrastructure Real Assets*, 258 So 3d 750, 757; 2017-264 (La App 3d Cir 12/13/17) ("A shareholder who is victim to such a situation is left with no access to our courts for recourse. Prior to the merger, such an innocent shareholder could not bring an action given the lack of ripeness of the claim, i.e., the financial harm would have yet to occur. After the merger, the innocent, now former shareholder is left with no avenue to recover any damages due to a supposed no right of action, because any such suit must be derivative and the corporation no longer exists. Such a result also violates a strong public policy of a party having its day in court.").

the shareholder in handling a cash-out merger transaction may bring that claim as a direct shareholder action. We therefore reverse the decision of the Court of Appeals and remand this case to the Oakland County business court for proceedings consistent with this opinion.

MCCORMACK, C.J., and VIVIANO, BERNSTEIN, CLEMENT, CAVANAGH, and WELCH, JJ., concurred with ZAHRA, J.

PEOPLE v DIXON

Docket No. 162221. Argued on application for leave to appeal December 9, 2021. Decided April 28, 2022.

Hamin L. Dixon pleaded guilty in the Chippewa Circuit Court to attempted possession of a cell phone, MCL 800.283a. Defendant was serving a sentence at a state correctional facility when prison staff found him in a bathroom stall near a cell phone. A cell phone charger was later found during a search of defendant's shared prison cell. Defendant was charged with possession of a cell phone in a prison and pleaded guilty to attempted possession in exchange for dismissal of the possession charge and withdrawal of the prosecution's request for habitual-offender sentencing. The trial court assessed 25 points under Offense Variable (OV) 19, MCL 777.49(a), for conduct that threatened the security of a penal institution. The court sentenced defendant to 11 to 30 months in prison. Defendant later moved to correct an invalid sentence, arguing that the court should have assessed zero points under OV 19 because there was no evidence that his conduct had threatened the security of the prison. The court denied the motion, concluding that there was no set of circumstances under which possession of a cell phone would not threaten the security of a prison. The Court of Appeals, REDFORD, P.J., and BECKERING and M. J. KELLY, JJ., affirmed, reasoning that, like possession of drugs in a prison, possession of a cell phone in a prison is inherently dangerous. 333 Mich App 566 (2020). Defendant sought leave to appeal in the Supreme Court, and in lieu of granting leave to appeal, the Court ordered oral argument on the application. 507 Mich 924 (2021).

In an opinion by Chief Justice MCCORMACK, joined by Justices CLEMENT, CAVANAGH, and WELCH, the Supreme Court *held*:

Possession of a cell phone by a prisoner justifies a 25-point score for OV 19 only if facts establish that the defendant's conduct actually threatened the security of the prison.

1. A 25-point score for OV 19 requires the trial court to find by a preponderance of the evidence that the defendant, by their conduct, threatened the security of a penal institution. Two factual findings are necessary to satisfy this standard: (1) that the

defendant engaged in some conduct that (2) threatened the security of the prison. The Court of Appeals did not address the lack of any evidence of "conduct" by defendant, other than being near the cell phone when it was found, that threatened the security of the prison. Relying on *People v Dickinson*, 321 Mich App 1 (2017), the Court of Appeals apparently found that possession alone was sufficient conduct to warrant a score of 25 points for OV 19. However, *Dickinson* was distinguishable and unhelpful because the defendant in that case brought heroin into a prison while visiting an inmate. Therefore, the defendant's conduct was smuggling, in addition to possession. Smuggling a controlled substance into a penal institution is a crime, which justified the assessment of 25 points for OV 19; i.e., because the defendant's conduct was illegal, it threatened the security of the penal institution. *People v Carpenter*, 322 Mich App 523 (2018), was also distinguishable. The *Carpenter* panel upheld the defendant's 25-point score for OV 19 because the defendant had threatened the security of the jail where he was an inmate by attempting to smuggle controlled substances into the jail and by attacking an inmate he believed had informed jail authorities of his plan. In addition to the threat posed by smuggling, the *Carpenter* panel reasoned that the retaliatory assault was an additional threat to security, in part because it had the potential to discourage other inmates from reporting security breaches they might witness. Both *Dickinson* and *Carpenter* focused on the defendants' conduct beyond the drug possession, including smuggling and assault, to justify the assessment of 25 points for OV 19. There was no similar evidence of conduct beyond the cell phone possession in this case. Possession alone, even constructive possession, might be conduct that threatens the security of a penal institution, depending on the item possessed. For example, someone who was not authorized to possess a gun in a prison, but was found in possession of one, would threaten the security of the prison through possession alone. But determining whether possession of a cell phone threatens the security of a prison requires an assessment of the accused's conduct beyond the possession itself because, unlike a gun, a cell phone has many nonthreatening uses. Because the only evidence in this case was that defendant was near a cell phone, there was no support for the trial court's finding that defendant engaged in conduct that threatened the security of the prison.

2. The Court of Appeals panel relied on the holding in *Dickinson* that controlled substances posed a threat because controlled substances were inherently dangerous. The Court of Appeals in this case saw cell phones the same way and was

persuaded that because the Legislature made possessing a cell phone in prison a crime, that act is necessarily a threat to the security of a penal institution. According to this view, the specific facts of the possession are not relevant. But the statute does not support the Court of Appeals' textual shortcut. MCL 800.285(1) provides only a maximum sentence for someone who violates it and does not address minimum or appropriate sentencing. Offense variables are intended to generate a sentencing range that reflects the particular facts of each case. If OV 19 instructed the court to assess 25 points for possession of a cell phone in prison, then the position of the Court of Appeals would be persuasive. But OV 19 requires the court to find that the defendant's conduct threatened the security of the prison. Although some cell phone possession by prisoners meets that standard, not all of it does. Because the sentencing court found no facts beyond constructive possession, there was no evidence that defendant's conduct threatened the security of the prison, so OV 19 was improperly scored.

Reversed and remanded.

Justice VIVIANO, joined by Justice ZAHRA, dissenting, opined that common sense and the overwhelming consensus of legal authorities indicated that prisoners in possession of cell phones pose an obvious danger to prison staff and other inmates, regardless of whether the phone has been used or is being used to commit a new crime at the moment of discovery. Justice VIVIANO noted that the Legislature clearly indicated that cell phones threaten the security of penal institutions by enacting MCL 800.283a, and numerous decisions from other jurisdictions have explained the dangers of cell phones in prison. Additionally, media reports and data indicate that cell phones pose significant risks in prisons and have been used by prisoners to conduct criminal activity and foment discord within prisons. The majority tried to avoid this conclusion, that cell phones pose a severe risk to prison security by enabling harmful conduct, by artificially dividing the statute into two parts. First, the majority determined that mere possession of a cell phone is insufficient to constitute conduct, without defining "conduct." In a criminal setting, "conduct" refers to particular acts that have been proscribed, and the conduct proscribed by the statute at issue is possession. Therefore, according to Justice VIVIANO, there was no serious debate that defendant was engaged in "conduct" in this case, even if he only possessed or attempted to possess the cell phone. Second, the majority suggested that there must be particular facts that establish a threat in order to satisfy the

requirements of the statute. To "threaten" means to be a source of danger or menace to something. The risk of danger need not materialize in order for conduct to be threatening. Therefore, whether defendant had or had not used the cell phone in a dangerous manner was irrelevant because the risk itself constituted the threat. Similarly, whether cell phones were inherently dangerous was irrelevant. OV 19 is not limited to items that are dangerous in every context, but rather requires consideration of whether the item is dangerous when possessed by an inmate in a prison. Because possession of a cell phone by a prisoner endangered the safety of the prison, Justice VIVIANO would have affirmed the judgment of the Court of Appeals.

Justice BERNSTEIN, dissenting, agreed that simple possession of a cell phone may not be enough to assess 25 points for OV 19, but disagreed with the majority's analysis of the statute as imposing two independent requirements: (1) an offender must engage in some conduct that threatens the security of the prison, and (2) that conduct threatens the security of the prison. According to Justice BERNSTEIN, it was not clear that these were independent requirements, especially given that the majority acknowledged that mere possession is conduct. Moreover, the majority's analysis collapsed into the second requirement when it concluded simply that mere possession cannot be sufficient conduct to score 25 points under MCL 777.49(a) because a cell phone can be used in a nonthreatening manner. Justice BERNSTEIN noted that although the majority distinguished *Dickinson* and *Carpenter* under the conduct requirement, the majority did not explain why the Court of Appeals panel erred by relying on these two cases under the threat requirement. Justice BERNSTEIN suggested that scoring points for OV 19 might require a finding that a defendant intended to threaten the security of a penal institution and that interpreting "threatened" to include an element of intent would have the benefit of being grounded in the text of the statute and would require a showing of more than mere possession. Further, Justice BERNSTEIN opined that assessing intent for a prisoner's possession of any sort of contraband would be a simpler test to employ than determining an item's inherent dangerousness.

CRIMINAL LAW — SENTENCING GUIDELINES — OFFENSE VARIABLES — SECURITY OF A PENAL INSTITUTION — POSSESSION OF A CELL PHONE BY A PRISONER.

Offense Variable (OV) 19 addresses threats to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services; a prisoner's possession of a cell phone in prison might justify a 25-point score for OV 19 because it threatens the security of the prison, but only

if facts establish that the defendant's conduct, in fact, threatened the security of the institution; a hypothetical threat is not sufficient to support a score of 25 points (MCL 777.49).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Robert L. Stratton III*, Prosecuting Attorney, for the people.

Curcio Law Firm PLC (by *C. Nicholas Curcio*) for defendant.

MCCORMACK, C.J. Hamin Lorenzo Dixon pled guilty to attempted possession of a cell phone in prison in violation of MCL 800.283a. At sentencing, the trial court assigned Dixon 25 points under Offense Variable (OV) 19 for "conduct threaten[ing] the security of a penal institution . . . ." MCL 777.49(a). The court cited the inherent dangerousness of possessing a cell phone in prison to support this score, and the Court of Appeals agreed. That is, the court assessed 25 points for the very conduct that made Dixon guilty of the offense—possessing the phone—and only that conduct. It did not find any additional facts to support the point assessment.

We find possession alone was not enough in this case. Some prison cell phone possession will be conduct that threatens the security of the prison and some won't; the facts of the possession matter. Because the trial court did not rely on any facts beyond Dixon's possession and nothing about that was inherently threatening, we reverse the Court of Appeals and remand for resentencing.

I. FACTS AND PROCEDURAL HISTORY

Dixon was serving a sentence at Kinross Correctional Facility when prison staff found him in a bath-

room stall with a cell phone nearby. A later search of his shared prison cell revealed a cell phone charger. Dixon was charged with possession of the phone in a prison in violation of MCL 800.283a. He pled guilty to attempted possession in exchange for the prosecution's dismissing the possession charge and withdrawing a request for habitual-offender sentencing.

The probation department's Presentence Investigation Report proposed an assessment of 25 points under OV 19, making the recommended guidelines range for the defendant's minimum sentence 5 to 17 months. A 25-point score is assessed under OV 19 when the court finds that "[t]he offender by his or her conduct threatened the security of a penal institution . . . ." MCL 777.49(a). Had Dixon received zero points under OV 19, his recommended minimum sentence guidelines range would have been 0 to 17 months.

The court sentenced Dixon to a minimum term of 11 months in prison and a maximum term of 30 months in prison. After sentencing, Dixon moved to correct an invalid sentence, arguing that he should have received zero points under OV 19. He argued that there was no evidence that he had used the cell phone to threaten the security of the prison—in fact, no evidence showed that he had used the cell phone or even that it worked. The court denied the motion, reasoning that cell phones are inherently dangerous. That is, the court believed that there is no set of circumstances in which possessing a cell phone wouldn't threaten the safety of the prison, as would possession of a weapon. Under the court's reasoning, every possession of a cell phone in prison—even one that's inoperative—requires a 25-point score under OV 19.

Dixon appealed, and the Court of Appeals affirmed. *People v Dixon*, 333 Mich App 566; 963 NW2d 378

(2020). In upholding the 25-point score, the Court analogized possession of a cell phone in prison to possession of drugs in prison, citing its decision in *People v Dickinson*, 321 Mich App 1; 909 NW2d 24 (2017). In *Dickinson*, a prison visitor tried to smuggle heroin into the facility and was convicted of furnishing a controlled substance to a prisoner, MCL 800.281(1), among other offenses. *Id*. at 4-6. The Court of Appeals held in *Dickinson* that smuggling a controlled substance into prison justified a 25-point score for OV 19 because it inherently threatens the security of the institution. *Dixon*, 333 Mich App at 573, citing *Dickinson*, 321 Mich App at 23-24. Just like heroin, the *Dixon* panel reasoned, cell phones are inherently dangerous because of the "numerous ways in which a prisoner may use such a device for illicit purposes . . . ." *Dixon*, 333 Mich App at 573. And, just as the Legislature criminalized the possession of drugs in prison, it criminalized cell phone possession too, "indicat[ing] that prisoners shall not have cell phones within a penal institution because of the inherent dangers posed by [their] presence . . . ." *Id*. Like the trial court, the Court of Appeals concluded that every possession—and attempted possession—of a cell phone warrants a 25-point score under OV 19.

Dixon sought leave to appeal in our Court. We ordered oral argument on the application to address whether an attempted violation of MCL 800.283a necessarily requires a score of 25 points for OV 19 and, if not, whether there is sufficient evidence to score OV 19 at 25 points in this case. *People v Dixon*, 507 Mich 924 (2021).

II. ANALYSIS

We review a trial court's factual determinations at sentencing for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation" that we review de novo. *Id*. When the guidelines range is incorrectly calculated and that error alters the range, a defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

The purpose of OVs is to tailor a recommended sentence to a particular case. See *People v Lockridge*, 498 Mich 358, 391; 870 NW2d 502 (2015) (crediting our sentencing scheme with " 'helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary' "), quoting *United States v Booker*, 543 US 220, 264-265; 125 S Ct 738; 160 L Ed 2d 621 (2005). The OVs are a procedural mechanism for courts to individualize sentencing to the offense and the offender. A 25-point score under OV 19 requires the trial court to find by a preponderance of the evidence that the defendant "by his or her conduct threatened the security of a penal institution or court." MCL 777.49; *Hardy*, 494 Mich at 438 ("Under the sentencing guidelines, the circuit court's factual determinations . . . must be supported by a preponderance of the evidence.").

To satisfy this standard, a court must find (1) that the defendant engaged in some conduct and (2) that conduct threatened the security of the prison. The facts showed Dixon was in a bathroom stall near a cell phone and that there was a charger in his shared cell. No evidence showed that he used the phone, was

planning to use it, or even held it. In fact, no facts showed that the phone was operable.

A. POSSESSION AS CONDUCT

The Court of Appeals did not specifically address OV 19's "conduct" requirement or whether Dixon's constructive possession satisfied it. Instead, relying on *People v Dickinson*, which upheld a 25-point OV 19 score for drug smuggling in penal institutions, the panel reasoned that the possession of a cell phone is inherently threatening to the security of the prison. It seems the panel believed that the constructive possession alone was sufficient conduct.

But we find *Dickinson* distinguishable and unhelpful. In *Dickinson*, the defendant was visiting an inmate at Lakeside Correctional Facility when a sergeant observed her hand the inmate a concealed object: a small balloon filled with heroin. *Dickinson*, 321 Mich App at 5-6. The Court of Appeals held that 25 points were properly assessed for OV 19 because "[b]ringing a controlled substance like heroin into a prison and delivering it to a prisoner . . . inherently puts the security of the penal institution at risk." *Id*. at 23. The defendant's *conduct* was not the possession alone, but the smuggling of the illegal substance into the prison. The panel was also convinced that the assessment was justified since smuggling controlled substances into penal institutions is a crime. That fact too was evidence of "the seriousness of the problem" of delivering "an unquestionably dangerous drug" into our prisons. *Id*. at 23-24. Put differently, since the conduct—drug smuggling and possession—was illegal, it threatened the security of the institution.

People v Carpenter, 322 Mich App 523; 912 NW2d 579 (2018), which Justice BERNSTEIN also finds persua-

sive, is also distinguishable and unhelpful. In that case, the defendant, who was in pretrial detention for several charges, tried to smuggle controlled substances into the jail and struck and injured another inmate whom he believed had informed jail authorities of his smuggling plan. *Id*. at 526-527. At the defendant's sentencing on the initial charges for which he had been detained, the trial court assessed 25 points for OV 19 on the basis of the smuggling and the assault. *Id*. at 527. The Court of Appeals upheld the defendant's OV 19 score because "by attempting to bring controlled substances into [the jail] and by attacking another inmate" the defendant threatened the security of the penal institution. *Id*. at 530. The panel reasoned that "[t]he smuggling of controlled substances into a jail" poses a threat "because of the dangers of controlled substances to the users and those around them." *Id*. at 531. The retaliatory assault was an additional threat to security because it had the potential to discourage other inmates "from coming forward about security breaches they might witness." *Id*.

Neither *Dickinson* nor *Carpenter* provide us any help in evaluating Dixon's conduct for OV 19. Both decisions focused on the defendants' conduct beyond the drug possession—drug smuggling and assault—to justify a 25-point score. The Court of Appeals did not address this important difference or explain why constructive possession alone was sufficient; nor does Justice BERNSTEIN.

To be sure, we agree with Justice VIVIANO that possession alone, even constructive possession, could be "conduct" for purposes of scoring OV 19. And possession might be "conduct [that] threaten[s] the security of a penal institution" depending on the item possessed. Someone not authorized to possess a

weapon in a prison who possesses a gun would threaten the security of the prison by that possession alone. But a cell phone is not a gun, and determining whether cell phone possession threatens the security of a prison requires assessment of the accused's conduct beyond the possession itself. That is, unlike possession of a weapon, the nature of the cell phone possession is important to determining whether it "threatened the security of a penal institution" because cell phones have many nonthreatening uses. Here, where the only evidence was that Dixon was near a cell phone, there is no support for the trial court's finding that Dixon engaged in conduct that threatened the security of the prison.

B. CELL PHONES AS A THREAT

The Court of Appeals also relied on the *Dickinson* panel's reasoning in analyzing whether the defendant's conduct threatened the penal institution. The *Dickinson* panel held that smuggling controlled substances is inherently dangerous in penal institutions. The *Dickinson* panel was specifically persuaded by the fact that smuggling drugs into prison is a crime—criminal activity in a prison is threatening to the prison.

The Court of Appeals saw cell phones the same way. The panel was persuaded that because possessing a cell phone in a prison is a crime, that act necessarily threatens the security of the prison. The specific facts about the possession aren't relevant—proof of the crime is also proof sufficient to support a score of 25 points for OV 19.

But we don't see a textual basis for the panel's shortcut. Dixon's crime is the reason he was being sentenced. But the statute creating the criminal of-

fense Dixon pled guilty to provides only a maximum sentence for someone who violates it. See MCL 800.285(1). It doesn't direct a minimum sentence or an appropriate sentence. That's where OVs come in; OVs generate a sentencing range meant to reflect the particular facts of the case. Each OV represents a factor that the Legislature believes is relevant to determining an appropriate sentence in a specific case.

If OV 19 instructed a court to assess 25 points for possessing a cell phone in a prison, or for committing a crime in a prison, then we would agree with the Court of Appeals. But OV 19 requires that the court find that the defendant's "conduct threatened the security of [the prison]." Some prisoner cell phone possession surely meets that standard. Not all does.

Justice VIVIANO lists numerous ways a cell phone can be used for illicit, threatening purposes. We agree with his list; cell phones can be used in threatening ways, particularly in prisons. But if a 25-point score is warranted under OV 19 for mere possession of any object that hypothetically could pose a threat with some creativity, the OV becomes boundless. We agree with Justice VIVIANO that "[c]ontext is thus critical."

Here, that context is that no facts showed that Dixon used the phone or that it was operational. Because the court found no facts beyond the constructive possession, there was no evidence that Dixon's conduct threatened the security of the prison. As a result, OV 19 was improperly scored.

III. CONCLUSION

Possessing a cell phone in prison might justify a 25-point score for OV 19 because it threatens the security of the prison, but only if facts establish that the defendant's conduct, in fact, threatened the secu-

rity of the institution. A hypothetical threat isn't enough. Because no such facts were presented to establish that Dixon's possession threatened the prison, the court should not have assessed 25 points under OV 19. We reverse the opinion of the Court of Appeals and remand to the trial court for resentencing consistent with this opinion.

CLEMENT, CAVANAGH, and WELCH, JJ., concurred with MCCORMACK, C.J.

VIVIANO, J. (*dissenting*). The majority today holds that prisoners who secretly possess cell phones inside of a prison do not "threaten[] the security of a penal institution." MCL 777.49(a). That conclusion is puzzling. The plain language of Offense Variable (OV) 19 encompasses conduct that poses a risk to the safety of a penal institution without requiring more. Common sense and the overwhelming consensus of legal authorities tell us that prisoners who possess cell phones within the prison walls pose an obvious danger to prison staff and other prisoners, whether or not the phone has been used or is being used at the precise moment of discovery to commit a new crime. For these reasons, I respectfully dissent.

Defendant has a lengthy criminal history which includes a number of crimes committed while he was incarcerated, such as attempted murder, witness intimidation, and felonious assault. While serving time for these crimes, defendant committed the instant offense. In 2016, prison staff discovered defendant in a bathroom with a cell phone in his possession. The cell phone was confiscated, and a subsequent search of defendant's prison cell revealed a cell phone charger. Defendant was charged as a fourth-offense habitual

offender with being a prisoner in possession of a cell phone under MCL 800.283a(2), a public-safety offense.

Defendant pleaded guilty to attempted possession of a cell phone in exchange for the dismissal of the possession charge and the habitual-offender enhancement. At sentencing, defendant did not object to the court's assessment of 25 points for OV 19 for conduct threatening the security of a penal institution. Indeed, his counsel stated, "I believe the scoring to be accurate."[1] However, defendant later moved to correct an invalid sentence, arguing that OV 19 was incorrectly scored. The trial court denied defendant's motion, and the Court of Appeals affirmed in a published opinion, holding that it is "axiomatic that a prisoner's possession of contraband like a cell phone threatens the safety and security of the prison staff and prisoners . . . ." *People v Dixon*, 333 Mich App 566, 573; 963 NW2d 378 (2020). Defendant has appealed here, objecting to the scoring of OV 19.

MCL 777.49(a) provides that OV 19 is properly scored at 25 points when "[t]he offender by his or her conduct threatened the security of a penal institution." The question in this case is whether defendant's possession of a cell phone is conduct that threatened the security of a penal institution. That question is easily answered by referring to the record in this case, our state's laws, numerous precedents, and common sense. The presentence investigation report—prepared by the Michigan Department of Corrections, the very agency responsible for administering the state's prisons—lists

[1] Arguably, this concession waives any challenge defendant could bring to the scoring. Nevertheless, the prosecutor has not argued waiver, and the majority has reached the merits. I will therefore address the alleged error.

the numerous ways a cell phone may be used by a prisoner for illicit purposes:

> The possession and use of a device that has cellular telephone capabilities within the secure perimeter of a correctional facility puts both staff and inmates' lives in jeopardy. An inmate's ability to engage freely in unmonitored conversations with outside entities puts correctional administrators at a serious disadvantage with regard to institutional safety and security. Matters such as escape, assault (both staff and prisoner) and introduction of contraband may be freely discussed by a prisoner possessing and utilizing an unauthorized cellular telephone.

The Legislature certainly thought that cell phones in prisons were dangerous. That is why it criminalized prisoner possession of cell phones in 2012, imposing a penalty of up to five years' imprisonment and a $1,000 fine. 2012 PA 255, amending MCL 800.283a; see also MCL 800.285.[2] Another Michigan statute demonstrates the link between prison telephone communications and prison security. MCL 791.270(1)(b) permits monitoring of prisoner telephone calls on the Prisoner Telephone System if, among other things, "[t]he monitoring is routinely conducted for the purpose of preserving the security and orderly management of the correctional facility . . . ." Cell phone communications are even more dangerous because they cannot be monitored in this fashion.

In addition, numerous decisions from other courts, addressing a variety of issues, have explained the dangers of cell phones in prisons. Congress has deemed prisoner possession of cell phones to be a crime pun-

[2] This conclusion finds support from *People v Dickinson*, 321 Mich App 1, 24; 909 NW2d 24 (2017), which similarly noted that the criminalization of controlled substances in prison was evidence of the substances' dangerousness to the penal institution.

ishable by imprisonment. 18 USC 1791. In a case predating that provision, the United States Court of Appeals for the Third Circuit examined whether a predecessor statute applied to such possession. *United States v Blake*, 288 F Appx 791 (CA 3, 2008). The prisoner-defendant in that case was found with a cell phone and charger and was convicted under 18 USC 1791(d)(1)(F), which, when *Blake* was decided, banned "any other object that threatens the order, discipline, or security of a prison, or the life, health, or safety of an individual." PL 99-646, § 52; 100 Stat 3592. The defendant argued that this catchall provision was void for vagueness. *Blake*, 288 F Appx at 793.

The court had no problem rejecting this argument: "Given the unique prison context in which the statute is applied, the ordinary person would know that possessing a cell phone and a charger in prison 'threatens the order, discipline, or security' of that institution." *Id*. at 793-794. "To begin with," the court noted, "the risks presented when inmates possess cell phones and cell phone chargers are patent." *Id*. at 794. Testimony at trial from a prison official noted that cell phones could be used to intimidate witnesses or arrange for harassment of prison employees on the outside; charger cords could be used for strangulation or suicide. *Id*. But the court did not rely only on the trial testimony, noting in addition that "during the last several years, media outlets have documented the growing problem of, and dangers associated with, prisoners possessing cell phones." *Id*. (collecting sources). The court concluded, "That cell phones can, and have been, used for various dangerous and unlawful purposes in the prison context

is, thus, quite clear." *Id*. at 795. Accordingly, the court rejected the void-for-vagueness argument.[3]

For similar reasons, other courts have upheld the application to cell phones of the Federal Bureau of Prisons' regulation prohibiting hazardous tools. Through 2010, that regulation did not expressly prohibit possession of cell phones in prison; instead, it prohibited "[p]ossession, manufacture, or introduction of a hazardous tool . . . ." 28 CFR 541.13 (2010).[4] The United States Court of Appeals for the Fifth Circuit upheld a disciplinary action under the regulation that was imposed for a prisoner's possession of a cell phone. *Evans v Martin*, 496 F Appx 442, 444 (CA 5, 2012). The court noted that other courts had rejected the argument, raised by the defendant in *Evans*, that the regulation did not give fair notice that a cell phone is a hazardous tool. *Id*. at 445 (collecting cases). Agreeing with this conclusion, the court in *Evans* stated that "[g]iven the context in which inmates are provided telephone access and the important goal of maintain-

[3] See also *Robinson v Warden*, 250 F Appx 462, 464 (CA 3, 2007) (reaching the same conclusions as *Blake*); cf. *People v Green*, 32 Misc 3d 447, 454-455; 927 NYS2d 296 (NY Co Ct, 2011) (holding "that as a matter of law a cell phone, no matter how a defendant may use it, is inherently *dangerous* because a cell phone or other telecommunication device has a substantial probability that the item itself may be used in a manner that is likely to bring out major threats to a detention facility's institutional safety or security by the defendant, or other inmates, in the facility"); but see *United States v Beason*, 523 F Appx 932, 935 (CA 4, 2013) (reaching a conclusion contrary to *Blake*, but largely on the basis that cell phones were unlike the other items enumerated in the statute, including weapons, intoxicating substances, and cash).

[4] Hazardous tools were defined as "[t]ools most likely to be used in an escape or escape attempt or to serve as weapons capable of doing serious bodily harm to others; or those hazardous to institutional security or personal safety; e.g., hack-saw blade." 28 CFR 541.13 (2010). The rule was subsequently amended to include "portable telephone[s]." See 28 CFR 541.3 (2021).

ing institutional order, it is clear that an unauthorized cell phone falls within the definition of a hazardous tool because a cell phone can be used to plan an escape or to undermine safety and security." *Id*.; see also *id*. at 445-446 (noting that access to cell phones would "allow inmates to prepare escape plans, procure contraband, and conspire to harm others—including both security personnel and fellow inmates"). It would therefore be clear to an inmate that a cell phone was a hazardous tool. *Id*. at 446.

The dangers discussed in these cases have been demonstrated numerous times. A Senate Fiscal Agency legislative analysis noted the serious problems cell phones had caused in Michigan prisons. See Senate Legislative Analysis, SBs 551 and 552 (June 27, 2012).[5] Other states and countries have seen prisoners use cell phones to conduct criminal activity and foment discord within prisons.[6] The media sources cited in *Blake* similarly demonstrate that cell phones pose significant risks in prison. *Blake*, 288 F Appx at 794-795. And the problem is widespread, as cell phones

[5] I am not, of course, using this document to help interpret the text of the statute; rather, I am consulting it for the factual information it contains about the dangers of cell phones in prisons.

[6] See Christie, *Disconnected: The Safe Prisons Communications Act Fails to Address Prison Communications*, 51 Jurimetrics J 17, 32 (2010) (noting examples); Burke & Owen, *Cell Phones as Prison Contraband*, 79 FBI Law 10 Enforcement Bulletin (July 1, 2010) <https://leb.fbi.gov/articles/featured-articles/cell-phones-as-prison-contraband> (same) [https://perma.cc/W392-H77A]. Just a few years ago, a drone successfully dropped marijuana and cell phones to prisoners in a Michigan prison. Gerstein, *Drone Sneaks Package into Michigan Prison*, The Detroit News (October 1, 2017) <https://www.detroitnews.com/story/news/local/michigan/2017/10/01/report-drone-sneaks-contraband-prison/106224348/> [https://perma.cc/9Z55-7ENR] (noting the successful delivery by drone of marijuana and cell phones to inmates).

pervade the prison system. Skarbek, *The Social Order of the Underworld: How Prison Gangs Govern the American Penal System* (New York: Oxford University Press, 2014), p 22 (noting the high number of seizures of phones in California and calculating the likely high number of cell phones in prisons).

These sources confirm what common sense tells us. Cell phones in a prison pose a severe risk to prison security because they enable so much harmful conduct. Escapes can be planned and attacks on guards arranged. Cell phones can also facilitate deadly prison riots. Kinnard, *Governor Takes 'Emergency' Action After Deadly Prison Riots*, Associated Press (April 23, 2018) (discussing a deadly riot in South Carolina that was attributed to cell phones and also noting comments of the Director of Corrections that "cellphones . . . represent his No. 1 security threat behind bars").[7] Moreover, even as purely physical items, phones could pose risks. Just as a charger cord could be used to strangle someone, see *Blake*, 288 F Appx at 794, a cell phone might be shattered in such a way as to produce sharp shards that could be used as weapons.

The majority tries to avoid the obvious commonsense conclusion that prisoners with cell phones are a source of danger by artificially dividing the statute into two parts. First, the majority appears to conclude that mere possession of a cell phone is insufficient to constitute conduct. The analysis is hard to follow. The majority nowhere defines the term "conduct" but instead begins its analysis by distinguishing the cases the Court of Appeals relied on because those cases involved conduct in addition to possession. Perhaps

[7] Available at <https://apnews.com/article/c88dad65fed54af082e047f90ed28eal> (accessed April 4, 2022).

those cases are distinguishable with regard to the conduct at issue.[8] But this does not tell us much about whether possession of a phone constitutes "conduct."[9]

In the criminal setting, "conduct" refers to particular acts that have been proscribed. " '[T]he substantive criminal law is that law which . . . declares what *conduct* is criminal and prescribes the punishment to be imposed for such conduct.' " *People v Arnold*, 508 Mich 1, 19; 973 NW2d 36 (2021) (emphasis added), quoting 1 LaFave, Substantive Criminal Law (3d ed), § 1.2, p 11.[10] In the present case, as in many others, the proscribed conduct is possession. MCL 800.283a(2); see also *People v Gray*, 297 Mich App 22, 32; 824 NW2d 313 (2012) ("The 'conduct' relating to defendant's sentence

[8] In *Dickinson*, 321 Mich App at 5-6, 23-24, the defendant was not a prisoner in possession of drugs; rather, she brought heroin to a prisoner she was visiting. Thus, the pertinent "conduct" was the smuggling of drugs. In the other case, *People v Carpenter*, 322 Mich App 523; 912 NW2d 579 (2018), although the defendant was a prisoner, the relevant conduct was his attempted smuggling of drugs into a jail and his assault on a fellow inmate.

[9] The majority also seems to discount the conduct of possessing the cell phone *because* that conduct was involved in the underlying criminal offense. But "absent an express prohibition, courts may consider conduct inherent in a crime when scoring offense variables." *People v Hardy*, 494 Mich 430, 442; 835 NW2d 340 (2013). There is no express prohibition here. Therefore, while the majority might be concerned that OV 19 will always be scored at 25 points when the defendant is convicted under MCL 800.283a—because the underlying criminal conduct also satisfies the variable's requirements—that result is a function of the text of OV 19.

[10] This generally aligns with the dictionary definition of "conduct." At the time MCL 777.49 was passed, the relevant lay definition of "conduct" was "personal behavior; way of acting; deportment." *Webster's American Dictionary: College Edition* (2000). See also *The American Heritage College Dictionary* (2004) ("The way a person acts, esp. morally or ethically."); *Webster's New World College Dictionary* (1996) ("[T]he way that one acts; behavior; deportment"). These definitions refer to an individual's behavior.

for possession of cocaine with intent to deliver concerned defendant's possession of less than 50 grams of cocaine . . . ."). Therefore, there can be no serious debate that defendant was engaged in conduct here, even if he only possessed or attempted to possess the cell phone.[11]

The majority does not take on this conclusion directly. Instead, it says that possession of a cell phone is insufficient under the conduct requirement "because cell phones have many nonthreatening uses." *Ante* at 180. This is confusing. How does the threatening or nonthreatening nature of cell phone possession relate to whether that possession is conduct in the first place? I cannot see how it does. This seems to be, instead, an analysis of the threat requirement.

On that point—the second piece of the analysis—the majority also misreads the statute. The majority suggests that there must be particular facts showing a threat. Not all cases in which a prisoner possesses a cell phone will be threatening, according to the majority. Here, for example, there is no evidence that defendant used the phone or that the phone even worked. He was simply found near it. But nowhere does the majority attempt to define the key term. To "threaten" is "to be a source of danger" or "menace" to something; here, a penal institution. *The American Heritage College*

[11] It is true that defendant pleaded guilty to *attempted* possession. The majority does not address any distinction between possession and attempted possession of a cell phone. But that distinction might be important under the majority's strained reasoning. An attempt to possess a cell phone would necessarily involve some conduct aimed at bringing the cell phone into one's possession. Arranging to possess contraband in the prison sounds a lot like smuggling. In any case, my analysis would be the same for attempted possession under the present facts, where defendant was discovered near the cell phone and the charger was found in his cell.

Dictionary (2004). The risk of danger need not materialize for conduct to be threatening. Rather, it is the risk itself that constitutes the threat. Whether defendant had or had not yet used the cell phone in a dangerous manner is irrelevant.[12]

Moreover, the suggestion that a cell phone is not *inherently* dangerous is a red herring. We are not tasked with determining the Platonic ideal of cell phones, such that we must say whether they are dangerous in every context.[13] Rather, OV 19 requires consideration of whether the item is dangerous when possessed by an inmate in a prison. Context is thus critical. For example, when an audience member at a local theater production falsely yells "Fire!" and begins to run, that is conduct that threatens the security of the theater. When a cast member does it on stage, that is entertainment. Here, we are dealing only with threats to penal institutions. In that context, a cell phone obviously poses such a threat.

Of course, not all cell phone use by prisoners will necessarily result in harm to the institution. But that

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[12] It would seem that the only use of the phone that would meet the majority's standard is one that actually brings about the dangers that the rule seeks to prohibit from even being risked, let alone actualized. For example, an escape must be arranged or a plan to harm a prison official made before a cell phone is considered dangerous. This view would essentially require the defendant to commit an additional crime before the court could find that the cell phone represents a danger. This ignores that OV 19 covers the mere *risk* of such events happening. Further, it is unclear why the operability of the cell phone matters. A nonfunctioning phone could nonetheless provoke fights among prisoners seeking to seize the phone, or it might be used as a weapon itself, or it might be repaired and made functional again.

[13] As the Court of Appeals has recognized, OV 19 is not limited to "weapons or other mechanical destructive devices" or other items that might appear to be dangerous in every context. *Dickinson*, 321 Mich App at 24.

is not what OV 19 requires. Rather, to score 25 points for OV 19, the conduct must simply threaten the security of the penal institution. I would hold, in accordance with common sense and the courts above, that the possession of a cell phone by a prisoner endangers the safety of a prison.[14] For these reasons, I dissent and would affirm the judgment of the Court of Appeals.

ZAHRA, J., concurred with VIVIANO, J.

BERNSTEIN, J. (*dissenting*). I agree with the majority that simple possession of a cell phone may not be enough to assess 25 points under Offense Variable (OV) 19. However, I disagree with the majority's analysis and write separately to explain why.

A 25-point score under OV 19 is appropriate when "[t]he offender by his or her conduct threatened the security of a penal institution . . . ." MCL 777.49(a). The majority reads the statute as imposing two requirements: first, the offender must engage in some *conduct* that threatens the security of the prison, and second, that conduct *threatens* the security of the prison. It is unclear how we are meant to parse these as independent requirements, especially given that the majority acknowledges that mere possession is conduct.[1] The majority simply concludes that mere possession cannot be sufficient "conduct" to score 25 points

[14] By reaching the opposite conclusion, the majority's decision lowers the minimum sentence guidelines range for this activity and lessens the deterrent effect of the crime at issue. This, unfortunately, has the potential to make cell phone use in prisons even more pervasive and to make prisons less safe.

[1] In other words, if the conduct required by MCL 777.49(a) must be conduct that *threatens* the security of the prison, why isn't this requirement fully subsumed by the threat requirement?

under MCL 777.49(a) because a cell phone can be used in a nonthreatening manner; essentially, the majority's analysis collapses down into the second requirement.

As to the threat requirement, the majority states that the Court of Appeals panel engaged in a shortcut that ignores the text of the statute by relying on the fact that possessing a cell phone in prison is itself a crime. See MCL 800.283a(2). However, to the extent that the Court of Appeals panel engaged in such a shortcut, that is also true of the panels in *People v Dickinson*, 321 Mich App 1; 909 NW2d 24 (2017), and *People v Carpenter*, 322 Mich App 523; 912 NW2d 579 (2018). In both *Dickinson* and *Carpenter*, the Court of Appeals simply found that controlled substances are inherently dangerous. There was no analysis as to how mere possession "*threatened* the security of a penal institution." MCL 777.49(a) (emphasis added). Despite distinguishing these two cases under the conduct requirement, the majority does not explain why the Court of Appeals panel in this case erred in relying on these two cases under the threat requirement.

I see no meaningful difference between this case and *Dickinson* or *Carpenter*. The controlled substance at issue in *Dickinson* was heroin, and possession of heroin admittedly may seem more dangerous than possession of a cell phone. However, MCL 800.281(4) also prohibits a prisoner's possession of "any alcoholic liquor, prescription drug, poison, or controlled substance." But individuals who are of age in Michigan can legally possess alcohol, prescription drugs, and even certain controlled substances, like marijuana. As with a cell phone, mere possession of alcohol by a prisoner does not necessarily lead to the conclusion that there will be threatening conduct.

Instead of focusing somewhat vaguely on conduct as the distinguishing factor, I wonder whether focusing on the statute's use of the word "threatened" might shine more light on the proper application of OV 19. Although defendant specifically declined to make such an argument in his briefs to this Court, I am intrigued by an argument raised by Justice MARILYN KELLY: "I believe that scoring points for OV 19 may require that a defendant intend to threaten the security of a penal institution." *People v Ward*, 483 Mich 1071, 1073 (2009) (KELLY, C.J., dissenting). Specifically, Justice KELLY noted that "OV 19 arguably does include an intent requirement because of the Legislature's use of the word 'threatened.' Black's Law Dictionary's definition of 'threat' includes the element of the *intention* to cause loss or harm to something." *Id*. at 1075.

Reading "threatened" to include an element of intent would certainly have the benefit of being grounded in the text of the statute, and it would require a showing of more than mere possession. Assessing intent for a prisoner's possession of any sort of contraband would be a simpler test to employ than determining an item's inherent dangerousness: the majority opinion would seemingly classify a cell phone as less dangerous than heroin, but where would one put marijuana along the scale of dangerous items, or pain medication? What about a simple toothbrush, which could be fashioned into a weapon?

Unfortunately, because defendant declined to make such an argument, I dissent from the majority's conclusion, as I do not understand the mere nature of a cell phone to sufficiently distinguish this case from *Dickinson* or *Carpenter*.

CONSUMERS ENERGY COMPANY v STORM

Docket No. 162416. Argued on application for leave to appeal March 2, 2022. Decided May 10, 2022.

Consumers Energy Company filed an action in the Kalamazoo Circuit Court against Brian Storm, Erin Storm, and Lake Michigan Credit Union, seeking to condemn a portion of the Storms' property for a power-line easement. The Storms challenged the necessity of the easement under the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*. The trial court, Alexander C. Lipsey, J., concluded that Consumers had failed to establish the public necessity of the easement on the Storms' property and entered an order dismissing Consumers' action and awarding attorney fees to the Storms. Consumers appealed that order as of right in the Court of Appeals. The Storms moved to dismiss the appeal for lack of jurisdiction, arguing that under MCL 213.56(6), Consumers could only appeal the trial court's public-necessity determination by leave granted. The Court of Appeals initially denied the motion by order, but the order was entered without prejudice to further consideration of the jurisdictional issue by the case-call panel. The Court of Appeals case-call panel, O'BRIEN, P.J., and BECKERING and CAMERON, JJ., issued an opinion in which it agreed with the Storms that the Court of Appeals lacked jurisdiction; the Court of Appeals therefore dismissed the portion of Consumers' appeal challenging the trial court's determination of public necessity. Despite dismissing the public-necessity portion of Consumers' appeal, the Court of Appeals addressed Consumers' challenge to the trial court's award of attorney fees and vacated the attorney-fee award. 334 Mich App 638 (2020). Consumers sought leave to appeal, and the Storms sought leave to cross-appeal. The Supreme Court ordered and heard oral argument on whether to grant the applications or take other action. 508 Mich 944 (2021).

In a unanimous per curiam opinion, the Supreme Court *held*:

The UCPA provides standards for the acquisition of property by an agency, the conduct of condemnation actions, and the determination of just compensation. Under MCL 213.56(6), there must be a public necessity in order for the taking of property to be

permitted. MCL 213.56 also allows the property owner to challenge the necessity of the acquisition by filing a motion asking that the necessity be reviewed. MCL 213.56(5) provides that the court's determination of a motion to review necessity is a final judgment, and MCL 213.56(6) provides that "an order of the court upholding or determining public necessity" may be appealed in the Court of Appeals only by leave of that Court under the court rules. The UCPA allows condemning agencies to obtain title quickly so that public projects can proceed without the delays of normal civil litigation. MCL 213.56(6) does not limit appeals as of right for condemning agencies, but only for property owners. The language "an order of the court upholding . . . public necessity or upholding the validity of the condemnation proceeding" is, by its own terms, limited to circumstances in which the trial court has rejected a condemnation challenge by concluding that the condemnation was justified by public necessity or that the proceeding was otherwise valid. If the Legislature had intended the phrase "an order of the court . . . determining public necessity" to also mean *an order determining that there is no public necessity*, it could have said so. The condemning agency and the property owner are situated differently within the statutory scheme; therefore, it is appropriate to treat them differently regarding their respective appellate rights. Moreover, the language of MCL 213.56(6) indicates that the orders appealable only by leave are limited to the types of orders that would subsequently lead to "a judgment as to just compensation." There is no possibility of a judgment as to just compensation when the trial court has determined that no public necessity justified the property acquisition. This interpretation is consistent with MCL 213.56(5), which provides that the court's determination of a motion to review necessity is a final judgment. Generally, final judgments are appealable as of right. Finally, in light of the entire legislative scheme of the UCPA, it was unlikely that the Legislature intended to expedite the trial court's determination of public necessity for the benefit of the condemning agency while also making review of the trial court's decision contingent on the Court of Appeals' discretion, which could lead to uncertainty hindering the timely progress of public-work projects. In this case, the Court of Appeals should have considered Consumers' appeal as of right and reached the question of whether the trial court erred by holding that there was no public necessity for the proposed acquisition; additionally, the analysis of the Court of Appeals concerning attorney fees had to be vacated as premature under the circumstances.

Court of Appeals judgment reversed to the extent it held that it did not have jurisdiction to hear Consumers' appeal as of right, Part III of the Court of Appeals' opinion (concerning attorney fees) vacated, and case remanded to the Court of Appeals for further proceedings.

CONDEMNATION — PUBLIC NECESSITY — APPEALS.

MCL 213.56(6) of the Uniform Condemnation Procedures Act, MCL 213.51 *et seq*., provides that an order of the court upholding or determining public necessity or upholding the validity of the condemnation proceeding is appealable in the Court of Appeals only by leave of the Court pursuant to the general court rules; MCL 213.56(6) applies when the trial court has rejected a condemnation challenge by concluding that the condemnation satisfies public necessity or is otherwise valid; MCL 213.56(6) does not limit the right of a condemning agency to appeal as of right orders of the trial court determining that no public necessity justifies an acquisition.

Aaron L. Vorce for Consumers Energy Company.

Miller Johnson (by *Stephen J. van Stempvoort* and *Craig H. Lubben*) for Brian Storm and Erin Storm.

Amicus Curiae:

Zausmer, PC (by *Mischa M. Boardman*, *Devin R. Sullivan*, and *Nathan S. Scherbarth*) for International Transmission Company and Michigan Electric Transmission Company, LLC.

PER CURIAM. In this eminent domain action, we consider whether a condemning agency has an appeal as of right when a trial court determines there is no public necessity for a proposed acquisition by condemnation. We hold that MCL 213.56 affords the condemning agency an appeal as of right in this circumstance. We therefore reverse in part the judgment of the Court of Appeals and remand to that Court for further proceedings consistent with this opinion.

The Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*., " 'provides standards for the acquisition of property by an agency, the conduct of condemnation actions, and the determination of just compensation.' " *Wayne Co v Britton Trust*, 454 Mich 608, 621-622; 563 NW2d 674 (1997), quoting MCL 213.52(1). "It is required pursuant to MCL 213.56 that there be a public necessity for the taking to be permitted." *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 252; 701 NW2d 144 (2005). MCL 213.56 "allows the owner of the property to be taken 'to challenge the necessity of acquisition of all or part of the property for the purposes stated in the complaint' by filing a motion asking that the necessity be reviewed." *Id*. at 248, quoting MCL 213.56(1). The statute provides, in pertinent part:

> (5) The court's determination of a motion to review necessity is a final judgment.
>
> (6) Notwithstanding [MCL 600.309[1]], *an order of the court* upholding or *determining public necessity* or upholding the validity of the condemnation proceeding *is appealable to the court of appeals only by leave of that court pursuant to the general court rules*. In the absence of a timely filed appeal of the order, an appeal shall not be granted and the order is not appealable as part of an appeal from a judgment as to just compensation. [MCL 213.56 (emphasis added).]

The Court of Appeals concluded that "an order of the court . . . determining public necessity" refers to "both an order determining that public necessity justified an acquisition *and* an order determining that no public necessity justified the acquisition." *Consumers Energy*

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[1] MCL 600.309 provides that, with limited exception, "all appeals to the court of appeals from final judgments or decisions permitted by [the Revised Judicature Act] shall be a matter of right."

Co v Storm, 334 Mich App 638, 646; 965 NW2d 672 (2020). Consequently, the Court of Appeals held that it lacked jurisdiction over the appeal because the condemning agency did not seek leave to appeal as required by Subsection (6). *Id*. at 650. We disagree.

"In interpreting a statute, we consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 133-134; 860 NW2d 51 (2014) (quotation marks and citation omitted). The UCPA is a "quick take" system that allows condemning agencies "to quickly obtain title so that public projects can proceed without the delays of normal civil litigation[.]" *Goodwill Community Chapel v Gen Motors Corp*, 200 Mich App 84, 87-88; 503 NW2d 705 (1993); *In re Acquisition of Lands*, 137 Mich App 161, 172; 357 NW2d 843 (1984) ("[O]ne of the prime purposes for enactment of the uniform statute was to expedite condemnation."). By enacting MCL 213.56, the Legislature "separate[d] the issue of necessity, while leaving ample time to litigate damages." *Detroit v Lucas*, 180 Mich App 47, 50; 446 NW2d 596 (1989). The Legislature required a hearing on a motion challenging public necessity within 30 days, MCL 213.56(1), and a decision within 60 days of the initial hearing, MCL 213.56(4). In *Novi*, 473 Mich at 254-255, we recognized this clear legislative intent to quickly facilitate lawful condemnation with a limited and time-sensitive process for a reviewing court to consider challenges to public necessity. Subsection (6), in particular, "adds a final hurdle for defendants by permitting appellate review of the trial court's decision only by leave granted." *Id*. at 255.

In the present case, we consider whether Subsection (6) also limits the appellate rights of the condemning

agency when a trial court determines that a proposed acquisition fails to satisfy the requirement of public necessity. We must decide the meaning of "an order of the court . . . determining public necessity" as the Legislature has employed that phrase in Subsection (6). The context and setting of Subsection (6) informs our conclusion that the Legislature did not intend to limit appeals as of right for condemning agencies. We find it compelling that each of the other enumerated circumstances in the same sentence concerns a situation in which the condemning agency is the prevailing party and it is the property owner filing the appeal. Indeed, the language "an order of the court *upholding* . . . public necessity or *upholding* the validity of the condemnation proceeding," MCL 213.56(6), is by its own terms limited to circumstances in which the trial court has rejected a condemnation challenge by concluding that the condemnation satisfies public necessity or that the proceeding is otherwise valid.[2] If the Legislature intended the phrase "an order of the court . . . determining public necessity" to also mean *an order determining that there is no public necessity*, it is fair to expect that the Legislature would have said so explicitly. See *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 424; 565 NW2d 844 (1997) ("We avoid inserting words in statutes unless necessary to give intelligible meaning or to prevent absurdity.").

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[2] The Legislature had to refer to both "upholding" and "determining" public necessity because the nature of the trial court's review under MCL 213.56 depends on whether the condemning agency is public or private. For private agencies, "[e]xcept as otherwise provided" in MCL 213.56, *the trial court determines* "the public necessity of the acquisition of the particular parcel." MCL 213.56(3). Public agencies are afforded a more deferential review: *a public agency's determination* of public necessity is " 'binding on the court in the absence of a showing of fraud, error of law, or abuse of discretion.' " *Novi*, 473 Mich at 249, quoting MCL 213.56(2).

We also consider the contested phrase's "placement and purpose in the statutory scheme." *Speicher*, 497 Mich at 133-134. When a trial court determines that there is public necessity for the proposed acquisition, the separate question of just compensation may remain in dispute and require further litigation. *Lucas*, 180 Mich App at 50; MCL 213.62 (providing a right to trial by jury "as to the issue of just compensation"). Comparatively, if a property owner's motion challenging public necessity prevails, the proposed acquisition cannot proceed and the case—absent a successful appeal—is subject to closure. In this case, the trial court dismissed the case with prejudice. Because the condemning agency and the property owner are situated differently within the UCPA statutory scheme, it is appropriate to treat them differently in terms of their respective appellate rights.

This distinction provides additional context to the limitation imposed by Subsection (6) and, in particular, its final sentence stating that "[i]n the absence of a timely filed appeal of *the order*, an appeal shall not be granted and *the order* is not appealable as part of an appeal from a judgment as to just compensation." MCL 213.56(6) (emphasis added). The words "the order" unmistakably refer to the preceding contested language. See *Maples v State*, 507 Mich 461, 472; 968 NW2d 446 (2021) (recognizing that the use of the definite article "the" has "a specifying or particularizing effect") (quotation marks and citation omitted). In other words, the orders appealable only by leave pursuant to Subsection (6) can only be those types of orders that would subsequently engender "a judgment as to just compensation." There is no possibility of "a judgment as to just compensation" when the trial court determines that no public necessity justifies the proposed acquisition. This result is also more consistent

with Subsection (5), which explicitly states, "The court's determination of a motion to review necessity is a final judgment." It is the general rule that final judgments are appealable as of right. MCL 600.309. Absent Subsection (5), an order denying a property owner's motion to review necessity would not be a final judgment because the separate just-compensation phase of the condemnation proceedings remains pending. Subsection (6) merely qualifies that those orders finding public necessity supporting a proposed acquisition, although final judgments, are appealable by leave only.

Finally, we appreciate the significant uncertainty inherent in permitting appeals from an order dismissing a case with prejudice only by leave granted. In light of the entire legislative scheme of the UCPA, which is designed to facilitate lawful condemnation, we do not believe the Legislature intended to expedite the trial court's decision on public necessity for the benefit of the condemning agency only to make review of a potentially erroneous trial court decision contingent on the Court of Appeals' discretion. This uncertainty could easily hinder the timely and efficient progress of public-works projects and add delay and costs to the provision of essential public services, such as maintaining and expanding public utilities that are vital to the public welfare. Cf. *Lucas*, 180 Mich App at 50 (recognizing that litigation relating to a single parcel "could bring the largest of public improvement programs to a complete halt").

Although it held that it was without jurisdiction to disturb the trial court's decision concerning public necessity, the Court of Appeals still reached the separate issue of whether the trial court erred by ordering the reimbursement of attorney fees and other expenses

incurred by the property owner under MCL 213.66(2).[3] The Court of Appeals should have considered the condemning agency's appeal as of right and reached the ultimate question of whether the trial court erred by holding that there was no public necessity for the proposed acquisition. Therefore, it is not yet apparent that the proposed acquisition was improper such that the property owners would be entitled to reimbursement so as to avoid being "forced to suffer because of an action that they did not initiate and that endangered, through condemnation proceedings, their right to private property." *Indiana Mich Power Co v Community Mills, Inc*, 333 Mich App 313, 319; 963 NW2d 648 (2020) (quotation marks and citation omitted). Accordingly, we vacate the analysis construing MCL 213.66(2) in Part III of the Court of Appeals' opinion and remand to that court for further proceedings consistent with this opinion.

MCCORMACK, C.J., and ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, CAVANAGH, and WELCH, JJ., concurred.

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[3] MCL 213.66(2) provides:

> If the property owner, by motion to review necessity or otherwise, successfully challenges the agency's right to acquire the property, or the legal sufficiency of the proceedings, and the court finds the proposed acquisition improper, the court shall order the agency to reimburse the owner for actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition.

COMERICA, INC v DEPARTMENT OF TREASURY

Docket No. 161661. Argued December 8, 2021 (Calendar No. 1). Decided June 7, 2022.

Comerica, Inc., sought review in the Tax Tribunal of a 2013 decision by the Department of Treasury to deny tax credits for brownfield and historic-restoration activity that Comerica had claimed under the since-repealed Single Business Tax Act (SBTA), 1975 PA 228. In 2005, one of Comerica's subsidiaries—KWA I, LLC—had assigned these credits to another Comerica subsidiary, a Michigan bank. In 2007, the Michigan bank merged with a third Comerica subsidiary, a Texas bank. Around the same time, the Legislature repealed the SBTA, see 2006 PA 325, and enacted a successor, the Michigan Business Tax Act (MBTA), 2007 PA 36 (since repealed by 2019 PA 90). Comerica filed returns under the MBTA for the tax years 2008–2011, identifying the Texas bank, but not the Michigan bank, among its subsidiaries, and claiming refunds based in part on the credits that had been assigned to the Michigan bank under the SBTA. In 2013, the Department of Treasury audited Comerica's returns and disallowed the claimed credits on the basis of two SBTA provisions, former MCL 208.38g(18) and former MCL 208.39c(7), which barred assignees of credits from subsequently assigning those credits. Comerica sought review before the Tax Tribunal, arguing that the credits had passed to the Texas bank not as the result of a subsequent assignment but by operation of law as a result of the merger with the Michigan bank. The parties cross-moved for summary disposition under MCR 2.116(C)(10). The Tax Tribunal, citing *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98 (2012), granted partial summary disposition to the Department of Treasury, ruling that the credits had not passed to the Texas bank in the merger but rather had been extinguished. The Court of Appeals, BOONSTRA, P.J., and RIORDAN and REDFORD, JJ., vacated in part, reversed in part, and remanded, noting that although former MCL 208.38g(18) and former MCL 208.39c(7) prohibited any assignment of credits beyond the initial assignment, those provisions were silent regarding transfers made by any other mechanism, such as transfers made by operation of law pursuant to a merger of entities. Accordingly, the Court of Appeals agreed with Com-

erica that the tax credits had been transferred by operation of law and that those transfers thus were not barred by the SBTA's single-assignment provisions. The Court of Appeals also held, contrary to the Tax Tribunal's conclusions, that the rule of strict construction for tax exemptions does not apply to tax credits and that the tax credits were property rather than privileges. 332 Mich App 155 (2020). The Supreme Court granted the Department of Treasury's application for leave to appeal. 507 Mich 888 (2021).

In an opinion by Justice CLEMENT, joined by Justices ZAHRA, VIVIANO, and BERNSTEIN, the Supreme Court *held*:

Tax credits that had been lawfully acquired by one Comerica subsidiary, a Michigan bank, passed by operation of law under the Banking Code, MCL 487.11101 *et seq*., to another Comerica subsidiary, a Texas bank, when the two banks merged. Accordingly, the provisions of the SBTA that prohibited an assignee of credits from subsequently assigning those credits did not explicitly or implicitly interfere with the Banking Code's operation in this case. Therefore, the Department of Treasury erred by not allowing Comerica to claim these credits on its returns for tax years 2008–2011, and the Tax Tribunal erred by granting the department partial summary disposition. The Court of Appeals' judgment was affirmed.

1. Former MCL 208.38g and former MCL 208.39c provided, in relevant part, that a qualified taxpayer could assign a credit to its partners, members, or shareholders, but that those assignees could not subsequently assign those credits or any portion of those credits. In this case, KWA was the qualified taxpayer, and it was undisputed that KWA could lawfully assign its credits to the Michigan bank. Although the Department of Treasury argued that the SBTA barred the Michigan bank, as an assignee, from becoming an assignor by subsequently assigning the credits to the Texas bank, it offered no evidence that the Michigan bank assigned, or tried to assign, the credits. Instead, as Comerica correctly argued, the credits passed to the Texas bank not by assignment but by operation of law—specifically, the Banking Code, which governs consolidations and mergers of banks. MCL 487.13703(1) provides in part that if a consolidation agreement has been certified and approved, the corporate existence of each consolidating organization is merged into and continued in the consolidated bank. To the extent authorized by the Banking Code, the consolidated bank then possesses all the rights, interests, privileges, powers, and franchises and is subject to all the restrictions, disabilities, liabilities, and duties of each of the

consolidating organizations. MCL 487.13703(1) further specifies that the title to all property is transferred to the consolidated bank and may not revert or be impaired by reason of the act. While the parties disagreed about whether the credits should be considered privileges or property, this distinction made no difference to the outcome in this case because, under the Banking Code, the consolidated bank acquires both the privileges and property of the consolidating organizations, by operation of law, not by assignment or by any other act of the consolidating organizations. The distinction between a voluntary act of assignment and a transfer by operation of law was described in *Miller v Clark*, 56 Mich 337 (1885), and this distinction was relied on in *Kim*. Thus, regardless of whether the SBTA credits are considered property or privileges, MCL 487.13703 operated to transfer the credits from the Michigan bank to the Texas bank, and no assignment was needed.

2. The assignment provisions of the SBTA did not implicitly bar the credits from being possessed by anyone but the initial assignee. The negative-implication canon of statutory construction—*expressio unius est exclusio alterius*—means that the express mention of one thing implies the exclusion of other similar things. However, this canon does not apply without a strong enough association between the specified and unspecified items, according to common understandings of the specified items and the context in which they are used. In this case, the Department of Treasury offered no reason to think that the SBTA's mention of "assign[ing]" and not "subsequently assign-[ing]" credits suggests that the Legislature meant to regulate all the ways that credits could be transferred so that when the Legislature said only "assign" it was impliedly prohibiting other forms of transfer. Because there was no apparent contextual or circumstantial predicate for invoking the negative-implication canon, it was not applied.

3. Assuming that the canon of strict construction applies to statutes regulating the possession of tax credits, it may be invoked only as a last resort. The directive to strictly construe certain tax statutes in favor of the government reflects a judicial preference against tax exemptions. However, that preference is not aimed at revealing the semantic content of a statute, and it sheds no light on the statute's meaning. Courts will only employ the canon of strict construction if the statutory meaning fails to emerge after the ordinary rules of interpretation are applied. Because the SBTA's ordinary meaning was discernible by exam-

ining the text and context of its relevant provisions, strict construction played no role in this case.

Affirmed.

Justice CAVANAGH, joined by Chief Justice MCCORMACK and Justice WELCH, concurring in the result, explained that the certificated tax credits at issue in this case, which were earned through brownfield and historic-restoration activity, flowed from the fulfillment of a contract-like arrangement between the government and a taxpayer and required the taxpayer to expend a significant amount of time, effort, and capital to earn them. She concurred with the majority that regardless of whether the certificated credits were construed as rights, interests, privileges, powers, or franchises such that Comerica-Texas simply possessed them or instead as "property" that was transferred to Comerica-Texas, neither scenario constituted an "assignment" as contemplated by the SBTA, whose single-assignment limitation did not affect how property was allocated between merging banks under MCL 487.13703(1). Contrary to the Court of Appeals' holding, she did not view the *expressio unius est exclusio alterius* canon of statutory interpretation as particularly applicable, explaining that the SBTA's limitation on single assignments was not sufficient to suggest an exclusive or exhaustive means of transfer. For these reasons, she agreed that the Court of Appeals' decision should be affirmed.

Justice WELCH, concurring in part and dissenting in part, stated that the Court of Appeals decision reached the right result but went too far in declaring the tax credits at issue in this case to be vested property rights. Under MCL 487.13703, Comerica-Texas, as the consolidated bank following the merger, held all rights of property, franchises, and interests in the same manner and to the same extent as those rights and interests were held by each consolidating organization at the time of the consolidation, and was also subject to all the restrictions, disabilities, liabilities, and duties of each of the consolidating organizations, effectively rendering Comerica-Texas and Comerica-Michigan one and the same as a matter of law. She noted that not only was there no statutory prohibition on Comerica-Texas claiming the disputed tax credits by the terms of the merger, it would have been unjust and contrary to legislative intent to hold otherwise, given Comerica's efforts to redevelop brownfields and historic properties and the Legislature's goal of monetarily incentivizing these private-public redevelopment partnerships. She concluded that allowing petitioner to claim the earned tax credits would hold the state to

its side of the bargain, and she saw nothing that would indicate a legislative intent to disallow petitioner from claiming the earned tax credits in this situation.

TAXATION — TAX CREDITS — SINGLE BUSINESS TAX ACT — MERGERS.

Tax credits that were lawfully acquired for brownfield and historic-restoration activity by a corporate subsidiary and subsequently assigned to a second subsidiary may pass by operation of law to a third subsidiary created by a merger of the latter two corporate entities under the Banking Code, MCL 487.11101 *et seq*., notwithstanding the limitations on second assignments contained in the Single Business Tax Act, 1975 PA 228, repealed by 2006 PA 325 (former MCL 208.38g(18) and former MCL 208.39c(7)).

Schenk & Bruetsch PLC (by *Thomas P. Bruetsch*) for Comerica, Inc.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Scott L. Damich* and *David W. Thompson*, Assistant Attorneys General, for the Department of Treasury.

Amici Curiae:

Novara Tesija Catenacci McDonald & Bass, PLLC (by *Jackie J. Cook* and *Kimberly A. Cloud*) for the State Bar of Michigan Taxation Section.

Warner Norcross & Judd LLP (by *Gaëtan Gerville-Réache*) for the Michigan Bankers Association.

CLEMENT, J. In this taxpayer protest, Comerica seeks to redeem certain tax credits over the Department of Treasury's objection. The credits were earned under the Single Business Tax Act by a Comerica affiliate. That subsidiary assigned the credits to another subsidiary, a Michigan bank. Later, Comerica created a third subsidiary, a Texas bank, and merged the Michigan bank into the Texas bank. Comerica then claimed the tax credits, on behalf of the Texas bank, in its

Michigan tax filings. The Department of Treasury disallowed the tax credits, concluding that the Texas bank did not receive the Michigan bank's credits through the merger because the Michigan bank lacked the legal authority to transfer the credits. We hold that the tax credits could lawfully pass to the Texas bank.

I. BACKGROUND

Comerica, Inc. is a bank-holding corporation with many subsidiaries, of which three are relevant here. The first is KWA I, LLC. Before 2005, KWA earned tax credits relating to brownfield and historic-restoration activity. Those credits were governed in part by the Single Business Tax Act, 1975 PA 228, which allowed the entity earning a credit to assign it. In 2005, KWA assigned its credits to the second Comerica subsidiary, a Michigan bank. In 2007, Comerica created the third subsidiary, a Texas bank. Soon afterward, the Michigan and Texas banks entered into an "agreement and plan of merger." As of October 31, 2007, Comerica considered the Michigan bank to have "merged into" the Texas bank. And Comerica understood the merger to have caused the Michigan bank's tax credits to pass to the Texas bank.

Around the same time, the Legislature repealed the Single Business Tax Act, see 2006 PA 325, and enacted a successor, the Michigan Business Tax Act, 2007 PA 36.[1] Comerica filed returns under the MBTA for the tax years 2008–2011, identifying the Texas bank, but not the Michigan bank, among its subsidiaries. In each return, Comerica claimed a refund, relying in part on the credits that had been assigned to the Michigan

[1] The Michigan Business Tax Act was itself repealed in 2019, see 2019 PA 90, although that repeal does not take effect until tax years starting after December 31, 2031.

bank under the SBTA. Although the SBTA had been repealed, the MBTA, MCL 208.1435 and MCL 208.1437, recognized the credits' continued existence.

In 2013, the Department of Treasury audited Comerica's returns, disallowed the claimed credits, and reduced Comerica's refunds accordingly. Treasury pointed to two SBTA provisions, MCL 208.38g(18) and MCL 208.39c(7), which governed assignment of the credits. In particular, each provision allowed the entity earning the credit to assign it, and so Treasury recognized as valid KWA's assignment of the credits to the Michigan bank. But those provisions didn't let an assignee "subsequently assign a credit or any portion of a credit assigned"—in other words, the provisions barred a second assignment. From Treasury's view, a second assignment was the only way the Texas bank could acquire the Michigan bank's credits through the merger. Treasury thus treated the credits as void and reduced Comerica's refunds.[2]

Comerica unsuccessfully challenged Treasury's decision in an informal conference before a Treasury hearing referee. Comerica then sought review before the Tax Tribunal, arguing that there had been no second assignment of the credits; rather, it argued, under Texas corporation law and Michigan banking law, the credits passed to the Texas bank as a result of the merger, "by operation of law." Treasury argued that the credits were governed by the SBTA alone—that Texas corporation law and Michigan banking law didn't bear on the credits' status. The parties cross-moved for summary disposition under MCR 2.116(C)(10).

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[2] Treasury further reduced Comerica's refunds because of an issue related to calculation of Comerica's "net capital." That issue is not presently before us.

The Tax Tribunal, citing *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98; 825 NW2d 329 (2012), acknowledged the possibility that credits could be transferred by operation of law, but it believed that *Kim* required such a transfer to be "unintentional or involuntary." Any transfer here, the tribunal believed, was not "unintentional or involuntary" since Comerica had chosen to merge the transferee and transferor banks. The tribunal thus concluded that the credits had not passed to the Texas bank but rather had been "extinguished" when the Michigan bank merged into the Texas bank. In so doing, the tribunal rejected Comerica's argument that the credits had passed to the Texas bank under a merger provision in the Texas Business Organizations Code. That provision allocates title to "*property* owned by each [merging] organization to . . . the surviving or new organization[] . . . without . . . any transfer or assignment having occurred." Tex Bus Orgs Code Ann 10.008(a)(2)(C) (emphasis added). But the tribunal, citing federal law, declared the credits to be not "property" but rather "privileges," a term omitted from the Texas law. Finally, the tribunal applied to tax credits the rule of "strict construction for tax exemptions." For all these reasons, the tribunal concluded that Treasury had appropriately disallowed the tax credits and, accordingly, granted partial summary disposition to Treasury.

Comerica challenged the Tax Tribunal's ruling in the Court of Appeals, which reversed in relevant part. See *Comerica, Inc v Dep't of Treasury*, 332 Mich App 155; 955 NW2d 593 (2020). The Court of Appeals recognized that the SBTA, MCL 208.38g(18) and MCL 208.39c(7), forbade an assignee to "subsequently assign a credit or any portion of a credit assigned." *Id*. at 167. But even though the provisions "prohibit[ed] any assignment beyond the first initial assignment," they

"address[ed] only transfers made by assignment and [were] silent regarding transfers made by any other mechanism, such as transfers made by operation of law pursuant to a merger of entities." *Id*.

Like the Tax Tribunal, the Court of Appeals recognized that, under *Kim*, "transfers by assignment are distinct from transfers by operation of law." *Id*. at 168. But while the tribunal had read *Kim* to suggest that the credits could be transferred by operation of law only if the merger was "unintentional or involuntary," the Court of Appeals recognized that a "voluntary act of merger" is different from an "automatic transfer of assets resulting from that merger." *Id*. at 172. Here, the Court concluded, "the voluntary act of merging . . . automatically transferred the tax credits by operation of law and precluded application of the SBTA's single-assignment provisions." *Id*. The Court of Appeals disagreed with the tribunal on a couple of other points. First, it determined that the rule of "strict construction for tax exemptions" doesn't extend to tax credits. *Id*. at 169. Second, it determined that the tax credits are "property" rather than "privileges." *Id*. at 171. The Court of Appeals thus reversed the tribunal's grant to Treasury of partial summary disposition.

Treasury applied for our leave to appeal, arguing that the credits were unlawfully assigned when they passed from the Michigan bank to the Texas bank and that the credits were not a "vested right" or a "property right." We granted leave, *Comerica, Inc v Dep't of Treasury*, 507 Mich 888 (2021), and now, for the reasons below, we affirm.

II. DISCUSSION

Treasury primarily contends that the tax credits at issue passed to Comerica's Texas bank in violation of

sections 38g and 39c of the Single Business Tax Act, formerly codified at MCL 208.38g and MCL 208.39c. Section 38g(18) stated, in relevant part:

> *[T]he qualified taxpayer may assign* all or a portion of a credit . . . to its partners, members, or shareholders . . . . A partner, member, or shareholder that is *an assignee shall not subsequently assign* a credit or any portion of a credit assigned under this subsection. [Emphasis added.]

Section 39c(7) similarly stated:

> *[T]he qualified taxpayer may assign* all or any portion of a credit . . . to its partners, members, or shareholders . . . . A partner, member, or shareholder that is *an assignee shall not subsequently assign* a credit or any portion of a credit assigned to the partner, member, or shareholder under this subsection. [Emphasis added.]

Both provisions said essentially the same thing: The qualified taxpayer that earned the credit "may assign" that credit, but the credit's "assignee shall not subsequently assign a credit or any portion of a credit assigned." Put otherwise, the assignee cannot later become an assignor.

In the present case, KWA was the "qualified taxpayer," and Treasury recognizes that KWA could and did lawfully assign its credits to the Michigan bank. But Treasury insists that the SBTA barred the Michigan bank, as an assignee, from becoming an assignor by "subsequently assign[ing]" the credits to the Texas bank. We agree—the statute plainly forbids the credits' assignee to later become the credits' assignor. But Treasury has offered nothing to suggest that the Michigan bank *became an assignor*, i.e., that it *assigned* the credits. So while the statute plainly forbade the Michigan bank to assign the credits, there's no evidence that the Michigan bank assigned, or tried to assign, the credits.

For its part, Comerica urges that the credits passed to the Texas bank not by assignment but by "operation of law." In other words, the Michigan bank did not need to assign the credits to the Texas bank because the law operated to move the credits from one to the other. Comerica identified as the operative law the Banking Code, 1999 PA 276, which governs how "consolidating organizations" can merge into a "consolidated bank."[3] Section 3703(1) of the Banking Code, MCL 487.13703(1), directs how the particulars of each "consolidating organization" become the particulars of a "consolidated bank":

> If approval and certification of the consolidation agreement . . . have been completed, the corporate existence of each consolidating organization is merged into and continued in the consolidated bank. To the extent authorized by this act, *the consolidated bank possesses all the* rights, interests, *privileges*, powers, and franchises and is subject to all the restrictions, disabilities, liabilities, and duties *of each of the consolidating organizations*. *The title to all property*, real, personal, and mixed, *is transferred to the consolidated bank*, and shall not revert or be in any way impaired by reason of this act. [Emphasis added.]

Under this provision, the consolidated bank acquires each consolidating organization's "rights, interests, privileges, powers, and franchises" and becomes subject to each consolidating organization's "restrictions, disabilities, liabilities, and duties." And "title to all property . . . is transferred to the consolidated bank."

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[3] Although Comerica suggested in the Tax Tribunal that Texas law has a role to play in this case, we see no citation to Texas law in the briefing before this Court. While we ordinarily might be reluctant to determine a Texas bank's relationship to tax credits without considering Texas law, we're not reluctant here, where both the tax credits and their assignee are creatures of Michigan law and where the parties have here addressed only Michigan law.

As this litigation has developed, the parties have bickered about the nature of the credits, with Treasury persuading the Tax Tribunal that they are "privileges," and Comerica persuading the Court of Appeals that they are "property." Yet, as we will explain, it doesn't matter whether they are privileges or property since, under the Banking Code, the consolidated bank acquires the consolidating organizations' privileges and property "by operation of law," not by assignment or by any other act of the consolidating organizations.

When Comerica contends that the SBTA credits *transfer* by operation of law, we take Comerica to mean that the credits are property since the Banking Code identifies only title to "property" (and not "privileges") as "transferred." Notably, the act of transfer is expressed passively, with neither the "consolidating organization" nor the "consolidated bank" charged with acting to effect the transfer. It's true that the consolidating organizations here—the Michigan bank and the Texas bank—needed to act to effect the merger. But the Court of Appeals put it well when it distinguished "the voluntary act of merger" from "the automatic transfer of assets resulting from that merger." *Comerica*, 332 Mich App at 172. Because the transfer is "automatic" under the Banking Code, it makes sense to characterize the Banking Code itself, i.e., the "law," as effecting the transfer—hence, transfer "by operation of law."[4]

Our reasoning has ample and long-standing support in our caselaw. Well over a century ago, in *Miller v*

[4] See, e.g., *United States v Seattle–First Nat'l Bank*, 321 US 583, 587-588; 64 S Ct 713; 88 L Ed 844 (1944) (explaining that if "the immediate mechanism by which the transfer is made effective" is "entirely statutory," then the transfer is "wholly by operation of law").

Clark, 56 Mich 337; 23 NW 35 (1885), we distinguished a "voluntary act" of assignment from a transfer "by operation of law":

> The assignments which are required to be recorded are those which are executed by the voluntary act of the party, and this does not apply to cases where the title is transferred by operation of law[.] [*Id*. at 340-341.]

We relied on *Miller*'s distinction relatively recently, in *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98; 825 NW2d 329 (2012), explaining that *Miller* is consistent with *Black's Law Dictionary* and emphasizing the "automatic" nature of a transfer "by operation of law":

> *Miller*'s interpretation of when a transfer occurs by "operation of law" is consistent with *Black's Law Dictionary*'s definition of the expression. *Black's* defines "operation of law" as "[t]he means by which a right or a liability is created for a party *regardless of the party's actual intent*." Similarly, this Court has long understood the expression to indicate "the manner in which a party acquires rights *without any act of his own*." Accordingly, there is ample authority for the proposition that a transfer that takes place by operation of law occurs unintentionally, involuntarily, or through no affirmative act of the transferee. [*Id*. at 110.[5]]

We continue to agree with *Kim*'s and *Miller*'s distinction between an assignment effected by a voluntary act and a transfer effected by an automatic, statutory process, i.e., "by operation of law."[6]

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[5] Quoting *Black's Law Dictionary* (9th ed); *Merdzinski v Modderman*, 263 Mich 173, 175; 248 NW 586 (1933) (citation and quotation marks omitted).

[6] Treasury urges that we should decline to rely on *Kim* (and, by implication, on *Miller*) because it involved transfers of mortgages, not tax credits. We take the point, that lessons from a decision in one domain shouldn't be naïvely applied in another domain. But Treasury

As *Kim* and *Miller* show, the law itself can effect a transfer of title to property. It thus is not necessarily true, as Treasury suggests, that a transfer of the credits from the Michigan bank implies an assignment by the Michigan bank. As explained above, section 3703 of the Banking Code can trigger a transfer without an assignment. Here, if the SBTA credits are property, section 3703 operated to transfer the credits from the Michigan bank to the Texas bank. No assignment was needed.

What then if the tax credits are, as Treasury proposes, "privileges"? The answer is the same. As noted above, under section 3703, "the consolidated bank possesses all the . . . privileges . . . of each of the consolidating organizations." The language is plain: All privileges of a consolidating organization become possessed by the consolidated bank. While the Banking Code characterizes as a "transfer" the conferring of title to property, it doesn't so characterize the conferring of attributes like privileges—instead, it simply declares what attributes of the consolidating organization "the consolidated bank possesses." In any event, whether privileges are characterized as the subject of a transfer or some other thing, they are not the subject of an assignment.[7]

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offers no reason to limit *Kim* and *Miller*'s teaching on automatic, statutory transfers to mortgages, and we see none.

[7] The Michigan Bankers Association, as amicus curiae, urges us to conclude that there was no transfer here. The Association points out that under section 3703(1), "the corporate existence of each consolidating organization is merged into and continued in the consolidated bank"—in other words, the Michigan bank's existence is "continued in the" Texas bank, and so the credits haven't changed hands. As the Association acknowledges, section 3703(1) also states that "title to all property . . . is transferred to the consolidated bank." Put otherwise, while the Association says there was no transfer, the Banking Code expressly refers to title to property being "transferred." Since the

We cannot escape the statute's plain meaning, i.e., that the Michigan bank's privileges were conferred on the Texas bank "by operation of" the Banking Code, not by assignment. If the credits are privileges, no assignment was needed for them to pass to the Texas bank.

Treasury offers an alternative perspective on the SBTA's assignment provisions: Even if the Michigan bank didn't violate those provisions by becoming an assignor, the credits couldn't pass to the Texas bank because those provisions implicitly barred the credits from leaving the Michigan bank's possession. In other words, Treasury argues that the SBTA's regulation of initial assignments bars the credits from afterward being possessed by anyone but the initial assignee. Treasury thus relies on the negative-implication canon, often called by its hoary epithet, *expressio unius est exclusio alterius*.

Under this canon of statutory construction, the express mention of one thing implies the exclusion of other similar things. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931). As we have recently explained, however, the canon "properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved." *Bronner v Detroit*, 507 Mich 158, 173; 968 NW2d 310 (2021), quoting Scalia & Garner, *Reading Law* (St. Paul: Thomson/West, 2012), p 107. The canon thus does not apply without a strong enough association between the specified and unspecified items. See *Chevron USA Inc v Echazabal*, 536 US 73, 81; 122 S Ct

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parties' arguments are adequate to resolve this case, we decline to engage further with the Association's reading of section 3703(1).

2045; 153 L Ed 2d 82 (2002). That association is evaluated according to common understandings of the specified items and the context in which they are used. See generally *United States v Vonn*, 535 US 55, 65; 122 S Ct 1043; 152 L Ed 2d 90 (2002); *Reading Law*, p 107.

Scalia and Garner illustrate this point with a couple of examples involving common restaurant signs. The first example:

> The sign outside a restaurant "No dogs allowed" cannot be thought to mean that no other creatures are excluded—as if pet monkeys, potbellied pigs, and baby elephants might be quite welcome. Dogs are specifically addressed because they are the animals that customers are most likely to bring in; nothing is implied about other animals. [*Reading Law*, p 107.]

The second example:

> Consider the sign at the entrance to a beachfront restaurant: "No shoes, no shirt, no service." By listing some things that will cause a denial of service, the sign implies that other things will not. One can be confident about not being excluded on grounds of not wearing socks, for example, or of not wearing a jacket and tie. But what about coming in without pants? That is not included in the negative implication because the specified deficiencies in attire noted by the sign are obviously those that are common at the beach. Others common at the beach (no socks, no jacket, no tie) will implicitly not result in denial of service; but there is no reasonable implication regarding wardrobe absences *not* common at the beach. They go beyond the category to which the negative implication pertains. [*Id*. at 108.]

In each example, the negative implication is restrained by the expression of prohibitions (dogs or going shirtless or shoeless), the circumstances to which the prohibitions apply (restaurant or beachfront restaurant), and common understandings (about people's behavior

with pets or at the beach). We thus understand that a restaurant with both signs would welcome neither a pantsless man nor the horse he rode in on.

Here, the question is whether the SBTA's mention of "assign[ing]" and not "subsequently assign[ing]" credits suggests anything about how credits otherwise pass between entities. Treasury offers no reason to think that the Legislature meant to regulate all the ways that credits could be transferred so that when the Legislature said only "assign" it was impliedly prohibiting other forms of transfer. For instance, by analogy to the "no dogs allowed" example, Treasury might have asserted that "assigning" is singled out in the statute because it is "the action that tax-credit holders are most likely to perform." To be clear, that reasoning sounds dubious to us, but the point is that Treasury hasn't explained how expressly regulating credit assignments implies anything about how credits can otherwise change hands; nor has it pointed to any language in the SBTA suggesting an intention to regulate all transfers of tax credits.[8] Unlike restaurant signs' expression of "dogs" or of seaside sartorial omissions, the SBTA's expression about "assigning" implies very little, in our "[c]ommon sense." *Bronner*, 507 Mich at 173, quoting *Reading Law*, p 107.[9]

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[8] By contrast, the Banking Code, MCL 487.13703(1), mandates that the consolidated bank acquires all the consolidating organizations' privileges and property—a strong clue that the Legislature favors free flow of privileges and property in a merger.

[9] Incidentally, our common sense today is consistent with our thinking in *Miller* in 1885. The statute there mentioned "assignment" but not other transfers, and yet we inferred the possibility of transfer by operation of law. *Miller*, 56 Mich at 340-341; see also *Kim*, 493 Mich at 109-110.

In short, we see no contextual or circumstantial predicate for invoking the negative-implication canon, and so we decline to apply it here.

Treasury has urged us to "strictly construe" the SBTA's tax-credit provisions against Comerica. We initially question whether the canon of strict construction applies to statutes governing tax credits. This case doesn't ask us to determine whether those tax credits were appropriately awarded in the first place—Treasury hasn't disputed that KWA earned them fair and square. We're instead looking at provisions governing how those credits can pass between a corporation's subsidiaries. It is not obvious that provisions like that should be "strictly construed."

But even if the "canon of strict construction" applies to statutes regulating the possession of tax credits, it may be invoked only as a "last resort." *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 343; 952 NW2d 384 (2020). As we recently explained, the directive to strictly construe certain tax statutes in favor of the government reflects a judicial "preference against tax exemptions." *Id*. at 340. That preference, whatever its merit, isn't aimed at "reveal[ing] the semantic content of a statute," *id*. at 343—that is, it doesn't "shed any light" on the statute's meaning, *id*. at 342. Only if that meaning fails to emerge after we apply "the ordinary rules of interpretation" may we put our thumb on the scales and construe a statute against the taxpayer. *Id*. at 343. Here, as indicated above, the SBTA's "ordinary meaning is discernible" by examining the text and context of its relevant provisions, *id*.; "strict construction" thus plays no role here.

III. CONCLUSION

This appeal asked us to decide whether tax credits lawfully acquired by one Comerica subsidiary, a Michigan bank, could lawfully pass to another Comerica subsidiary, a Texas bank, when the two banks merged. As explained above, the Single Business Tax Act barred the Michigan bank from assigning the credits, but no such assignment was attempted here. Rather, the Banking Code let the Texas bank acquire the credits "by operation of law." The SBTA did not explicitly or implicitly interfere with the Banking Code's operation.

For these reasons, we conclude that the credits could lawfully pass to the Texas bank. We, therefore, affirm the Court of Appeals' judgment.

ZAHRA, VIVIANO, and BERNSTEIN, JJ., concurred with CLEMENT, J.

CAVANAGH, J. (*concurring in the result*). This case involves a dispute over certificated tax credits issued under the now long-repealed Single Business Tax Act (SBTA), former MCL 208.1 *et seq*. Unlike a tax credit for overpayment or a credit intended to offset tax liability, certificated credits flow from the fulfillment of a contract-like arrangement between the government and a taxpayer. The two types of certificated credits at issue are earned through brownfield and historic-restoration activity. To summarize, in order to promote the redevelopment of brownfield property,[1] the Michigan Legislature enacted the Brownfield Redevelopment Financing Act (BRFA), MCL 125.2651 *et seq*. In

[1] A "brownfield" is generally regarded as real property that has the presence or potential presence of hazardous substances, pollutants, or contaminants that hinder expansion, redevelopment, or reuse. See 42

addition to financing available under the BRFA, the Legislature also provided for tax credits for property owners who undertook brownfield projects. To become eligible for the brownfield tax credits, the property owner was required to submit an application to the Michigan Economic Growth Authority (MEGA) demonstrating that the project met requirements for job creation and retention, construction, rehabilitation, and development. See MCL 207.808. If MEGA approved the application, it would enter into an agreement with the taxpayer for the brownfield tax credits under the SBTA that would become available once the project was complete. The credit was worth 10% of the taxpayer's eligible investments, up to $1 million, and the taxpayer could carry the credit forward for 10 years to offset any subsequent tax liability under the SBTA.

Similarly, under the SBTA, property owners were incentivized to rehabilitate and preserve historic properties in exchange for tax credits. To obtain a historic-restoration credit, the taxpayer would apply for certification from the State Historic Preservation Office or the National Parks Service, submit a rehabilitation plan, and, upon completion of the project, seek a certificate of completed rehabilitation. If the rehabilitation was in conformity with the plan approved, a certificate of completion was issued, making the taxpayer eligible for a 25% credit for qualified expenditures. Like the brownfield credits discussed earlier, the historic-restoration credit was also able to be carried forward for 10 years. In sum, to earn the certificated

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USC 9601(39). In Michigan, a brownfield also broadly includes certain noncontaminated properties such as "blighted" or "functionally obsolete" properties. MCL 125.2652.

tax credits at issue, the taxpayer was required to expend a significant amount of time, effort, and capital.[2]

The credits at issue were earned by a Comerica, Inc., affiliate and subsequently assigned to a Comerica subsidiary (Comerica-Michigan). Comerica-Michigan later merged with another Comerica subsidiary (Comerica-Texas). Because the SBTA prohibited a subsequent assignment of the certificated tax credits, former MCL 208.38g(18) and former MCL 208.39c(7), the question before the Court is whether the credits are properly held by Comerica-Texas as a result of the merger—or, as the Department argues, whether Comerica-Texas's acquisition of the credits via a merger constitutes an improper second assignment of the certificated tax credits.

I concur with the majority that, whether the certificated credits are construed as either "rights, interests, privileges, powers, [or] franchises" such that Comerica-Texas simply "possesses" them or as "property" such that it was "transferred" to Comerica-Texas, neither scenario constitutes an "assignment" as contemplated by the SBTA. The SBTA's single-assignment prohibition does not affect how property is allocated between merging banks under MCL 487.13703(1), a provision of the Banking Code, MCL 487.11101 *et seq*.[3] The SBTA

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[2] With this in mind, I find the Department's suggestion that we "strictly construe" the SBTA's tax credit provision against Comerica unpersuasive. See *Canterbury Health Care v Dep't of Treasury*, 220 Mich App 23, 313; 558 NW2d 444 (1996) (holding that tax *exemptions* are strictly construed in favor of the taxing authority).

[3] MCL 487.13703(1) provides:

> If approval and certification of the consolidation agreement as required by [MCL 487.13701] have been completed, the corporate existence of each consolidating organization is merged into and

spoke only to limiting assignments; it did not mention what would happen to certificated credits in a bank merger. "Michigan courts determine the Legislature's intent from its *words*, not from its silence." *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999). Contrary to the Court of Appeals' holding, I do not see the *expressio unius est exclusio alterius* canon of statutory interpretation as particularly applicable in this case. As the majority explains, this canon is animated by context and reasonability. See *Bronner v Detroit*, 507 Mich 158, 173; 968 NW2d 310 (2021). The SBTA's limitation on single assignments is simply not sufficient to suggest an exclusive or exhaustive means of transfer.

For these reasons, I agree that the Court of Appeals' decision should be affirmed, and I concur in the result reached by the Court majority.

MCCORMACK, C.J., and WELCH, J., concurred with CAVANAGH, J.

WELCH, J. (*concurring in part and dissenting in part*). I join Justice CAVANAGH's concurring opinion. We can resolve this case by focusing less on legal abstractions and instead returning to first principles of how this Court has historically interpreted tax-related statutes. This Court has long recognized "that taxing is a practical matter and that the taxing statutes must receive a practical construction." *In re Brackett's Es-*

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continued in the consolidated bank. To the extent authorized by this act, the consolidated bank possesses all the rights, interests, privileges, powers, and franchises and is subject to all the restrictions, disabilities, liabilities, and duties of each of the consolidating organizations. The title to all property, real, personal, and mixed, is transferred to the consolidated bank, and shall not revert or be in any way impaired by reason of this act.

tate, 342 Mich 195, 205; 69 NW2d 164 (1955). Substance governs over form. See 23 Michigan Civil Jurisprudence, Taxes, § 37, p 222 ("A court, in reading taxation statutes, should disregard form for substance and place an emphasis on economic reality."). It is a "black-letter principle that 'tax law deals in economic realities, not legal abstractions.' " *PPL Corp v Comm'r of Internal Revenue*, 569 US 329, 340; 133 S Ct 1897; 185 L Ed 2d 972 (2013), quoting *Comm'r v Southwest Exploration Co*, 350 US 308, 315; 76 S Ct 395; 100 L Ed 347 (1956). Applying this lens, this case is easily resolved.

The parties agree on the basic facts. Petitioner's subsidiary earned brownfield-restoration and historic-preservation tax credits by completing certain approved projects. In accordance with the applicable statutory scheme—the since repealed Single Business Tax Act (SBTA), former MCL 208.1 *et seq*.—in 2005 the subsidiary properly assigned these credits to Comerica Bank, a Michigan banking corporation (Comerica-Michigan). Under the SBTA, such credits could only be assigned once. Former MCL 208.38g(18); former MCL 208.39c(7). Comerica-Michigan later merged with Comerica Bank, a Texas banking association (Comerica-Texas). Following the merger, Comerica-Michigan ceased to exist as a separate entity. The parties now disagree on whether petitioner can lawfully claim Comerica-Michigan's earned, but never used, and already once-assigned tax credits.

I think the Court of Appeals decision reached the right result but went too far in declaring the tax credits at issue in this case "vested" property rights. This Court has never understood tax credits in this manner, and it was unnecessary for the Court of Appeals to do so here. Viewing tax credits as vested property rights

has the potential to greatly disturb our state government's system of taxation. Unsurprisingly, our Court of Appeals in an earlier decision held that "because any 'rights' that arise under a tax statute are purely a result of legislative 'grace,' the Legislature is free to take such a 'right' away at any time . . . ." *Ludka v Dep't of Treasury*, 155 Mich App 250, 259-260; 399 NW2d 490 (1986) (finding "no vested right in a foreign tax credit" or "in a tax statute or in the continuance of any tax law"). Similarly, although never speaking in such absolute terms, this Court has held that the Legislature, within the limits of the Constitution, has broad discretion over taxation. *Hudson Motor Car Co v Detroit*, 282 Mich 69, 79; 275 NW 770 (1937). This Court emphasized, however, that broad discretion is not limitless discretion. *Id*. For instance, "[t]he control of the state in regard to taxation . . . can not be exercised in an arbitrary manner, nor without regard to those principles of justice and equality on which it is based." *Ryerson v Utley*, 16 Mich 269, 276 (1868).

In order to resolve the statutory question presented in this case, we should only have to look at the economic realities. The Legislature has chosen to create incentives for brownfield restoration and historic preservation. Rather than supporting such efforts directly, the Legislature subsidizes that pursuit through tax policy. Cf. *United States v Hoffman*, 901 F3d 523, 537 (CA 5, 2018) ("Tax credits are the functional equivalent of government spending programs."). The Legislature has imposed specific controls on how the credit is earned and how it can be claimed. As relevant here—and as the parties agree—the Legislature allows only a single assignment to a qualifying partner, member, or shareholder. The parties also agree—and it is abundantly clear—that there was never a prohibited successive assignment between Comerica-Michigan

and Comerica-Texas. Instead, Comerica-Texas claims the credit by reason of its merger with Comerica-Michigan.

As our Court of Appeals has recognized, "the effect of a merger or consolidation on the existing constituent corporations depends upon the terms of the statute under which the merger or consolidation is accomplished." *Handley v Wyandotte Chems Corp*, 118 Mich App 423, 425; 325 NW2d 447 (1982). In this case, the merger proceeded under MCL 487.13703, which governs bank mergers. The bank-merger statute provides that Comerica-Texas, as the consolidated bank following the merger, "holds and enjoys the same and all rights of property, franchises, and interests . . . in the same manner and to the same extent as those rights and interests were held or enjoyed by each consolidating organization at the time of the consolidation." MCL 487.13703(2). Comerica-Texas also "is subject to all the restrictions, disabilities, liabilities, and duties of each of the consolidating organizations." MCL 487.13703(1). As a matter of law, Comerica-Texas and Comerica-Michigan are one and the same, because Comerica-Michigan's corporate existence continues in Comerica-Texas even though it is no longer a separate entity. See MCL 487.13703(1).[1]

As a practical matter, not only is there no statutory prohibition on Comerica-Texas claiming the disputed tax credits by the terms of the merger, it would be grossly unjust and contrary to legislative intent to hold

[1] This is also a general statement of Michigan corporation law. Although the Business Corporation Act, MCL 359.1101 *et seq*., does not apply to banking corporations, MCL 450.1123(2), it similarly provides that following a merger the surviving corporation receives all rights and title to property "without reversion or impairment," MCL 450.1724(1)(b), as well as "all liabilities," MCL 450.1724(1)(d).

otherwise. It would make little sense to find Comerica-Texas subject to Comerica-Michigan's tax liabilities as the result of the merger but not its earned tax credits resulting from Comerica-Michigan's real-life efforts to redevelop brownfields and historic properties. The cascading effect of disallowing these credits would be that future businesses will decide against redeveloping properties that earn the credits, which would damage the Legislature's goal of monetarily incentivizing these private-public redevelopment partnerships. The state must be held to its side of the bargain, and I see no reason to think that there was ever any intention on the part of the state to disallow petitioner from claiming the earned tax credits in this situation.[2]

For these reasons, I concur in part and dissent in part.

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[2] I also question the majority opinion's reference to *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 343; 952 NW2d 384 (2020). Discarding 166 years of legal precedent, *TOMRA* held for the first time that "the canon requiring strict construction of tax exemptions . . . is a canon of last resort" and instead chose a malleable standard for statutory interpretation. See *TOMRA*, 505 Mich at 340-343. Regardless of any differences in judicial philosophies about how to go about statutory interpretation, *TOMRA* concerned tax exemptions, i.e., the absence of tax in a given situation. It did not concern tax credits. It has no application here.

CAMPBELL v DEPARTMENT OF TREASURY

Docket No. 161254. Argued November 9, 2021 (Calendar No. 1). Decided June 9, 2022.

Andrew P. Campbell filed a petition in the Michigan Tax Tribunal, challenging the Department of Treasury's denial of his claim to a principal residence exemption (PRE) for the 2017 tax year. Petitioner had claimed and received the exemption for many years. In late 2016, he purchased property in Arizona. Without petitioner's knowledge, Arizona automatically gave him a credit on his tax bill after he purchased the property, treating the Arizona property as his primary residence. Petitioner claimed a PRE for his Michigan property when he filed his 2017 taxes. Respondent denied the exemption because petitioner had received a substantially similar tax exemption, deduction, or credit for the 2017 tax year from Arizona. When petitioner discovered that Arizona considered his Arizona property his primary residence, petitioner had Arizona change the classification. Nevertheless, respondent refused to grant petitioner a PRE for his Michigan property for the 2017 tax year. Petitioner appealed the denial, and respondent affirmed the denial following an informal conference. Petitioner thereafter filed his petition in the tribunal. The tribunal concluded that petitioner's property did not qualify for an exemption under the PRE statute, MCL 211.7cc, because, even though petitioner did not apply for the Arizona primary-residence classification, under Subsection (3)(a) of the PRE statute, he had still "claimed" a substantially similar benefit to the PRE in another state for the 2017 tax year, regardless of the amount of the benefit or petitioner's subsequent rescission of the Arizona classification. However, the tribunal determined that under Subsection (4) of the PRE statute, the PRE for the property continued until December 31, 2017, and that the property, therefore, had a 100% PRE for the 2017 tax year. Respondent moved for reconsideration, and the tribunal denied the motion. Respondent appealed. In a published opinion, the Court of Appeals, BOONSTRA, P.J., and TUKEL and LETICA, JJ., affirmed the tribunal's judgment. 331 Mich App 312 (2020). The Court agreed with the tribunal that the no-longer-valid exemption remained in effect through December 31 of the 2017 tax year and that petitioner was

entitled to 100% of the PRE for that year. It reasoned that the result was required by the Legislature's public-policy choice in the statutes at issue, including Subsection (4), which creates a uniform taxation scheme that promotes ease of administration by providing a uniform formula for determining the date on which an exemption that has become invalid ceases to apply. The Supreme Court granted respondent's application for leave to appeal. 506 Mich 964 (2020).

In a unanimous opinion by Justice WELCH, the Supreme Court *held*:

Under MCL 211.7cc(3)(a), petitioner was not entitled to a PRE in 2017 because he had claimed in that year a substantially similar exemption, deduction, or credit on property he owned in Arizona. Subsection (4) was not applicable to this case because petitioner's PRE was denied under MCL 211.7cc(3)(a), and Subsection (4) therefore did not entitle petitioner to the benefit of a continuing exemption through the end of the calendar year. The Court of Appeals judgment was reversed because it erred by relying on Subsection (4) to conclude that petitioner's denied PRE was valid through the end of the 2017 tax year.

1. Under MCL 211.1, all property, real and personal, within Michigan's jurisdiction is subject to taxation unless expressly exempted. MCL 211.7cc(1) provides that a principal residence is exempt from the tax levied by a local school district for school operating purposes if the owner of that principal residence claims an exemption as provided in the PRE statute. To obtain the PRE, MCL 211.7cc(2) states that the property owner must file an affidavit with the local tax collecting unit on a form prescribed by the treasury department attesting (1) that the property is owned and occupied as a principal residence by that owner of the property on the date the affidavit is signed and (2) that the owner has not claimed a substantially similar exemption, deduction, or credit on property in another state.

2. MCL 211.7cc(3) prescribes disqualifying factors that preclude eligibility for the PRE even if a person owns and occupies a property as a principal residence. In *Stege v Dep't of Treasury*, 252 Mich App 183 (2002), the Court of Appeals held that the PRE statute did not prohibit owners from simultaneously claiming a PRE in this state at the same time the owner claimed a similar tax benefit for a residence in another state. The following year, the Legislature amended the PRE statute to address the *Stege* opinion. Relevant here, Subsection (3)(a) now provides that a person is not entitled to a PRE in any calendar year in which that person has claimed a substantially similar exemption, deduction,

or credit, regardless of amount, on property in another state. A claim for a substantially similar exemption, deduction, or credit in another state occurs at the time of the filing or granting of a substantially similar exemption, deduction, or credit in another state. If the assessor of the local tax collecting unit, the department of treasury, or the county denies an existing claim for exemption under the PRE statute, an owner of the property subject to that denial cannot rescind a substantially similar exemption, deduction, or credit claimed in another state in order to qualify for the exemption under the PRE statute for any of the years denied.

3. MCL 211.7cc(4) provides, in part, that upon receipt of an affidavit filed under Subsection (2) and unless the claim is denied under the PRE statute, the assessor shall exempt the property from the collection of the tax levied by a local school district for school operating purposes until December 31 of the year in which the owner is no longer entitled to an exemption as provided in Subsection (3). Before the Legislature's amendment of the PRE statute, MCL 211.7cc(4) had allowed only for denial of a claim under Subsection (6); to conform with the 2003 change in Subsection (3), the Legislature broadened Subsection (4) to make it generally applicable to separate bases for PRE denials under the PRE statute. Overall, legislative amendments in 2003 (to address the Court of Appeals' decision in *Stege*) and 2017 (clarifying that a property owner is not entitled to a PRE in any calendar year in which the owner claims a substantially similar tax benefit in another state—regardless of whether the out-of-state benefit is rescinded) reflect a clear legislative intent to preclude property owners from obtaining the benefit of a PRE and a similar out-of-state tax benefit in the same year. Because Subsection (4) does not apply when an owner's PRE is denied, the subsection does not allow a property owner the benefit of a continuing exemption through the end of the calendar year in which a PRE claim is denied.

4. Under MCL 211.7cc(8), the treasury department determines whether the property is the principal residence of the owner claiming the exemption—i.e., the department has authority to independently review the validity of PRE claims and to deny a claim for exemption if the claimant is not entitled to that exemption. In this case, the treasury department reviewed and denied petitioner's 2017 PRE claim because, as prescribed in Subsection (3), he had received a substantially similar exemption, deduction, or credit on his Arizona property in that same calendar year. Contrary to the Court of Appeals' conclusion, because the

PRE was *denied*, MCL 211.7cc(4) did not apply to extend the no-longer-valid exemption through December 31 of the 2017 tax year.

Court of Appeals judgment reversed; treasury department decision and order of determination reinstated.

Justice VIVIANO, joined by Justices ZAHRA and CLEMENT, concurring in full with the majority, wrote separately to further explain why petitioner was not entitled under Subsection (4) to a PRE through the end of the 2017 tax year. To fully resolve the issue before the Court, it was critical to understand the Subsection (4) language "or the owner is no longer entitled to an exemption as provided in Subsection (3)" because the Court of Appeals relied on that language to conclude, incorrectly, that petitioner maintained the PRE through the end of 2017. In response to *Stege*, the Legislature amended Subsection (3) to provide that a person is not entitled to a PRE when that person has claimed a substantially similar exemption, deduction, or credit on property in another state that is not rescinded. Before amendments of the statute beginning in 2003, Subsection (4) provided owners a statutory incentive to voluntarily rescind their PREs; if an owner rescinded his or her PRE, Subsection (4) applied and the property owner would enjoy the PRE through the end of the year in which the PRE was rescinded. The Legislature maintained the pre-2003 incentive structure when it later amended Subsection (4). For that reason, when a claim is *denied* under Subsection (3), Subsection (4) does not apply. Because petitioner did not voluntarily rescind his PRE in 2017 but, rather, the treasury department denied his claim, Subsection (4) did not apply and he was not entitled to retain the exemption until the end of the 2017 tax year.

TAXATION — PROPERTY TAXES — PERSONAL RESIDENCE EXEMPTION — DENIAL OF CLAIM.

MCL 211.7cc(3)(a) provides that a person is not entitled a personal residence exemption (PRE) in any calendar year in which that person has claimed a substantially similar exemption, deduction, or credit, regardless of amount, on property in another state; MCL 211.7cc(4) provides that the assessor shall exempt the property from the collection of the tax levied by a local school district for school operating purposes until December 31 of the year in which the owner is no longer entitled to an exemption as provided in MCL 211.7cc(3); MCL 211.7cc(4) does not apply when an owner's PRE is denied; because MCL 211.7cc(4) does not apply when an owner's PRE is denied, that subsection does not allow a

property owner the benefit of a continuing exemption through the end of the calendar year in which the PRE claim is denied.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *James A. Ziehmer*, Assistant Attorney General, for the Department of Treasury.

Amicus Curiae:

Jason C. Long for the Real Property Law Section of the State Bar of Michigan.

WELCH, J. In this property tax dispute, we consider whether a property owner is entitled to claim a principal residence exemption (PRE) under Michigan tax law when the owner received a similar tax benefit for a home in another state. We conclude that the property owner is not entitled to the PRE. Specifically, under MCL 211.7cc(3)(a), a property owner "is not entitled to [the PRE] in any calendar year in which . . . [t]hat person has claimed a substantially similar exemption, deduction, or credit, regardless of amount, on property in another state." MCL 211.7cc(3)(a) (paragraph structure omitted). Accordingly, we reverse the judgment of the Court of Appeals and reinstate the Department of Treasury's October 2, 2018 decision and order of determination denying petitioner's PRE for the 2017 tax year.

I. FACTS AND PROCEDURAL HISTORY

Petitioner, Andrew P. Campbell, is a lifelong Michigan resident. For many years, petitioner claimed and enjoyed a PRE on his Michigan residence. In late 2016, petitioner purchased a second home in Surprise, Arizona. Petitioner indeed received a surprise the following year: respondent, the Michigan Department of

Treasury (Treasury), reviewed and denied petitioner's PRE claim for his Michigan property for the 2017 tax year. The denial notice stated the following:

> The parcel did not contain a dwelling owned and occupied by a person(s) as his or her principal residence. A person is not entitled to a PRE if the property is not occupied by the owner as his or her principal residence as defined by MCL 211.7dd and/or if any of the conditions detailed in Subsection (3) of MCL 211.7cc occur (refer to the back of this letter for the applicable statutory language). [Emphasis omitted.]

Petitioner appealed Treasury's determination to the Michigan Tax Tribunal's Small Claims Division. As part of his appeal, petitioner attached numerous documents in an attempt to demonstrate his Michigan residency, including his driver's license, insurance, vehicle registrations, voter registration, library card, credit card and banking statements, tax records, and a jury summons. Treasury's position was that it was not questioning whether petitioner actually maintained his Michigan home as his principal residence. Rather, Treasury determined that petitioner was not entitled to the PRE for the 2017 tax year because he had claimed a substantially similar exemption, deduction, or credit in Arizona that same year.

At the Tax Tribunal hearing, petitioner admitted that he had received, unknowingly and unintentionally, a substantially similar exemption, deduction, or credit on his Arizona tax bill because, at least according to the state of Arizona, the Arizona property was his primary residence (and thus eligible for a reduction on property taxes otherwise owed). When petitioner became aware that the effect of this Arizona "primary residence" status would eliminate his ability to claim the PRE on his Michigan property taxes, he promptly

contacted the Maricopa County Assessor's Office and had the classification corrected on a prospective basis. By all appearances, this seems to have been an honest mistake. However, Treasury took the position that under Michigan law, it makes no difference whether the substantially similar exemption, deduction, or credit is deliberately claimed or later rescinded.

The Tax Tribunal agreed with Treasury that petitioner was not entitled to the PRE for the 2017 tax year because he had claimed a substantially similar tax benefit in Arizona and that this determination stood without regard to the amount of the benefit offered by Arizona or petitioner's subsequent rescission of the Arizona primary residence classification. Despite upholding Treasury's determination under MCL 211.7cc(3)(a), the Tax Tribunal then held, with minimal analysis, that petitioner's Michigan PRE continued until the end of that tax year—i.e., December 31, 2017—under a different subsection, MCL 211.7cc(4). The result of this decision was that petitioner was set to receive both the Michigan PRE and Arizona's substantially similar tax benefit for the 2017 tax year. Treasury appealed.

Our Court of Appeals affirmed in a published opinion, holding that "the no-longer-valid exemption remained in effect through December 31 of the 2017 tax year" under MCL 211.7cc(4) and that petitioner "is entitled to 100% of the PRE for that year." *Campbell v Dep't of Treasury*, 331 Mich App 312, 327; 952 NW2d 568 (2020). It reasoned that this was the necessary result of "the public-policy choices made by the Legislature in the statutes at issue." *Id*. at 327 n 3. In particular, the Court understood Subsection (4) as "creating a uniform taxation scheme that promotes ease of administration" because it "provides a uniform

formula for determining the date on which an exemption that has become invalid ceases to apply." *Id*. at 324. We granted leave to consider whether our Court of Appeals erred by interpreting MCL 211.7cc(4) as allowing petitioner's PRE to continue through December 31 of the calendar year in which he was not entitled to the exemption. *Campbell v Dep't of Treasury*, 506 Mich 964 (2020).[1]

II. STANDARD OF REVIEW

Our review of Michigan Tax Tribunal decisions is limited. *Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). "In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation." Const 1963, art 6, § 28. We review de novo questions of statutory interpretation. *Mt Pleasant*, 477 Mich at 53.

III. ANALYSIS

A. INTERPRETATIVE STANDARDS

Under the General Property Tax Act (GPTA), MCL 211.1 *et seq*., "all property, real and personal, within the jurisdiction of this state, *not expressly exempted*, shall be subject to taxation." MCL 211.1 (emphasis added). We understand and give effect to the Legislature's intent as expressed in its words and phrases according to their plain meaning. *Bisio v Village of Clarkston*, 506 Mich 37, 44; 954 NW2d 95 (2020).

[1] Petitioner has not participated in any appellate proceedings. The Real Property Law Section of the State Bar of Michigan submitted an amicus curiae brief advocating for an affirmance of the Court of Appeals decision.

Although the Tax Tribunal's interpretation of a tax statute is entitled to " 'respectful consideration,' " we will enforce an unambiguous statute as written. *SBC Health Midwest, Inc v Kentwood*, 500 Mich 65, 71; 894 NW2d 535 (2017) (citation omitted).

B. THE MICHIGAN PRINCIPAL RESIDENCE EXEMPTION

Because taxation is the rule and exemption from taxation the exception, the burden is on the claimant to establish the right to a tax exemption. *Detroit v Detroit Commercial College*, 322 Mich 142, 149; 33 NW2d 737 (1948); MCL 211.1. The PRE is governed by MCL 211.7cc, which details how a local tax collecting unit, when the exemption is properly claimed, must exempt a qualifying principal residence from the collection of the tax levied by local school districts for school operating purposes. Subsection (1) provides an express exemption for a principal residence "if an owner of that principal residence claims an exemption as provided in [MCL 211.7cc]."[2] MCL 211.7cc(1). Subsection (2) specifies the mechanics of how a property owner may claim the PRE by filing an affidavit with the local tax collecting unit on a form prescribed by Treasury attesting both "that the property is owned and occupied as a principal residence by that owner of the property on the date that the affidavit is signed" and "that the owner has not claimed a substantially similar exemption, deduction, or credit on property in another state." MCL 211.7cc(2).

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[2] "Principal residence" is a defined term. In relevant part, it "means the 1 place where an owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established." MCL 211.7dd(c). In this case, the parties do not dispute that petitioner's Michigan home might satisfy the requirements to qualify as his principal residence.

The remaining sections of MCL 211.7cc provide, in pertinent part:

> (3) . . . For taxes levied after December 31, 2002, *a person is not entitled to an exemption under this section in any calendar year in which any of the following conditions occur*:
>
> (a) *That person has claimed a substantially similar exemption, deduction, or credit, regardless of amount, on property in another state*. Upon request by the department of treasury, the assessor of the local tax collecting unit, the county treasurer or his or her designee, or the county equalization director or his or her designee, a person who claims an exemption under this section shall, within 30 days, file an affidavit on a form prescribed by the department of treasury stating that the person has not claimed a substantially similar exemption, deduction, or credit on property in another state. *A claim for a substantially similar exemption, deduction, or credit in another state occurs at the time of the filing or granting of a substantially similar exemption, deduction, or credit in another state. If the assessor of the local tax collecting unit, the department of treasury, or the county denies an existing claim for exemption under this section, an owner of the property subject to that denial cannot rescind a substantially similar exemption, deduction, or credit claimed in another state in order to qualify for the exemption under this section for any of the years denied.* If a person claims an exemption under this section and a substantially similar exemption, deduction, or credit in another state, that person is subject to a penalty of $500.00. The penalty shall be distributed in the same manner as interest is distributed under subsection (25).
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> * * *
>
> (4) Upon receipt of an affidavit filed under subsection (2) *and unless the claim is denied under this section*, the assessor shall exempt the property from the collection of the tax levied by a local school district for school operating purposes to the extent provided under section 1211 of the

revised school code, 1976 PA 451, MCL 380.1211, as provided in subsection (1) until December 31 of the year in which the property is transferred or, except as otherwise provided in subsections (5), (32), and (33), is no longer a principal residence as defined in section 7dd, or the owner is no longer entitled to an exemption as provided in subsection (3).

* * *

(8) The department of treasury shall determine if the property is the principal residence of the owner claiming the exemption. . . . [T]he department of treasury may review the validity of exemptions for the current calendar year and for the 3 immediately preceding calendar years. Except as otherwise provided in subsections (5), (32), and (33), if the department of treasury determines that the property is not the principal residence of the owner claiming the exemption, the department shall send a notice of that determination to the local tax collecting unit and to the owner of the property claiming the exemption, indicating that the claim for exemption is denied, stating the reason for the denial, and advising the owner claiming the exemption of the right to appeal the determination to the department of treasury and what those rights of appeal are. . . . Upon receipt of a notice that the department of treasury has denied a claim for exemption, the assessor shall remove the exemption of the property and, if the tax roll is in the local tax collecting unit's possession, amend the tax roll to reflect the denial and the local treasurer shall within 30 days of the date of the denial issue a corrected tax bill for any additional taxes with interest at the rate of 1.25% per month or fraction of a month and penalties computed from the date the taxes were last payable without interest and penalty. If the tax roll is in the county treasurer's possession, the tax roll shall be amended to reflect the denial and the county treasurer shall within 30 days of the date of the denial prepare and submit a supplemental tax bill for any additional taxes, together with interest at the rate of 1.25% per month or fraction of a month and penalties

> computed from the date the taxes were last payable without interest or penalty. [Emphasis added.]

The statute is clear on its face. A tax exemption for real or personal property under the GPTA is available only when the Legislature *expressly* exempts that property from taxation. MCL 211.1. That has not occurred here. Instead, the Legislature explicitly provided that "a person *is not entitled to an exemption* under [MCL 211.7cc] *in any calendar year*" when "[t]hat person has claimed a substantially similar exemption, deduction, or credit, regardless of amount, on property in another state."[3] MCL 211.7cc(3)(a) (emphasis added).[4] As applied to the facts of this case, petitioner was not entitled to the PRE in the 2017 tax year exactly because he admitted that he had received

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[3] As a general rule, the taxable status of real property is determined as of December 31 of the *immediately preceding* year. MCL 211.2(2). However, in the context of the PRE, a different rule applies. "Notwithstanding the tax day provided in [MCL 211.2], the status of property as a principal residence shall be determined on the date an affidavit claiming an exemption is filed under [MCL 211.7cc(2)]." MCL 211.7cc(1). Subsection (3)(a) requires a review of the property owner's tax claims in another state during the course of the entire calendar year.

[4] Our Court of Appeals recently described Subsection (3) as stating the "conditions in which a person otherwise qualified to receive the PRE in Subsection (1) is disqualified from doing so." *Foster v Van Buren Co*, 332 Mich App 273, 281; 956 NW2d 554 (2020). The *Principal Residence Exemption Guidelines*, a publication issued by Treasury, similarly refers to Subsection (3) as listing "disqualifying factors" that preclude eligibility for the PRE even if a person owns and occupies a property as a principal residence. Treasury, *Principal Residence Exemption Guidelines* (August 2021), p 25, available at <https://www.michigan.gov/documents/taxes/PRE_Guidelines_725007_7.pdf> (accessed December 9, 2021) [https://perma.cc/HH73-RLCK]. The result is the same regardless of whether the property owner is considered "disqualified" or simply unable to establish entitlement to the PRE because of a failure to satisfy the express conditions imposed by the Legislature for eligibility. Under either circumstance, the property owner is not entitled to the PRE.

"a substantially similar exemption, deduction, or credit" on his Arizona property in that same calendar year.

Although our Court of Appeals arrived at this same conclusion, it did not end its analysis there. Instead, reasoning that the Legislature sought to maintain uniformity and to simplify the administration of the PRE, that Court held that Subsection (4) applied and worked to allow petitioner to maintain the benefit of his denied PRE through the end of the 2017 calendar year. *Campbell*, 331 Mich App at 324-325. We disagree.

To understand why the Court of Appeals erred in its interpretation of Subsection (4), it is important to recognize the changes that the Legislature has made to MCL 211.7cc over time and in response to earlier judicial decisions interpreting this statute. See *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009) ("[C]ourts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute.").

In *Stege v Dep't of Treasury*, 252 Mich App 183, 193-196; 651 NW2d 164 (2002), our Court of Appeals held that the GPTA did not prohibit property owners from simultaneously claiming both a PRE and a similar tax benefit for a separate residence in another state. The Legislature responded by amending MCL 211.7cc(3) to provide that property owners are not entitled to a PRE when they have "claimed a substantially similar exemption, deduction, or credit on property in another state that is not rescinded." 2003 PA 105. That change necessitated a conforming change to Subsection (4). Previously, Subsection (4) stated, "Upon receipt of an affidavit filed under subsection (2)

and unless the claim is denied *under subsection (6)*, the assessor shall exempt the property . . . ." MCL 211.7cc(4) as amended by 2002 PA 624 (emphasis added). Because 2003 PA 105 added a new basis for denying a PRE under Subsection (3)—i.e., claiming a substantially similar tax exemption in another state—Subsection (4) had to be broadened to make it generally applicable to all separate bases for PRE denials under MCL 211.7cc. Accordingly, 2003 PA 105 broadened the coverage of Subsection (4) to reflect its current form: "unless the claim is denied *under this section* . . . ." MCL 211.7cc(4) as amended by 2003 PA 105 (emphasis added).

In 2017, the Tax Tribunal issued an unpublished decision holding that property owners whose PRE claims are denied because they claimed a substantially similar tax benefit in another state could rescind their out-of-state tax benefit in order to qualify for the Michigan PRE that was previously denied. See *Walczak Trust v Berrien Co*, unpublished opinion of the Michigan Tax Tribunal, issued January 10, 2017 (Docket No. 16-001208), p 2. The Legislature responded to this decision by again amending MCL 211.7cc(3), this time to clarify that a property owner *is not* entitled to a PRE "in *any* calendar year in which" that owner claims a substantially similar tax benefit in another state—regardless of whether the out-of-state benefit is rescinded. See 2017 PA 121 (emphasis added).[5] Overall, we understand these legislative amendments to reflect a clear legislative intent to

[5] In enacting 2017 PA 121, the Legislature explicitly stated, "This amendatory act is curative and intended to correct any misinterpretation of legislative intent in the final opinion and judgment of the Michigan Tax Tribunal, MTT Docket No. 16-001208, issued January 10, 2017." 2017 PA 121, enacting § 2.

preclude property owners from obtaining the benefit of the PRE and a similar out-of-state tax benefit in the same year.[6]

As we have noted in earlier decisions, "[t]he GPTA provides a comprehensive system for the assessment of property for ad valorem tax purposes and the collection of those taxes. It also provides for the administration of the system." *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 530; 817 NW2d 548 (2012). A PRE is not available "in any calendar year" when a property owner "claimed a substantially similar exemption, deduction, or credit, regardless of amount, on property in another state." MCL 211.7cc(3)(a). Contrary to the Court of Appeals, we do not interpret Subsection (4) as allowing a property owner the continuing benefit of a denied exemption claim through the end of the calendar year. Instead, Subsection (4) should be read consistently with its purpose in administering our system of property taxation through the local tax collecting unit. It directs that "unless the claim is denied under this section, the assessor shall exempt the property" and describes other circumstances when the exemption will no longer remain valid. MCL 211.7cc(4).

To resolve this case, we recognize that Treasury *denied* petitioner's PRE pursuant to its authority under MCL 211.7cc to independently review the validity of PRE claims and to deny a claim for an exemption if the claimant is not entitled to that exemption. See MCL 211.7cc(8) (stating that "the department of treasury may review the validity of exemptions for the current calendar year and for the 3 immediately pre-

[6] Consistently with this understanding of legislative intent, the Legislature subjects those wrongfully claiming the PRE and a substantially similar exemption, deduction, or credit in another state to a $500 penalty. MCL 211.7cc(3)(a).

ceding calendar years"); *Schubert v Dep't of Treasury*, 322 Mich App 439, 453-454; 912 NW2d 569 (2017). When a PRE claim is denied under MCL 211.7cc, other provisions require that the assessor "remove the exemption of the property," that the tax roll be amended "to reflect the denial," and that a corrected tax bill issue "within 30 days of the date of the denial" for any additional taxes with interest. See MCL 211.7cc(6), (8), and (11). In other words, when a property owner's PRE claim is denied under MCL 211.7cc, Subsection (4) imparts no further duty or authority on the assessor to continue to exempt the property from taxation.[7] Therefore, the Court of Appeals erred when it applied Subsection (4) to conclude otherwise.

We reverse the judgment of the Court of Appeals and reinstate the October 2, 2018 decision and order of determination of the Department of Treasury.

MCCORMACK, C.J., and ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with WELCH, J.

VIVIANO, J. (*concurring*). I concur with the majority but write separately because I do not believe the majority opinion adequately explains why petitioner, Andrew P. Campbell, is not entitled to a principal residence exemption (PRE) through the end of the 2017 tax year under Subsection (4) of the PRE statute, MCL 211.7cc(4). In upholding petitioner's claim, the Court of Appeals panel believed that Subsection (4) was "at the

[7] In light of our holding that Subsection (4) does not entitle a property owner to the benefit of a continuing exemption through the end of a calendar year when a PRE claim is denied, we have no occasion to address whether a property owner can obtain the benefit of a continuing exemption through the end of a calendar year under Subsection (4) by preemptively rescinding a Michigan PRE claim in anticipation of claiming a substantially similar tax benefit in another state.

heart of this appeal" and was "the critical provision" in resolving this case. *Campbell v Dep't of Treasury*, 331 Mich App 312, 318, 322; 952 NW2d 568 (2020). Although the majority correctly concludes that Subsection (4) is not applicable, it does not sufficiently explain why this is so. I would take this opportunity to explain that Subsection (4) applies when the taxpayer voluntarily rescinds his or her PRE—not where, as here, the claim is denied by the tax authorities under MCL 211.7cc.

The majority holds that because petitioner's PRE was denied by respondent, the Department of Treasury, under MCL 211.7cc(3), that subsection's prohibition applied and he was "not entitled to an exemption under [MCL 211.7cc] in any calendar year in which" he "claimed a substantially similar exemption . . . in another state." I agree that Subsection (3) provides part of the answer. But the Court of Appeals looked to Subsection (4), which appears to set forth a different rule:

> Upon receipt of an affidavit filed under subsection (2) and unless the claim is denied under this section, the assessor shall exempt the property from the collection of the tax levied by a local school district for school operating purposes to the extent provided under section 1211 of the revised school code, 1976 PA 451, MCL 380.1211, as provided in subsection (1) until December 31 of the year in which the property is transferred or, except as otherwise provided in subsections (5), (32), and (33), is no longer a principal residence as defined in section 7dd, or the owner is no longer entitled to an exemption as provided in subsection (3).

Under its reading, the Court of Appeals concluded that this subsection applied and that it established an end date of December 31 for petitioner's PRE. *Campbell*, 331 Mich App at 322, 325-327. The majority purports

to explain why Subsection (4) is inapplicable, but offers only a dry statutory history followed by the broad conclusion that the history "reflect[s] a clear legislative intent to preclude property owners from obtaining the benefit of the PRE and a similar out-of-state benefit in the same year." Clearly, one colorable reading of Subsection (4) is that, at least in certain circumstances, the Legislature intended to *allow* the taxpayer to benefit from the PRE through the end of the year in which he or she claims a substantially similar tax exemption in another state. We must explain why those circumstances do not exist here. To complete the analysis, a more thorough investigation of the statutory history must be undertaken along with an examination of the statutory text.

Before MCL 211.7cc was amended in 2003, the statute contemplated that owners would lose their PREs only if they transferred ownership or no longer used the property as a principal residence. Former Subsection (3) simply stated that a husband and wife who filed a joint tax return were only entitled to one PRE, then known as the "homestead exemption." MCL 211.7cc(3), as amended by 2002 PA 624. Like the current statute, former Subsection (5) set forth the requirement that an owner who no longer uses his or her home as a principal residence "shall rescind the claim of exemption . . . ." MCL 211.7cc(5), as amended by 2002 PA 624.[1] And, as now, former Subsection (6) set out the process for a local tax assessor to deny a new or

[1] This subsection presently states:

> (5) . . . [N]ot more than 90 days after exempted property is no longer used as a principal residence by the owner claiming an exemption, that owner shall rescind the claim of exemption by filing with the local tax collecting unit a rescission form prescribed by the department of treasury. [MCL 211.7cc(5).]

existing PRE when the claimed property was no longer the owner's principal residence. MCL 211.7cc(6), as amended by 2002 PA 624.[2] At that time, former Subsection (4) was straightforward, stating, in relevant part, that "unless the claim is denied *under subsection (6)*," the property would be exempt "until December 31 of the year in which the property is transferred or no longer a homestead . . . ." MCL 211.7cc(4), as amended by 2002 PA 624 (emphasis added).

The statutory framework provided owners an incentive to voluntarily rescind their PREs. If they did so, then Subsection (4) would apply because their PRE claim would not be denied for the year in which the claim was rescinded. In other words, under former Subsection (4), the property owners could enjoy the PRE through the end of the year. If the claim was denied (under Subsection (6)), then they would not receive this benefit. See MCL 211.7cc(5), as amended by 2002 PA 624. As now provided for in Subsection (6), if a claim was denied under the former statute, the assessor was to remove the exemption and assess taxes with interest for the period in which the taxes should have been paid. See MCL 211.7cc(6) and (7), as amended by 2002 PA 624.

As the majority notes, the Court of Appeals in 2002 held that this statutory framework allowed taxpayers to simultaneously claim a PRE in Michigan and a similar tax benefit in another state. See *Stege v Dep't of*

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[2] This subsection now states,

> (6) . . . [I]f the assessor of the local tax collecting unit believes that the property for which an exemption is claimed is not the principal residence of the owner claiming the exemption, the assessor may deny a new or existing claim . . . . The assessor may deny a claim for exemption for the current year and for the 3 immediately preceding calendar years. [MCL 211.7cc(6).]

Treasury, 252 Mich App 183, 193-196; 651 NW2d 164 (2002). In response, the Legislature amended MCL 211.7cc(3) to provide that a person is not entitled to a PRE when that person has "claimed a substantially similar exemption, deduction, or credit on property in another state that is not rescinded." See MCL 211.7cc(3)(a), as amended by 2003 PA 105. The Legislature also put MCL 211.7cc(4) into its present form, expanding the introductory clause to exclude any claim "denied under this section[.]" See MCL 211.7cc(4), as amended by 2003 PA 105, and MCL 211.7cc(4), as amended by 2020 PA 96. The pre-2003 incentive structure remained in place after these amendments. Specifically, the statutory structure continues to encourage property owners to voluntarily rescind their PREs. Thus, if a claim is *denied* under Subsection (3), then Subsection (4) is inapplicable. That is, if the property owner rescinds his or her PRE, then Subsection (4)'s operative language ("unless the claim is *denied* under this section") would not be triggered and the December 31 termination date would apply to allow the property owner to retain the PRE for the remainder of the calendar year.[3] MCL 211.7cc(4) (emphasis added).

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[3] Amicus curiae the Real Property Law Section of the State Bar of Michigan argues that the language in Subsection (4)—"the claim . . . denied under this section"—refers only to a local tax assessor's initial assessment of a *new* PRE claim filed as an affidavit under Subsection (2) and, therefore, that respondent's denial of petitioner's *existing* PRE claim had no effect on the applicability of Subsection (4). A review of MCL 211.7cc as a whole, however, suggests the Legislature did not intend to limit Subsection (4)'s operative clause to only new claims. For example, MCL 211.7cc(6) refers to both "new" and "existing" claims in describing the local tax collecting unit's authority to deny a PRE if the assessor believes the property is not the owner's principal residence. Had the Legislature intended the language "the claim . . . denied under this section" in Subsection (4) to refer only to a "new" PRE claim, it likely would have used that phrasing. See *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d

The language in Subsection (3) that the majority relies on was added in response to a Tax Tribunal decision in 2017. The tribunal held that a taxpayer claiming a substantially similar exemption in another state could rescind that exemption and thereby retain his or her entitlement to the previously denied PRE in this state. See *Walczak Trust v Berrien Co*, unpublished opinion of the Michigan Tax Tribunal, issued January 10, 2017 (Docket No. 16-001208), p 2. The Legislature thereafter amended Subsection (3) to make clear that a person is not entitled to a PRE "in any calendar year in which" that person "claimed a substantially similar exemption . . . in another state," without regard to whether the other exemption is rescinded. See MCL 211.7cc(3)(a), as amended by 2017 PA 121.[4] In the same legislation, Subsection (4) was amended to add the clause at the center of the Court of Appeals' analysis: "or the owner is no longer entitled to an exemption as provided in subsection (3)." MCL 211.7cc(4), as amended by 2017 PA 121, and discussed in *Campbell*, 331 Mich App at 322, 325-327. This last change led the Court of Appeals here to conclude that terminations of PREs under Subsection (3) fall within

101 (2009) ("When the Legislature uses different words, the words are generally intended to connote different meanings. . . . If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word."). See also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 170 ("[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea.").

[4] The Legislature explicitly stated that the statute was in reaction to *Walczak Trust*: "This amendatory act is curative and intended to correct any misinterpretation of legislative intent in the final opinion and judgment of the Michigan Tax Tribunal, MTT Docket No. 16-001208, issued January 10, 2017." 2017 PA 121, enacting § 2.

Subsection (4) and have an end date on December 31. *Campbell*, 331 Mich App at 325-327.

While Subsection (4) does not apply here because the claim *was* denied under this subsection by the taxing authority, it is important to give some account of the language in Subsection (4) because the Court of Appeals relied on it. As noted, the December 31 end date in Subsection (4) applies when taxpayers voluntarily rescind their PREs, thus giving them the benefit of the PRE that they would not otherwise have if their claims were denied. It is possible, as the Court of Appeals concluded, that the phrase "December 31 of the year in which" applies to the phrase "or the owner is no longer entitled to an exemption as provided in subsection (3)." If so, then Subsection (4) would similarly benefit owners who voluntarily rescind their PREs when they acquire a substantially similar exemption in another state.[5] In other words, application of the December 31 date would encourage owners to voluntarily rescind their PREs when their claim would otherwise be de-

[5] In interpreting Subsection (4), the Court of Appeals concluded that the December 31 language in the subsection applied to the new phrase added to the end of the subsection in 2017. *Campbell*, 331 Mich App at 325-327. That is, the Court read the statute as terminating the PRE on "December 31 of the year in which the property is transferred or . . . is no longer a principal residence . . . , or the owner is no longer entitled to an exemption as provided in subsection (3)." MCL 211.7cc(4). While the December 31 deadline evidently applies to situations when "the property is transferred or . . . is no longer a principal residence," it is not immediately clear whether the December 31 deadline also extends to situations in which "the owner is no longer entitled to an exemption as provided in subsection (3)." *Id*. Of course, it is difficult to see what meaning that last phrase would have if the December 31 end date did not apply to it. Because Subsection (4) is not triggered when a PRE is denied, I need not resolve this in the instant case, but it is an open question whether the December 31 end date would apply to the third situation mentioned, where a taxpayer voluntarily rescinds a PRE because of claiming a substantially similar credit in another state.

nied under Subsection (3), just as it does for transfers and rescissions based on the home no longer being used as a principal residence. We need not decide that question here because the PRE was not voluntarily rescinded.

To fully resolve the question that is before the Court and explain why the Court of Appeals erred, it is critical to explain why Subsection (4) is inapplicable. The answer is that Subsection (4) applies only when a claim is not denied under MCL 211.7cc, and a claim is not denied when it is voluntarily rescinded. Here, petitioner did not voluntarily rescind his PRE; it was denied by the taxing authority. Therefore, Subsection (4) cannot apply and the language in Subsection (3) prohibiting the taxpayer from claiming an exemption controls.

For these reasons, I concur.

ZAHRA and CLEMENT, JJ., concurred with VIVIANO, J.

PEOPLE v MOSS

Docket No. 162208. Argued on application for leave to appeal December 8, 2021. Decided June 10, 2022.

John A. Moss was convicted of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(d) (related by blood or affinity and sexual penetration occurs), after he pleaded no contest to the charge in the Berrien Circuit Court. The charge stemmed from allegations made by defendant's adoptive sister. In exchange for his plea, the court, Donna B. Howard, J., dismissed the other charges that had been brought against defendant, including another count of CSC-III, MCL 750.520d(1)(b) (use of force or coercion), and a fourth-offense habitual-offender enhancement, MCL 769.12. Defendant and the complainant did not have a birth parent in common, but they were both adopted by the same woman. The court used the police report to establish the factual basis for the plea, finding that defendant and the complainant had engaged in sexual intercourse and that they were related as brother and sister by the adoption. After sentencing, defendant moved to withdraw his plea, arguing for the first time that he was not related to the complainant by either blood or affinity. The trial court denied the motion, determining that, although the adoptive siblings were not related by blood, they were related by affinity. Defendant sought leave to appeal in the Court of Appeals; the Court denied the application in an unpublished order entered August 21, 2017 (Docket No. 338877). Defendant sought leave to appeal in the Supreme Court, and after hearing oral argument on the application, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 503 Mich 1009 (2019). The Supreme Court directed the Court of Appeals to address whether a family relation that arises from a legal adoption is either effectively a blood relation, as that term is used in MCL 750.520b through MCL 750.520e, or a relation by affinity, as that term is used in MCL 750.520b through MCL 750.520e. On remand, the Court of Appeals, SHAPIRO, P.J., and SERVITTO and LETICA, JJ., affirmed the trial court's denial of defendant's motion, reasoning that defendant and the complainant were effectively related by blood. 333 Mich App 515 (2020). Having found that they were related by blood, the Court considered it unnecessary to

address whether defendant and the complainant were related by affinity, but it did so anyway because of the remand order and concluded that they were not related by affinity. Defendant again sought leave to appeal in the Supreme Court. The Supreme Court ordered and heard oral argument on whether to grant defendant's application for leave to appeal or take other action, and it directed the parties to submit briefs addressing whether the Court of Appeals erred by concluding that defendant and the complainant were effectively related by blood for purposes of MCL 750.520d(1)(d), such that there was an adequate factual basis for defendant's no-contest plea. 507 Mich 939 (2021).

In a per curiam opinion signed by Chief Justice MCCORMACK and Justices ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, the Supreme Court, in lieu of granting leave to appeal, *held*:

Persons who are related by adoption but who otherwise do not share an ancestor in common are not related "by blood" for purposes of MCL 750.520d(1)(d), which criminalizes sexual penetration with another person when the other person is related to the actor by blood or affinity to the third degree. Defendant and the complainant, who were adoptive siblings, were not related by blood for purposes of the statute, and the Court of Appeals erred by concluding otherwise. Because the order directing oral argument on the application only asked the parties to address whether defendant and the complainant were related by blood, the Court of Appeals' conclusion that defendant and the complainant were not related by affinity was left undisturbed. Because an adequate factual basis for defendant's plea did not exist in light of the Courts' legal rulings, remand to the trial court for further proceedings was required.

1. MCR 6.302(A) provides that a court may not accept a guilty plea unless the court is convinced that the plea is accurate. A trial court must establish a factual basis for a plea to ensure the plea's accuracy. The factual basis for a plea is insufficient if it does not establish grounds for finding that the defendant committed the crime charged. MCL 750.520d(1)(d) provides that a person is guilty of CSC-III if the person engages in sexual penetration with another person and that other person is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by Chapter LXXVI of the Michigan Penal Code, MCL 750.520 *et seq*. In *People v Zajaczkoswski*, 493 Mich 6 (2012), the Supreme Court interpreted the phrase "relationship by blood" as used in the first-degree criminal sexual conduct statute, MCL 750.520b, to mean a relationship between persons arising by descent from a common

ancestor or a relationship by birth rather than marriage. That interpretation also applies to the phrase "related to the actor by blood" in MCL 750.520d(1)(d). Because a relationship formed by adoption does not arise by descent from a common ancestor or by birth, persons who are related by adoption but who otherwise do not share an ancestor in common are not related "by blood" for purposes of MCL 750.520d(1)(d).

2. The Court of Appeals' analysis of MCL 710.60 to resolve the issue of whether defendant was related to the complainant for purposes of MCL 750.520d(1)(d) was flawed because (1) numerous sections in the Adoption Code distinguished and continue to distinguish between relationships by blood and relationships by adoption; (2) the Adoption Code can only change the law, not the genetic makeup of an adopted child or the child's adoptive parents, and MCL 710.60 focuses on the rights and duties of adoptive parents and adopted individuals, not on biological makeup; and (3) the Court of Appeals' analysis would impermissibly enlarge the CSC-III statute by creating a constructive crime, allowing prosecution when the actor is only *effectively* related by blood to the complainant rather than *actually* related by blood. Defendant and the complainant were not related by blood because there was no DNA evidence establishing that they were related to the third degree, no evidence that they shared a common ancestor, and no evidence that they were related by birth.

Court of Appeals judgment reversed in part, and case remanded to the trial court.

Justice WELCH, concurring in part and dissenting in part, agreed with the Court's holding that adoptive siblings are not related "by blood" for purposes of MCL 750.520d(1)(d) but wrote separately because, under that statute, the Legislature considers adoptive siblings to be related by affinity. Justice WELCH would have addressed whether adoptive siblings are related by affinity to the third degree for purposes of MCL 750.520d(1)(d) because it involved a controlling legal issue for which the Court could have provided a solution. The term "affinity" is defined as a relationship by marriage or by ties other than blood. In *People v Armstrong*, 212 Mich App 121 (1995), the Court of Appeals applied that definition to conclude that stepsiblings were related by affinity under the criminal sexual conduct statutes. The *Armstrong* rationale dictates that adoptive relationships are included within the term "affinity" as used in MCL 750.520d(1)(d); the Court of Appeals erred in this case by applying the *Armstrong* reasoning to the "blood" prong in MCL

750.520d(1)(d), instead of to the "affinity" prong. It would be patently absurd to hold that the Legislature intended what is essentially an incest statute to cover relationships between stepsiblings and not adoptive siblings. Thus, for purposes of MCL 750.520d(1)(d), "affinity" includes both step and adopted relationships. A review of the historical amendments of the criminal sexual conduct act supports that the drafters omitted the word "adoption" in the statutes concerning criminal sexual conduct with the understanding that those relationships would fall within the imprecise term "affinity." Moreover, defendant failed to offer any plausible, rational basis for enacting a criminal sexual conduct statute that would extend to step relationships but not to adoptive relationships.

STATUTES — CRIMINAL SEXUAL CONDUCT — ADOPTED INDIVIDUALS — WORDS AND PHRASES — "RELATED BY BLOOD."

MCL 750.520d(1)(d) provides that a person is guilty of third-degree criminal sexual conduct if the person engages in sexual penetration with another person and that other person is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by Chapter LXXVI of the Michigan Penal Code; persons who are related by adoption but who otherwise do not share an ancestor in common are not related "by blood" for purposes of MCL 750.520d(1)(d).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Steven P. Pierangeli*, Prosecuting Attorney, for the people.

State Appellate Defender (by *Jacqueline J. McCann*) for defendant.

PER CURIAM. At issue in this case is whether adopted siblings who do not share a common ancestor are related "by blood" for purposes of the crime of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(d). We hold that such persons are not related "by blood" under the statute. As a result, there was not an adequate factual basis for defendant's

no-contest plea.[1] We reverse, in part, the judgment of the Court of Appeals and remand to the circuit court.

I. FACTS AND PROCEDURAL HISTORY

Defendant, John Moss, was charged as a fourth-offense habitual offender with two counts of CSC-III, one for being related to the complainant by blood or affinity to the third degree, contrary to MCL 750.520d(1)(d), and one for using force or coercion, contrary to MCL 750.520d(1)(b).[2] At the time of the offense, defendant was 25 years old, and the complainant for the CSC-III charges, his adoptive sister, was 17 years old. Defendant and the complainant do not have a birth parent in common, but they were both adopted by the same woman. The complainant alleged that in November 2015 she and defendant engaged in sexual acts; the complainant reported that these act were not consensual, while defendant claimed that they were.

In exchange for dismissing all other charges against him and the fourth-offense habitual-offender enhancement, defendant pleaded no contest to the CSC-III count under MCL 750.520d(1)(d). The parties agreed with the trial court's suggestion to use the police report to establish a factual basis for the plea. Relying on that report, the court found that defendant and the complainant engaged in sexual intercourse and "that they are related to the third degree by adoption as brother and sister."

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[1] We leave undisturbed the Court of Appeals' conclusion that defendant and the complainant are not related by affinity. See *People v Moss*, 333 Mich App 515, 524-526; 963 NW2d 390 (2020).

[2] He was also charged with resisting and obstructing a police officer and possession of marijuana, second offense.

After being sentenced, defendant moved to withdraw his plea, arguing that he was not related to the complainant by either blood or affinity merely because they were both adopted by the same person. The trial court denied the motion. It found that defendant and the complainant were not related "by blood." With regard to relationship by "affinity," the trial court relied on *People v Armstrong*, 212 Mich App 121, 128; 536 NW2d 789 (1995), for the proposition that the term "affinity" described a relationship by either marriage or " 'ties other than those of blood.' " (Citation omitted.) Because defendant and the complainant were adopted by the same woman, the trial court held that they were related by affinity as adoptive brother and sister and that the factual basis for the plea was sufficient. Defendant applied for leave to appeal, and the Court of Appeals denied leave for lack of merit in the grounds presented. *People v Moss*, unpublished order of the Court of Appeals, entered August 21, 2017 (Docket No. 338877).

Defendant sought leave to appeal that decision in this Court, and after hearing oral argument on the application, in lieu of granting leave, we remanded to the Court of Appeals for it to address:

> whether a family relation that arises from a legal adoption, see MCL 710.60(2) ("After entry of the order of adoption, there is no distinction between the rights and duties of natural progeny and adopted persons") (1) is effectively a "blood" relation, as that term is used in MCL 750.520b—MCL 750.520e; or (2) is a relation by "affinity," as that term is used in MCL 750.520b—MCL 750.520e, see *Bliss v Caille Bros Co*, 149 Mich 601, 608 (1907); *People v Armstrong*, 212 Mich App 121 (1995); *People v Denmark*, 74 Mich App 402 (1977). [*People v Moss*, 503 Mich 1009 (2019).]

On remand, the Court of Appeals affirmed the trial court's denial of defendant's motion, reasoning that defendant and the complainant were related by blood. *People v Moss*, 333 Mich App 515, 519-524; 963 NW2d 390 (2020). In doing so, the Court of Appeals relied on MCL 710.60. *Id*. at 520. After determining that defendant and the complainant were related by blood, the Court of Appeals explained that it did not need to decide whether they were related by affinity but did so anyway because of the remand order, concluding that they were not related by affinity. *Id*. at 524-526.

Defendant again sought leave to appeal in this Court. We ordered oral argument on the application to consider "whether the Court of Appeals erred in concluding on remand that the defendant and the complainant are effectively related by blood for purposes of MCL 750.520d(1)(d), such that there was an adequate factual basis for the defendant's no-contest plea." *People v Moss*, 507 Mich 939 (2021).

II. STANDARD OF REVIEW AND INTERPRETIVE PRINCIPLES

"We review for an abuse of discretion a trial court's ruling on a motion to withdraw a plea." *People v Brown*, 492 Mich 684, 688; 822 NW2d 208 (2012). "A trial court necessarily abuses its discretion when it makes an error of law." *People v Rajput*, 505 Mich 7, 11; 949 NW2d 32 (2020) (citation and quotation marks omitted). We review de novo questions of law, such as the interpretation and application of statutes. *People v Kennedy*, 502 Mich 206, 213; 917 NW2d 355 (2018). "Our goal in interpreting a statute is to give effect to the intent of the Legislature as expressed in the statute's language." *People v Garrison*, 495 Mich 362, 367; 852 NW2d 45 (2014). "Absent ambiguity, we assume that the Legislature intended for the words in

the statute to be given their plain meaning, and we enforce the statute as written." *Id*.

III. ANALYSIS

A court may not accept a guilty plea unless it is convinced that the plea is accurate. MCR 6.302(A). To ensure the accuracy of a plea, a trial court must establish a factual basis for the plea. *People v Pointer-Bey*, 321 Mich App 609, 616; 909 NW2d 523 (2017), citing MCR 6.302(D). The factual basis is insufficient if it does "not establish grounds for finding that defendant committed the crime charged . . . ." *People v Mitchell*, 431 Mich 744, 748; 432 NW2d 715 (1988). In the present case, defendant pleaded no contest to CSC-III, contrary to MCL 750.520d(1)(d). The statute, which is part of the Michigan Penal Code, MCL 750.1 *et seq*., provides, in relevant part:

> (1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:
>
> * * *
>
> (d) That other person is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by this chapter. [MCL 750.520d.]

The statute does not define the word "blood" or the phrase "related to the actor by blood." We have previously interpreted these terms in the statute criminalizing criminal sexual conduct in the first degree, MCL 750.520b. See *People v Zajaczkowski*, 493 Mich 6, 13;

825 NW2d 554 (2012).[3] We noted, "A relationship by 'blood' is defined as 'a relationship between persons arising by descent from a common ancestor' or a relationship 'by birth rather than by marriage.' " *Id*., quoting *Black's Law Dictionary* (8th ed), p 182, and *Random House Webster's College Dictionary* (2001), p 145.[4] The definitions cited in *Zajaczkowski* are applicable to this case. A relationship formed by adoption does not arise by descent from a common ancestor or by birth. Therefore, under the ordinary meaning of the statutory language, individuals related by adoption are not related by blood.

Instead of first looking at the plain meaning of MCL 750.520d(1)(d), the Court of Appeals in this case looked at MCL 710.60,[5] which states, in relevant part:

> (1) After the entry of an order of adoption, if the adoptee's name is changed, the adoptee shall be known and called by the new name. The person or persons adopting the adoptee then become the parent or parents of the adoptee under the law as though the adopted person had been born to the adopting parents and are liable for all the duties and entitled to all the rights of parents.
>
> (2) After entry of the order of adoption, there is no distinction between the rights and duties of natural progeny and adopted persons, and the adopted person becomes

[3] Although some of the other elements differ between MCL 750.520b and MCL 750.520d, the relationship elements are sufficiently similar such that *Zajaczkowski* is relevant to determining the proper definition of the phrase in this case.

[4] Although different in their wording, the definitions have no practical difference because they both focus on a biological relationship. Therefore, it is unnecessary to determine whether "by blood" is a term of art, and it is proper to consult both lay and legal dictionaries. See *Sanford v Michigan*, 506 Mich 10, 21 n 23; 954 NW2d 82 (2020).

[5] We did highlight this statute in our remand order.

> an heir at law of the adopting parent or parents and an heir at law of the lineal and collateral kindred of the adopting parent or parents.

From the statute, the Court of Appeals concluded that "[t]he former biological ties of defendant and complainant were each severed by adoption, and a completely new relationship was substituted." *Moss*, 333 Mich App at 521. For this reason, it determined "that a constructive biological relationship exists between" defendant and the complainant and that the two are "effectively related by blood" for purposes of MCL 750.520d(1)(d). *Id*.

The Court of Appeals' analysis is flawed in a number of respects. First, numerous sections in the Adoption Code distinguished and continue to distinguish between relationships by blood and relationships by adoption.[6] The Legislature has also continued this distinction in defining "related" and "relative" since MCL 710.60 was enacted.[7] "As a general rule, we must

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[6] See, e.g., MCL 710.22(t) (defining "relative" as someone related "within the fifth degree by marriage, blood, or adoption"); MCL 710.26(2) ("This subsection also applies to . . . the adoption of a child related to the petitioner within the fifth degree by marriage, blood, or adoption."); MCL 710.27(6) (stating that the subsection does not apply to the adoption of a child related "within the fifth degree by marriage, blood, or adoption").

[7] See, e.g., MCL 205.27a(12) ("[A] person is related to an individual if that person is a spouse, brother or sister, whether of the whole or half blood or by adoption, ancestor, lineal descendant of that individual or related person . . . ."); MCL 333.21311a(8)(b) (defining "related" as "any of the following personal relationships by marriage, blood, or adoption: spouse, child, parent, brother, sister, grandparent, grandchild, aunt, uncle, stepparent, stepbrother, stepsister, or cousin"); MCL 400.112g(6)(c) (defining "caretaker relative" as "any relation by blood, marriage, or adoption who is within the fifth degree of kinship to the recipient"); MCL 554.524(3) (defining "member of the minor's family" as "the minor's parent, stepparent, spouse, grandparent, brother, sister, uncle, or aunt, whether of the whole or half blood or by adoption").

give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *People v Arnold*, 508 Mich 1, 23; 973 NW2d 36 (2021) (citations, quotation marks, and brackets omitted). The Legislature would have no need to use both by "blood" and "adoption" in defining "relative" or "related" if MCL 710.60 has the effect that the Court of Appeals concluded it does.

Second, the Adoption Code can only change the law, not the genetic makeup of an adopted child or his adoptive parents. The Court of Appeals in this case relied on *In re Toth*, 227 Mich App 548, 553; 577 NW2d 111 (1998), for the following proposition:

> "[T]he effect of [MCL 710.60(1)] is to make the adopted child, as much as possible, a natural child of the adopting parents, and to make the adopting parents, as much as possible, the natural parents of the child. The Michigan adoption scheme expresses a policy of severing, at law, the prior, natural family relationship and creating a new and complete substitute relationship after adoption." [*Moss*, 333 Mich App at 520 (second alteration in original), quoting *In re Toth*, 227 Mich App at 553.]

The Court of Appeals focused on the second sentence, concluding that adoption substitutes a completely new relationship for the old biological relationship. *Moss*, 333 Mich App at 521. In doing so, the Court ignored the first sentence, which recognizes that the effect of MCL 710.60(1) is not to *actually* make the adopted child a biological child of the adopted parents.[8] Rather, the statute focuses on the rights and duties

[8] We certainly do not mean to discount the importance of adoptive relationships. Indeed, we are well aware of the numerous benefits of adoption—not only for the children and parents in adoptive relationships but also for their extended families and for society as a whole. See, e.g., *Sharon S v San Diego Co Superior Court*, 31 Cal 4th 417, 438; 73 P3d 554 (2003) (recognizing that there are "nonlegal benefits of adoption

and not the biological makeup.[9] An adoptee has the same rights and duties as the natural progeny of the adoptive parents. But nothing in MCL 710.60 states that an adopted individual will be subject to criminal prosecutions as if the individual were a blood relative of the individual's adoptive parents.

The analysis in *Zajaczkowski* confirms this point. There, the defendant and the victim were not biologically related, but the prosecution argued that they were related because the defendant had been born while his mother was married to the victim's biological father. *Zajaczkowski*, 493 Mich at 9. The Court of Appeals had acknowledged the plain meaning of "by blood or affinity," but it went on to apply the civil presumption of legitimacy—i.e., that the child was a product of the marriage—to conclude that the defendant and victim were related "by blood" for purposes of MCL 750.520b. *Id*. at 14.[10]

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for children, parents, and society as a whole"); *In re Johnson*, 480 BR 305, 312 (Bankr ND Ill, 2012) (discussing studies showing the social benefits of adoption).

[9] It bears noting that MCL 710.60(3) refers specifically to orders for grandparenting time, which are governed by MCL 722.27b. MCL 722.27b(5) distinguishes between grandparents who are "the natural or adoptive parent" of the parent of the child in question, which indicates a difference between biological and adoptive relationships. Although MCL 722.27b(13) states that adoption of a child *generally* terminates the right of a grandparent to commence an action for grandparenting time, it goes on to state that, under certain circumstances, a grandparent may still commence such an action even after an adoption. That MCL 710.60 specifically refers to MCL 722.27b demonstrates that MCL 710.60 also recognizes that there is a difference between biological and adoptive relationships.

[10] Specifically, the Court of Appeals had relied on MCL 552.29 (stating with respect to divorce cases that "the legitimacy of all children begotten before the commencement of any action under this act shall be presumed until the contrary be shown") and cases from this Court involving the Paternity Act and Child Custody Act, which stood "for the proposi-

We reversed, rejecting the use of the presumption to create a blood relationship by legal fiction. DNA evidence showed that the victim's father was not the defendant's biological father; the two did "not share a relationship arising by descent from a common ancestor, and they [were] not related by birth." *Id*. As a result, we concluded that the defendant was "not related to the victim by blood to the fourth degree." *Id*. Anticipating the present dilemma, we noted in a footnote:

> The prosecution has raised the argument that this interpretation [of MCL 750.520b(1)(b)(*ii*)] will result in unintended consequences regarding adopted children because if the blood relationship element can only be established through a biological relationship, then a sexual penetration committed by a member of an adoptive family against an adopted minor child may not be punishable under MCL 750.520b(1)(b)(*ii*). While we acknowledge that the prosecution raises valid policy concerns, such policy concerns are best left to the Legislature to address. It is this Court's duty to enforce the clear statutory language that the Legislature has chosen. [*Zajaczkowski*, 493 Mich at 14 n 18.]

We rejected the reliance on the civil presumption of legitimacy and criticized the Court of Appeals for going

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tion that a putative biological father lacks standing to even bring an action to establish paternity unless there has been some prior court determination that the child was not the issue of the marriage." *Zajaczkowski*, 493 Mich at 11 (citation, quotation marks, and brackets omitted), citing *Barnes v Jeudevine*, 475 Mich 696; 718 NW2d 311 (2006), *In re KH*, 469 Mich 621; 677 NW2d 800 (2004), and *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991). Relying on MCL 700.2114(1)(a) and MCL 700.2114(5), which "incorporate the presumption of legitimacy and the standing requirement into intestate-succession disputes," the Court of Appeals concluded that the defendant lacked standing to challenge the presumption of legitimacy, which meant that he and the victim were related by blood as a matter of law. *Zajaczkowski*, 493 Mich at 11-12.

"beyond the statute's language and chang[ing] the ordinary meaning of the statute's terms by adding language that the Legislature did not include." *Id*. at 14-15.

Finally, we believe the interpretation of MCL 750.520d adopted by the Court of Appeals would create an impermissible constructive crime. A constructive crime is one that is " 'built up by courts with the aid of inference, implication, and strained interpretation . . . .' " *People v Olson*, 293 Mich 514, 515; 292 NW 860 (1940), quoting *Ex parte McNulty*, 77 Cal 164, 167; 19 P 237 (1888).[11] Michigan does not recognize constructive crimes, and we have previously characterized them as " 'repugnant to the spirit and letter of English and American criminal law.' " *Olson*, 293 Mich at 515, quoting *Ex parte McNulty*, 77 Cal at 168. In the present case, the Court of Appeals did not find that defendant and the complainant were *actually* related "by blood." Rather, it determined that defendant "*effectively*" became the biological child of his adoptive mother and that a "*constructive* biological relationship" existed between defendant and the complainant. *Moss*, 333 Mich App at 522 (emphasis added). By doing so, the Court of Appeals enlarged the CSC-III statute and strained its interpretation, impermissibly creating a constructive crime as applied to this defendant and others similarly situated.[12]

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[11] See also *Black's Law Dictionary* (11th ed), pp 466-467 (defining the term as "[a] crime that is built up or created when a court enlarges a statute by altering or straining the statute's language, esp. to drawing unreasonable implications and inferences from it").

[12] Other courts have rejected similar attempts to criminalize sexual conduct between persons related by adoption when the statute does not expressly prohibit such conduct between those related by adoption. See

Applying this analysis to the present case leads to the conclusion that defendant and the complainant are not related by blood. There is no DNA evidence establishing that defendant and the complainant are related to the third degree. Defendant and the complainant do not share a common ancestor. And they are not related by birth. Just as it was improper to rely on the civil presumption of legitimacy to interpret MCL 750.520b, it was improper for the Court of Appeals to rely on MCL 710.60 in this case. By doing so, "the Court of Appeals went beyond the statute's language and changed the ordinary meaning of the statute's terms by adding language that the Legislature did not include." *Zajaczkowski*, 493 Mich at 14-15. As we did in *Zajaczkowski*, we again acknowledge that there are valid policy concerns that this statute fails to provide adequate protection for adoptive siblings; however, we can only reiterate that those concerns are for the Legislature to address.

IV. CONCLUSION

For these reasons, we hold that persons who are related by adoption but who otherwise do not share an ancestor in common are not related "by blood" for purposes of MCL 750.520d(1)(d).[13] As a result, there was not an adequate factual basis for defendant's plea of no contest. We reverse, in part, the judgment of the

41 Am Jur 2d, Incest, § 17, p 356, citing *In re Adoption of Adult Anonymous*, 435 NYS2d 527 (Fam Ct, 1981), and *State v Bale*, 512 NW2d 164 (SD, 1994).

[13] We decline to reach the issue addressed by the dissent—i.e., whether defendant and the complainant are related by affinity—because our order directing oral argument on the application only asked the parties to address whether defendant and the complainant are related by blood. *Moss*, 507 Mich at 939.

Court of Appeals and remand to the circuit court for further proceedings not inconsistent with this opinion.

MCCORMACK, C.J., and ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred.

WELCH, J. (*concurring in part and dissenting in part*). I concur in the Court's holding that adoptive siblings are not related "by blood" for purposes of MCL 750.520d(1)(d). I write separately because I conclude that the Legislature considered adoptive siblings to be related by "affinity."[1]

MCL 750.520d(1) provides, in relevant part, that a person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and "[t]hat other person is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited" by Chapter LXXVI[2] of the Michigan Penal Code. Because of its conclusion that adoptive siblings are related "by blood," the Court of Appeals concluded that "it is not necessary that we decide whether a relationship by affinity also exists." *People v Moss*, 333 Mich App 515, 524; 963 NW2d 390 (2020). The Court of Appeals addressed the issue anyway

[1] The prosecutor did not file a separate application for leave to appeal the Court of Appeals' holding on the meaning of "affinity." However, this Court has stated that when "a controlling legal issue is squarely before this Court, . . . the parties' failure or refusal to offer correct solutions to the issue [does not] limit[] this Court's ability to probe for and provide the correct solution." *Mack v Detroit*, 467 Mich 186, 206-207; 649 NW2d 47 (2002). In this case, the issue "squarely before this Court" is whether the relationship between adoptive siblings is sufficient to satisfy MCL 750.520d(1)(d).

[2] Chapter LXXVI, MCL 750.520a through MCL 750.520*o*, is the chapter of the Michigan Penal Code that addresses criminal sexual conduct.

because this Court had remanded for consideration of the definitions of affinity provided by *Bliss v Caille Bros Co*, 149 Mich 601, 608; 113 NW 317 (1907) ("Affinity is the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other . . . .") and *People v Armstrong*, 212 Mich App 121, 128; 536 NW2d 789 (1995) ("*Random House College Dictionary* (rev ed) defines the term 'affinity' as a 'relationship by marriage or by ties other than those of blood.' ").[3] The Court of Appeals determined that, while *Armstrong* suggested that "affinity" might have a wider, context-dependent meaning than was recognized in *Bliss*, *Armstrong* "nonetheless concluded that stepsiblings were related by affinity 'because they were family members related *by marriage*.' " *Moss*, 333 Mich App at 526, quoting *Armstrong*, 212 Mich App at 128.

In determining that adoptive relationships are relationships "by blood," the Court of Appeals quoted *Armstrong* at length:

> [W]e think it is highly unlikely that the Legislature intended to treat adoptive siblings differently from biological siblings for purposes of the [criminal sexual conduct] statutes. We reached a similar conclusion in *Armstrong* . . . , in which we were tasked with deciding whether stepsiblings were related by affinity under the [criminal sexual conduct] statutes. We reasoned in part:
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> > In looking to the object of the second-degree criminal sexual conduct statute and the harm it is designed

[3] The Court of Appeals initially denied defendant's delayed application for leave to appeal his plea-based conviction. *People v Moss*, unpublished order of the Court of Appeals, entered August 21, 2017 (Docket No. 338877). We heard oral argument on the application for leave to appeal, and in lieu of granting leave to appeal, we remanded the case to the Court of Appeals for consideration as on leave granted. *People v Moss*, 503 Mich 1009 (2019).

> to remedy, and in applying a reasonable construction that best accomplishes the purpose of that statute in this case, we are persuaded that the term "affinity" encompasses the relation between a stepbrother and a stepsister. If the term were not so construed, then the first- and second-degree criminal sexual conduct statutes would impose a penalty more severe where the perpetrator sexually assaulted a spouse's brother or sister than where the perpetrator sexually assaulted a stepbrother or stepsister. In this time of divorce, remarriage, and extended families, we see no reason why the Legislature would give enhanced protection to a victim related to a perpetrator as an in-law but not to a victim related to a perpetrator as a stepbrother or stepsister. Thus, defining the term "affinity" to encompass the relation between a stepbrother and a stepsister avoids a construction of the second-degree criminal sexual conduct statute that would yield absurd results.
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> [*Moss*, 333 Mich App at 523, quoting *Armstrong*, 212 Mich App at 128-129.]

I would hold that *Armstrong*'s reasoning dictates that adoptive relationships *are* covered by MCL 750.520d(1)(d), but I would do so under the "affinity" prong that *Armstrong* actually addressed and not the "blood" prong to which the Court of Appeals applied *Armstrong*'s reasoning. *Armstrong* noted that "the term 'affinity' is not capable of a precise definition. Rather, at common law, whether someone was related to another by affinity depended upon the legal context presented." *Armstrong*, 212 Mich App at 125 (citation omitted). I see no reason to prefer, in the context of a criminal statute, the narrow definition of affinity stated in *Bliss*—a case interpreting a judicial disqualification statute—to the dictionary definition stated in *Armstrong*. Expanding upon the reasoning of *Armstrong*, it would be a patently absurd result to hold that the Legislature intended what is essentially an incest

statute to cover relationships between stepsiblings and not adoptive siblings. I therefore conclude that the Legislature did not pass such a statute. Instead, it passed a statute that included a broader term—affinity—to allow for inclusion of both step and adopted relationships.

In *Johnson v Recca*, 492 Mich 169, 193-194; 821 NW2d 520 (2012), this Court criticized a dissenting Justice for applying the absurd-results doctrine too liberally:

> To properly invoke the "absurd results" doctrine, the burden rests on the *dissent* to show that it is quite impossible that the Legislature could have intended to exclude replacement services from MCL 500.3110(4), MCL 500.3116(4), MCL 500.3135(3)(c), and MCL 500.3145(1). Rather than shoulder this burden—which might require a serious-minded analysis of the Legislature's policy objectives in enacting the statutes, the political realities and disagreements within the Legislature that adopted the statutes, the necessity for compromise and negotiation leading to enactment of the statutes, and the public impetus behind the statutes—the dissent characterizes our interpretation as "absurd" because the dissent
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> > can see no logical basis to conclude that the Legislature intended this chaotic and arbitrary approach to the collection of no-fault benefits. . . . The far more reasonable interpretation recognizes that the Legislature intended MCL 500.3135(3)(c) to allow excess expenses for ordinary and necessary services to be recovered in a third-party tort action.

The absurd-results principle has also been criticized by textualists as having "strong intentionalist foundations" inconsistent with "respect for the legislative process," which is characterized by "accommodation, messiness, and compromise." Manning, *The Absurdity Doctrine*, 116 Harv L Rev 2387, 2390-2391 (2003); see also *Barnhart v Sigmon Coal Co, Inc*, 534 US 438, 461;

122 S Ct 941; 151 L Ed 2d 908 (2002) ("The deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President, however, are not for us to judge or second-guess.").

In other words, the absurd-results doctrine should not be applied merely to question the reasonableness of the Legislature's policy determinations when a plausible, rational basis for the result exists. I agree. But in the present case, it is implausible to suggest that there were any interest groups pressuring the Legislature for a right to engage in sexual conduct with adoptive family members. In 1996, the Legislature amended MCL 750.520d, adding Subdivision (d), to criminalize sexual penetration with another person when "[t]hat other person is related to the actor by blood or affinity to the third degree . . . ." See 1996 PA 155. However, the Legislature had already criminalized, in 1974, sexual penetration and sexual contact with another person when that other person was at least 13 years but less than 16 years of age and the actor was related to the victim by blood or affinity. See MCL 750.520b(1)(b) and MCL 750.520c(1)(b), as enacted by 1974 PA 266. Thus, such conduct was criminalized in 1974—*the same year the Legislature adopted a new "effect of adoption" statute*, MCL 710.60, *that recognized adoption as a total and exclusive replacement of the child's natural family relationships*.[4] The reason-

[4] Commentators at the time the criminal sexual conduct act, 1974 PA 266, was passed stated that "[u]nder increasing pressure from women's rights groups and other reform organizations, the Michigan legislature has re-evaluated its centenarian rape statute, found it inadequate for the realities of the mid-twentieth century, and enacted a new sexual assault act." Legislative Note, *Michigan's Criminal Sexual Assault Law*, 8 U Mich J L Reform 217 (1974) (citations omitted). That same year, the Legislature replaced the former effect-of-adoption statute—which pro-

able inference from the "messiness" of the Legislative process is that the statute's drafters omitted the word "adoption" in the statutes concerning criminal sexual conduct with the understanding that adoptive relationships would fall within the imprecise term "affinity," the meaning of which "depend[s] upon the legal context presented." *Armstrong*, 212 Mich App at 125.

This is *not* a conclusion from my own policy preferences. Rather, it is a conclusion from defendant's failure to offer even plausible speculation as to a rational basis for enacting a criminal sexual conduct statute that extends to step relationships but not to adoptive relationships.[5]

In *Green v Bock Laundry Machine Co*, 490 US 504, 505, 509; 109 S Ct 1981; 104 L Ed 2d 557 (1989), the

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vided that adoption did not affect a child's right to inherit from "his natural parents"—with current MCL 710.60(2), which provides that "[a]fter entry of the order of adoption, the adopted person shall no longer be an heir at law of his or her natural parents[.]" *In re Adolphson Estate*, 403 Mich 590, 592-593; 271 NW2d 511 (1978) (emphasis omitted), quoting 1974 PA 296. The criminal sexual conduct act and the new effect-of-adoption provision became effective on the same day, January 1, 1975. 1974 PA 266; 1974 PA 296.

[5] Compare *Chapman v United States*, 500 US 453, 454; 111 S Ct 1919; 114 L Ed 2d 524 (1991), in which the Supreme Court declined to apply the absurd-results doctrine to a statute that imposed a mandatory minimum sentence for distributing more than one gram of a "mixture or substance" containing LSD. The petitioner emphasized that a dose of LSD weighs almost nothing, leading to the absurd and allegedly unconstitutional result that whether a defendant was subject to a minimum sentence could depend on the arbitrary fact of the weight of the paper on which the illegal substance was placed. *Id*. at 463-464. The Supreme Court held that the sentencing scheme was nonetheless rational because, "[b]y measuring the quantity of the drugs according to the 'street weight' of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component, the statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity." *Id*. at 465.

Supreme Court addressed a prior version of FRE 609(a)(1), which, when interpreted literally, required prejudice-balancing before a prior conviction could be admitted to impeach a civil defendant, but the rule did not extend the same protection to a civil plaintiff. The majority, in a lengthy analysis of the history of the rule, determined that language extending the benefit of prejudice-weighing to the "defendant" was intended to mean "criminal defendant," leaving neither side of a civil dispute protected by prejudice-weighing. *Id*. at 513-527. Justice Scalia, finding "no reason to believe that any more than a handful of the Members of Congress who enacted Rule 609 were aware of its interesting evolution from the 1942 Model Code," *id*. at 528 (Scalia, J., concurring), emphasized the petitioner's failure to offer any plausible basis for the "absurd, and perhaps unconstitutional, result," *id*. at 504, of a literal interpretation:

> (1) The word "defendant" in Rule 609(a)(1) cannot rationally (or perhaps even constitutionally) mean to provide the benefit of prejudice-weighing to civil defendants and not civil plaintiffs. Since petitioner has not produced, and we have not ourselves discovered, even a snippet of support for this absurd result, we may confidently assume that the word was not used (as it normally would be) to refer to all defendants and only all defendants. [*Id*. at 528-529].

Interpreting the word "defendant" as "criminal defendant" easily avoided the absurdity while doing the "least violence to the text." *Id*. at 529. Likewise, in the context of a criminal statute that prohibits sexual conduct between family members, the term "affinity" bears the meaning of familial relationships created by adoption just as easily as it bears the meaning of familial relationships created by marriage. Neither defendant nor this Court has offered even a snippet of

a rational basis for a contrary interpretation. Therefore, we can confidently assume that the word "affinity" was not used as it normally would be to refer to relationships created by marriage and only relationships by marriage.

MECOSTA COUNTY MEDICAL CENTER v METROPOLITAN GROUP PROPERTY AND CASUALTY INSURANCE COMPANY

Docket Nos. 161628 and 161650. Argued on application for leave to appeal November 10, 2021. Decided June 10, 2022.

Mecosta County Medical Center, doing business as Spectrum Health Big Rapids, and others sued Metropolitan Group Property and Casualty Insurance Company and State Farm Mutual Automobile Insurance Company in the Kent Circuit Court, seeking personal protection insurance (PIP) benefits related to a single-car crash involving Jacob Myers. Myers co-owned the vehicle involved in the crash with his girlfriend; his girlfriend's grandmother had purchased a no-fault insurance policy on the vehicle through Metropolitan Group. Myers was injured in the crash and was treated for his injuries by plaintiffs. Myers assigned plaintiffs his right to collect PIP benefits in the amount of his treatment bills. After the assignment, Myers sued Metropolitan Group and State Farm in the Wayne Circuit Court for PIP benefits related to other costs arising from the crash. Plaintiffs sued defendants in the Kent Circuit Court to recover on the assigned claim. Defendants moved for summary disposition against Myers in the Wayne Circuit Court. State Farm argued that because Myers did not live with the State Farm policyholders he was not covered by their policy. Metropolitan Group asserted that Myers was not entitled to coverage because he did not personally maintain coverage on the vehicle, contrary to MCL 500.3113(b). The Wayne Circuit Court granted both motions and dismissed Myers's PIP claim with prejudice. Myers did not appeal. While the defendants' motions were pending in the Wayne Circuit Court, Metropolitan Group also moved for summary disposition in the Kent Circuit Court on the same basis as its motion in the Wayne Circuit Court. However, the Wayne Circuit Court granted defendants' motions before the Kent Circuit Court considered Metropolitan Group's motion. After the Wayne Circuit Court granted summary disposition for defendants, defendants filed additional motions for summary disposition under MCR 2.116(C)(7) and (C)(10) in the Kent Circuit Court, arguing that plaintiffs' claims were barred under the doctrines of res judicata and collateral estoppel because the Wayne Circuit

Court had concluded that Myers was ineligible for PIP benefits. The Kent Circuit Court, Dennis B. Leiber, J., granted summary disposition, holding that plaintiffs' claims were barred by res judicata and collateral estoppel. Plaintiffs appealed in the Court of Appeals, and the Court of Appeals, METER and K. F. KELLY, JJ., (MURRAY, C.J., dissenting), reversed in a split, unpublished decision, issued March 24, 2020. The Court of Appeals majority held that an assignee was not bound by a judgment against an assignor in an action commenced after the assignment occurred. Defendants applied for leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant defendants' applications for leave to appeal or take other action. 507 Mich 865 (2021).

In a unanimous opinion by Justice VIVIANO, the Supreme Court, in lieu of granting leave to appeal, *held*:

Res judicata bars a second action on the same claim if (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. Similarly, collateral estoppel bars the relitigation of a specific issue within an action when (1) a question of fact essential to the judgment was litigated and determined by a valid and final judgment, (2) the parties or privies had a full and fair opportunity to litigate the issue, and (3) there is mutuality of estoppel. Thus, both res judicata and collateral estoppel apply only when the parties in the subsequent action were parties or privies of parties to the original action. Given that plaintiffs were not parties to the action filed by Myers, the question in this case was whether plaintiffs were privies of Myers with respect to the judgment entered by the Wayne Circuit Court after the assignment. A party is in privity with another party when the later litigant represents the same legal rights as the first litigant asserted, i.e., when the first and later litigants have mutual or successive relationships to the same interest and right of property or when there is such an identification of interests as to represent the same legal right. Generally, a relationship based on an assignment of rights is deemed to be one of privity. An assignment occurs when the assignor transfers his or her rights or interest to the assignee, and the assignee succeeds to the rights of the assignor. But the mere succession of rights to the same property or interest does not, by itself, give rise to privity with regard to subsequent actions by and against the assignor. Rather, the binding effect of adjudication flows from the fact that when the successor acquires an interest in the right it is then affected by the adjudication in

the hands of the former owner. That is, the assignee succeeds to the rights assigned by the assignor subject to any earlier adjudication involving the assignor that defined those rights. Therefore, a judgment entered after the assignment does not bind the assignee because the assignee was not in privity with the assignor with respect to that judgment. The dissenting opinion in the Court of Appeals relied on *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39 (2010). However, the medical provider's claim in *TBCI* was not obtained by assignment, but rather was based on caselaw, which was subsequently overturned, holding that medical providers had an independent claim in no-fault cases that was completely derivative of and dependent on the insured's having a valid claim of no-fault benefits against the insurer. *TBCI* did not address assignments and was not applicable here or to the traditional rule being applied in the instant case. In this case, plaintiffs were not in privity with Myers with respect to the judgment entered subsequently to the assignment, and therefore, plaintiffs could not be bound by that judgment under the doctrines of res judicata and collateral estoppel.

Judgment affirmed and case remanded for further proceedings.

RES JUDICATA — COLLATERAL ESTOPPEL — PRIVITY — ASSIGNMENTS OF RIGHTS — JUDGMENTS ENTERED AFTER ASSIGNMENT.

Res judicata and collateral estoppel apply only when the parties in a subsequent action were parties or privies of parties to the original action; a party is in privity with another party when the later litigant represents the same legal rights that the first litigant asserted; a judgment entered after an assignment does not bind the assignee under the doctrine of res judicata or collateral estoppel because the assignee was not in privity with the assignor with respect to that judgment.

Miller Johnson (by *Joseph J. Gavin*) for Mecosta County Medical Center, doing business as Spectrum Health Big Rapids; Spectrum Health Hospitals; Spectrum Health Primary Care Partners, doing business as Spectrum Health Medical Group; Mary Free Bed Rehabilitation Hospital, and Mary Free Bed Medical Group.

The Rossi Law Firm PLLC (by *Chrisdon F. Rossi* and *Monica Hoeft Rossi*) for Metropolitan Group Property and Casualty Insurance Company.

Hewson & Van Hellemont, PC (by *Jordan A. Wiener*) for State Farm Mutual Automobile Insurance Company.

Amicus Curiae:

Scarfone & Geen, PC (by *John C. W. Hohmeier*) for Michigan Defense Trial Counsel.

VIVIANO, J. Jacob Myers was injured in a car crash and received medical treatment from plaintiffs Mecosta County Medical Center and Mary Free Bed Rehabilitation Hospital. As compensation for this treatment, Myers assigned them his right to seek no-fault personal protection insurance (PIP) benefits from the insurer responsible for making those payments. After the assignment, Myers filed suit seeking PIP benefits for separate services he received arising from the crash. In that lawsuit, to which plaintiffs here were not party, the trial court held that Myers had not properly insured the vehicle and was therefore not entitled to any benefits. The question in the present case is whether that holding applies to plaintiffs and precludes them, under the doctrines of res judicata or collateral estoppel, from succeeding on the present assigned claim against the defendant insurers. Because plaintiffs were not parties to the earlier suit, they are bound by the judgment only if they were in privity with Myers when the earlier judgment against him was entered. The Court of Appeals properly determined that plaintiffs were not bound by the earlier judgment because it was entered *after* they were assigned the claim. Accordingly, because plaintiffs were

neither parties to the earlier suit nor privies with respect to the subsequently entered judgment, the doctrines of res judicata and collateral estoppel are inapplicable here.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs Mecosta County Medical Center and Mary Free Bed treated Myers for injuries he sustained in a single-car crash. Instead of paying the medical bills and seeking reimbursement from the vehicle's insurer, Myers assigned plaintiffs his right to collect PIP benefits in the amount of his treatment bills. Myers owned the vehicle with his girlfriend, whose grandmother had purchased the no-fault insurance policy on the vehicle through defendant Metropolitan Group Property and Casualty Insurance Company.

Myers then sued Metropolitan Group and defendant State Farm Mutual Automobile Insurance Company—who was also allegedly liable to provide coverage—for PIP benefits relating to other costs arising from the crash. As that suit was pending in the Wayne Circuit Court, plaintiffs here sued the same defendants in the Kent Circuit Court to recover on the assigned claim. Metropolitan moved to change venue to the Wayne Circuit Court, but plaintiffs opposed the motion, and the trial court ultimately denied it.

In Myers's action, defendants moved for summary disposition under MCR 2.116(C)(10). State Farm argued that Myers did not live with the State Farm policyholders and, therefore, was not covered. Metropolitan claimed Myers was not entitled to coverage because he personally did not maintain insurance coverage on the vehicle—rather, his girlfriend's grandmother did—and thus he violated MCL 500.3113(b), which required him, as the co-owner of the vehicle, to

maintain insurance coverage. The Wayne Circuit Court granted both motions, dismissing Myers's PIP claim with prejudice. Myers did not appeal.[1]

While the motions were pending in Myers's suit, defendant Metropolitan filed an identical motion in the instant suit in the Kent Circuit Court. However, the Wayne Circuit Court granted summary disposition before the Kent Circuit Court could consider the motion. After that judgment entered, both defendants in the present case filed an additional motion for summary disposition under MCR 2.116(C)(7) and (C)(10), arguing that plaintiffs' claims were barred by res judicata and collateral estoppel due to the decision of the Wayne Circuit Court holding that Myers was ineligible for PIP benefits. The Kent Circuit Court granted summary disposition, holding that plaintiffs' claims were barred by res judicata and collateral estoppel.

Plaintiffs appealed in the Court of Appeals, which reversed in a split, unpublished decision. The majority held that an assignee is not bound by a judgment against an assignor in an action commenced after the assignment occurred. *Mecosta Co Med Ctr v Metro Group Prop & Cas Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued March 24, 2020 (Docket No. 345868), p 5. To hold otherwise, it reasoned, would be to allow an assignor to cut off an assignee's rights without the latter having any notice or opportunity to be heard. *Id*. Judge MURRAY dis-

[1] After the trial court's decision in that case, we held in *Dye v Esurance Prop & Cas Ins Co*, 504 Mich 167, 172-173; 934 NW2d 674 (2019), "that an owner or registrant of a motor vehicle is not required to personally purchase no-fault insurance for his or her vehicle in order to avoid the statutory bar to PIP benefits." We do not here decide whether and how *Dye* would apply in the present case.

sented, expressing his belief that Court of Appeals caselaw mandated the conclusion that plaintiffs were privies of Myers and therefore bound by the judgment against him. See generally *id*. (MURRAY, C.J., dissenting).

Defendants sought leave to appeal the majority's decision in this Court. We ordered argument on the application, requesting briefing on whether plaintiffs' "claims for no-fault personal protection insurance benefits are barred by (1) res judicata or (2) collateral estoppel." *Mecosta Co Med Ctr v Metro Group Prop & Cas Ins Co*, 507 Mich 865 (2021).

II. STANDARD OF REVIEW

"We review de novo a trial court's decision on a motion for summary disposition." *Meemic Ins Co v Fortson*, 506 Mich 287, 296; 954 NW2d 115 (2020). Likewise, "[w]e review de novo the interpretation of a common-law doctrine." *Bertin v Mann*, 502 Mich 603, 608; 918 NW2d 707 (2018).

III. ANALYSIS

The issue in this case is whether plaintiffs' action is precluded by the judgment against Myers under the doctrines of res judicata or collateral estoppel. Res judicata bars a second action on the same claim if " '(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.' " *Foster v Foster*, 509 Mich 109, 120; 983 NW2d 373 (2022), quoting *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). Whereas res judicata involves preclusion of entire claims, collateral estoppel focuses on specific issues

within an action. See generally *Migra v Warren City Sch Dist Bd of Ed*, 465 US 75, 77 n 1; 104 S Ct 892; 79 L Ed 2d 56 (1984). The elements of collateral estoppel are similar: (1) "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment," (2) the parties or privies " 'must have had a full [and fair] opportunity to litigate the issue,' " and (3) " 'there must be mutuality of estoppel.' " *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (alteration in original), quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988).[2] "[O]ne of the critical factors in applying . . . collateral estoppel involves the determination of whether the respective litigants were parties or privy to a party to an action in which a valid judgment has been rendered." *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 42; 191 NW2d 313 (1971).

Thus, both res judicata and collateral estoppel apply only when the parties in the subsequent action were parties or privies of parties to the original action. Plaintiffs in the present case were not parties to Myers's action. Consequently, this case turns upon whether they were privies of Myers with respect to the judgment that was entered against him after the assignment.

"To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair*, 470 Mich at 122. "In its broadest sense, privity has been defined as 'mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as

[2] The mutuality requirement has been dispensed with in certain scenarios. See *id*. at 687-688. No mutuality concerns have been raised in the present case and we have no occasion to opine on this requirement.

to represent the same legal right.' " *Sloan v Madison Hts*, 425 Mich 288, 295; 389 NW2d 418 (1986) (citation omitted).[3]

Generally, a relationship based on an assignment of rights is deemed to be one of privity. See *Taylor v Sturgell*, 553 US 880, 894; 128 S Ct 2161; 171 L Ed 2d 155 (2008) (discussing nonparty preclusion under res judicata and collateral estoppel). An assignment of rights occurs when the assignor transfers his or her rights or interests to the assignee. See *State Treasurer v Abbott*, 468 Mich 143, 150 n 8; 660 NW2d 714 (2003) (" 'This court has defined the word "assignment" in the language of Webster as meaning "to transfer or make over to another;" and in the language of Burrill's Law Dictionary as "to make over or set over to another; to transfer." ' ") (emphasis and citation omitted), quoting *Allardyce v Dart*, 291 Mich 642, 644-645; 289 NW 281 (1939). In these circumstances, the assignee succeeds to the rights of the assignor, thus meeting the general definition of privity. See Casad & Clermont, *Res Judicata: A Handbook on its Theory, Doctrine, and Practice* (Durham: Carolina Academic Press, 2001), p 151.

But the mere succession of rights to the same property or interest does not, by itself, give rise to privity with regard to subsequent actions by and against the assignor. Cf. *Sodak Distrib Co v Wayne*, 77 SD 496, 502; 93 NW2d 791 (1958) ("Privity does not arise from the mere fact that persons as litigants are interested in the same question or in proving or disproving the same state of facts."). Rather, "[t]he binding effect of the adjudication flows from the fact that when the successor acquires an interest in the right it

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[3] See also Casad & Clermont, *Res Judicata: A Handbook on its Theory, Doctrine, and Practice* (Durham: Carolina Academic Press, 2001), p 151 (noting the "classic definition of privity as a 'mutual or successive relationship to the same rights of property' "), quoting 2 Black, *A Treatise on the Law of Judgments* (2d ed, 1902), p 830.

is then affected by the adjudication in the hands of the former owner." *Id*. at 502-503. In other words, the assignee succeeds to those rights subject to any earlier adjudication involving the assignor that defined those rights. When the litigation involving the assignor occurs after the assignment, the rights could not yet have been affected by the litigation at the time they were transferred to the assignee.

It is therefore well established that a judgment entered after the assignment does not bind the assignee because the assignee is not in privity with the assignor with respect to that judgment. As early as 1898, the United States Supreme Court was able to express this rule as black-letter law:

> We remark again that while a judgment or decree binds not merely the party or parties subject to the jurisdiction of the court but also those in privity with them, yet that rule does not avail the plaintiffs in error, for [the defendant's assignee] acquired his rights prior to the institution of the suit in New York and was therefore not privy to that judgment.
>
> > "It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected, occurred previously to the institution of the suit. A tenant in possession prior to the commencement of an action of ejectment cannot therefore be lawfully dispossessed by the judgment unless made a party to the suit. . . . No grantee can be bound by any judgment in an action commenced against his grantor subsequent to the grant, otherwise a man having no interest in property could defeat the estate of the true owner. The foreclosure of a mortgage, or of any other lien, is wholly inoperative upon the rights of any person not a party to the suit, whether such

> person is a grantee, judgment creditor, attachment creditor, or other lienholder." Freeman on Judgments (1st ed.), § 162.
>
> [*Dull v Blackman*, 169 US 243, 248; 18 S Ct 333; 42 L Ed 733 (1898).]

See also Freeman, A Treatise on the Law of Judgments (1886), § 162, p 177 ("The assignee of a note is not affected by any litigation in reference to it, beginning after the assignment."). Courts have continued to abide by this rule,[4] and it remains a bedrock in the literature on the subject.[5]

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[4] See, e.g., *Northern Oil & Gas, Inc v EOG Resources, Inc*, 970 F3d 889, 891 (CA 8, 2020) ("Under principles of res judicata, litigants in privity are bound by a *prior* judgment controlling an issue in subsequent litigation. In North Dakota, 'the privity doctrine cannot be applied if the rights to property were acquired by the person sought to be bound before the adjudication.' ") (emphasis added), quoting *Gerrity Bakken, LLC v Oasis Petroleum North America, LLC*, 915 NW2d 677, 684 (ND, 2018); *Indus Credit Co v Berg*, 388 F2d 835, 841 (CA 8, 1968) ("Ordinarily, a person in privity with a party to a lawsuit, . . . under principles of res judicata or collateral estoppel, must acquire his interest in the transaction after commencement of the action or rendition of the judgment."); *Wight v Chandler*, 264 F2d 249, 253 (CA 10, 1959) ("Having acquired the interest now in controversy prior to the institution of the action and having owned it ever since, he was not in privity with the defendant [assignor] respecting it at the time of the institution of the action or at any time later."); *Laster v American Nat'l Fire Ins Co*, 775 F Supp 985, 989 (ND Tex, 1991) ("There is no preclusion if the assignment takes place before the litigation that is urged as a basis for preclusion."); *Gramatan Home Investors Corp v Lopez*, 46 NY2d 481, 486-487; 386 NE2d 1328 (1979) ("In the assignor-assignee relationship, privity must have arisen after the event out of which the estoppel arises. Hence, an assignee is deemed to be in privity with the assignor where the action against the assignor is commenced before there has been an assignment. . . . Conversely, an assignee is not privy to a judgment where the succession to the rights affected thereby has taken place prior to the institution of the suit against the assignor.").

[5] See Restatement Judgments, 2d, § 55, p 68 ("The determination of issues in an action by or against either assignee or assignor is not preclusive against the other of them in a subsequent action, except"

This rule is reflected in this Court's caselaw. In its decision below, the Court of Appeals appropriately relied upon *Aultman, Miller & Co v Sloan*, 115 Mich 151, 154; 73 NW 123 (1897). In that case, after the mortgagee assigned his interest in the property, he sued the mortgagors, who argued that an assignment had occurred. *Id*. at 152-153. The mortgagee obtained a judgment, and the question in the second suit, brought by the assignee, was whether that judgment precluded the assignee's action. *Id*. at 153. In finding that there was no privity, we observed that the assignee and assignor disputed whether an assignment had occurred. *Id*. at 154. Nonetheless, we did not rely upon this disagreement alone and instead pronounced that allowing the assignor's subsequent case to preclude the assignee's case would "cut off the rights of [the assignee], without giving him an opportunity to be heard." *Id*. Therefore, the judgment obtained after the assignment should not be given preclusive effect. *Id*. *Aultman* has long been cited for the rule that judgments rendered after an assignment do not bind the

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when the action was "brought by the assignor before the assignment" and the assignee then brings an action or when "there is a further relationship between the assignee and assignor from which preclusion may arise"); 50 CJS, Judgments, § 1106, p 530 ("The assignee of a right of property or chose in action is concluded by a judgment for or against the assignor in a suit begun before the assignment, but not where the assignee's rights vested prior to the commencement of the action, except as the rule may have been altered by statute, or where the assignee has been notified to defend the action and failed to do so."); 46 Am Jur 2d, Judgments, § 570, p 937 ("A judgment against an assignor binds the assignee, where the assignee acquiesced to the assignor's *prior* litigation, there was a substantial legal relationship between the assignee and the assignor, the assignee's interests were aligned with the assignor in the prior litigation, *and* the assignee had control over the prior litigation and could have terminated it at any time.") (emphasis added); cf. *Res Judicata*, p 154 (stating that the transferee of property is not in privity with the transferor if the interest was acquired "before the commencement of the action involving the transferor").

assignee. See, e.g., 24 Garland & McGehee, eds, The American & English Encyclopedia of Law (1903), p 749 (citing *Aultman*, among other cases, for the rule that an assignee is not bound by the results of postassignment lawsuits to which it was not a party).

We expressed the same general rule even more directly in *Howell*, 386 Mich 37. We stated that " '[a] privy is one who, *after rendition of the judgment*, has acquired an interest in the subject matter affected by the judgment through or under one of the parties . . . .' " *Id.* at 43, quoting *Bernhard v Bank of America Nat'l Trust & Savings Ass'n*, 19 Cal 2d 807, 811; 122 P2d 892 (1942). This rule has been cited and relied upon by numerous courts.[6] We have also indicated elsewhere, in an analogous context, that the postassignment actions of an assignor cannot provide a basis to bind the assignee. See *Saginaw Fin Corp v Detroit Lubricator Co*, 256 Mich 441, 443; 240 NW 44 (1932) ("After assignment, the assignor loses all control over the chose [in action] and cannot bind the assignee, by estoppel or otherwise.").

In advocating for a different result, the Court of Appeals dissent here relied on *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39; 795 NW2d 229 (2010). That case also formed the basis for the holding in *The Medical Team, Inc v Auto-Owners Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued February 25, 2020 (Docket No. 345449), which reached a conclusion in direct conflict with the

[6] See, e.g., *Metzler v United States*, 832 F Supp 204, 208 (ED Mich, 1993) (citing and applying this rule from *Howell*); *Rohe Scientific Corp v Nat'l Bank of Detroit*, 133 Mich App 462, 467; 350 NW2d 280 (1984) (citing *Howell* and holding that because a party's interest in the property was obtained "long before judgment" in the first action, there was no privity).

one we reach in the present case. The medical provider's claim in *TBCI* was not obtained by assignment, however. Rather, the basis for the medical provider's claim was Court of Appeals caselaw (that was subsequently overturned) holding that medical providers had an independent claim that was nonetheless "completely derivative of and dependent on [the insured's] having a valid claim of no-fault benefits against" the insurer. *Moody v Home Owners Ins Co*, 304 Mich App 415, 440; 849 NW2d 31 (2014); see also *Mich Head & Spine Institute, PC v State Farm Mut Auto Ins Co*, 299 Mich App 442, 448 n 1; 830 NW2d 781 (2013), citing *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35, 39; 645 NW2d 59 (2002).[7]

Neither the dissent below, *The Medical Team*, nor *TBCI* itself explain why *TBCI*'s reasoning should prevail over the traditional approach discussed above. Indeed, none of these opinions mentions the traditional rule or our caselaw reflecting that rule. *TBCI* did not address assignments, which have long been governed by the rule discussed above. It therefore is not applicable here.[8]

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[7] That caselaw was overturned in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017). After *Covenant*, the Legislature expressly provided a direct cause of action for medical providers. MCL 500.3112. Those statutory causes of action are not before the Court, and we therefore do not decide whether a medical provider bringing such an action would be in privity with an insured for purposes of res judicata or collateral estoppel.

[8] *The Medical Team* also relied upon *Jones v Chambers*, 353 Mich 674; 91 NW2d 889 (1958). In that case, the owner of an oil truck involved in a collision assigned part of the claim to its insurer. The owner and insurer of the truck sued the owner of the other vehicle involved in the collision. *Id*. at 675-676. About two weeks later, the owner of the other vehicle and his insurer sued the truck owner (and an unrelated party) in a different court. That second case was decided first, and the owner of the other vehicle prevailed as plaintiff. *Id*. at 676. The trial court in the

In light of this analysis, we conclude that the plaintiff assignees here were not in privity with their assignor, Myers, with respect to the subsequently entered judgment. Therefore, the plaintiff assignees cannot be bound by that judgment under the doctrines of res judicata or collateral estoppel.

IV. CONCLUSION

In this case, we hold that plaintiff assignees were not in privity with Myers with respect to the judgment that was rendered against him after he had assigned the present PIP claim to plaintiffs. We therefore affirm

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first suit then held that the truck owner and its insurer were barred from suit. We agreed, quoting the trial court's opinion that even though the assignee-insurer was not a party to the second-filed suit, the insurer obtained only the rights of the truck owner and no more. *Id*. at 681-682.

The Court in *Jones* did not, however, address privity at all. In fact, our recitation of the law of res judicata was incomplete, as it did not discuss the need for the two lawsuits to contain the same parties or their privies. Moreover, under the unique facts in *Jones*, the parties arguably were in privity. They had, together, initiated the first suit. And they proceeded with that suit as the second one was filed and pending. Under these facts, it is arguable that they continued to have "a further relationship" such that the general rule against preclusion would not apply. See Restatement Judgments, 2d, § 55, p 68 (noting that the rule against application of res judicata is inapplicable where the assignee and assignor have "a further relationship"). These facts might also fall within the "outer limit of the doctrine" of privity as we defined it in *Adair*, 470 Mich at 122: "[T]he doctrine traditionally requires both a 'substantial identity of interests' and a 'working functional relationship' in which the interests of the nonparty are presented and protected by the party in the litigation." (Citation omitted.) Being coplaintiffs might qualify as a "working functional relationship." In any event, as noted, *Jones* simply did not address privity at all, much less the rule we are examining in this case. Therefore, it is inapplicable to the issue before the Court.

the judgment of the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

MCCORMACK, C.J., and ZAHRA, BERNSTEIN, CLEMENT, CAVANAGH, and WELCH, JJ., concurred with VIVIANO, J.

In re ESTATE OF HERMANN A VON GREIFF

Docket No. 161535. Argued on application for leave to appeal December 9, 2021. Decided June 10, 2022.

Carla J. Von Greiff petitioned the Marquette Probate Court under MCL 700.2801(2)(e) of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., seeking a declaration that Anne Jones-Von Greiff was not the surviving spouse of Carla's father, Hermann A. Von Greiff. Anne filed for divorce from Hermann on June 1, 2017. Before the probate court entered the judgment of divorce, however, Hermann died on June 17, 2018. In her petition, Carla asserted that Anne had been willfully absent from Hermann for a year or more before his death and that, therefore, Anne was not entitled to inherit as Hermann's surviving spouse under EPIC. The probate court, Cheryl L. Hill, J., ruled that Anne was not a surviving spouse under MCL 700.2801(2)(e) because she had been intentionally, physically, and emotionally absent from Hermann for more than a year before his death. Anne appealed in the Court of Appeals, MARKEY, P.J., and GLEICHER, J. (M. J. KELLY, J., dissenting), which determined that Anne was not willfully absent under MCL 700.2801(2)(e)(*i*) because she did not intend to abandon or desert Hermann but was exercising her legal right to seek a divorce and to enforce her rights as a divorcing spouse during the year preceding his death. 332 Mich App 251 (2020). The Supreme Court ordered and heard oral argument on whether to grant Carla's application for leave to appeal or take other action. 507 Mich 904 (2021).

In an opinion by Justice CAVANAGH, joined by Chief Justice MCCORMACK and Justices BERNSTEIN, CLEMENT, and WELCH, the Supreme Court, in lieu of granting leave to appeal, *held*:

When a party files an action for divorce and the other spouse subsequently dies before the divorce is finalized, there is a rebuttable presumption that the surviving spouse was not willfully absent from the decedent spouse under MCL 700.2801(2)(e)(*i*). The challenging party can rebut the presumption by establishing that, under the totality of the circumstances, the surviving spouse's communications with the decedent spouse, prior to their death, were inconsistent with a recognition of the

continued existence of the legal marriage. However, if there were spousal communications, whether direct or indirect, during the divorce proceedings that were consistent and made in connection with the legal termination of the marriage, then the surviving spouse was not willfully absent and is entitled to the benefits of a surviving spouse under the statute. In this case, Carla did not sustain her burden to show that Anne was willfully absent given that Anne was pursuing the entry of a divorce judgment via communications with the decedent through her attorney. Accordingly, the judgment of the Court of Appeals was affirmed on different grounds.

1. Under MCL 700.2801(2)(e)(*i*), an individual is not a surviving spouse if, for one year or more before the decedent spouse's death, the individual was "willfully absent from the decedent spouse." The burden is on the party challenging a legal spouse's status to show that the spouse was, in fact, "willfully absent from the decedent spouse." In order to establish that the legal spouse was willfully absent, the challenging party must show that, under the totality of the circumstances, (1) there was a complete absence from the decedent spouse, (2) the absence was continuous for at least one year before the spouse's death, and (3) the absence was willful—i.e., that the surviving spouse acted with the specific intent to be away from the decedent spouse for a continuous period of one year or more before the decedent spouse's death.

2. The Court of Appeals majority held that Anne was not willfully absent under MCL 700.2801(2)(e)(*i*) as a matter of law because she had filed for divorce. This per se rule was unwarranted, given that the phrase "willfully absent from the decedent spouse" does not encompass a categorical rule that precludes a divorcing spouse from losing the benefits of a surviving spouse under the statute. The Court of Appeals majority also erred by relying on MCL 700.2801(3) and the *expressio unius est exclusio alterius* (express mention in a statute of one thing implies the exclusion of other similar things) canon of statutory interpretation in creating a per se rule. The majority noted that MCL 700.2801(3)(b) provides that, for the purposes of making funeral arrangements, a surviving spouse does not include an individual who is a party to a divorce or annulment proceeding with the decedent spouse at the time of the decedent's death. Therefore, the majority reasoned, in all other contexts, a divorcing spouse is necessarily a surviving spouse. However, MCL 700.2801(3) was enacted after MCL 700.2801(2)(e)(*i*), and the exclusion in MCL 700.2801(3)(b) of a party to a divorce action from being a surviving spouse for purposes of making funeral arrangements indi-

cates only that the Legislature did not intend to categorically preclude a divorcing spouse from being considered to be a surviving spouse in other contexts. The Court of Appeals majority also erred by relying substantially on the common law of other jurisdictions in interpreting EPIC, which is a comprehensive statutory scheme, and in particular, the "willfully absent" provision, which is unique to Michigan law.

3. The probate court, relying on *In re Erwin*, 503 Mich 1 (2018), and evidence that the spouses were not in direct contact and did not see each other for over a year before Hermann's death, concluded that Anne intended to be physically and emotionally absent from Hermann, which resulted in the practical end of the marriage. But *Erwin* did not limit the court's inquiry to *direct* contact between spouses. Rather, in holding that physical absence alone was insufficient to establish willful absence, *Erwin* recognized that "absent" can mean "exhibiting inattentiveness toward another." A person is not exhibiting inattentiveness if they are communicating with a spouse indirectly, such as through their attorney. The record suggested that Anne and Hermann were in frequent contact with each other through their attorneys while litigating the divorce action as they worked out a settlement of everything except spousal support before Hermann died. The fact that the parties were in communication, by itself, did not defeat a finding of willful absence. Rather, a certain type of communication was required to defeat this finding. When one spouse unilaterally and without consideration of the other spouse's desires cuts off all direct or indirect contact with their spouse for over a year, they have taken action inconsistent with the very existence of a legal marriage. However, when there has been direct or indirect communication between spouses, the trial court must assess the totality of the circumstances to determine whether the parties' communications were consistent with a recognition that a legal marriage still existed at the time of the decedent spouse's death. In the context of a divorce action, a court should presume that the surviving spouse was not willfully absent. But the trial court must consider the totality of the circumstances in determining willful absence, and the challenging party bears the burden of rebutting the presumption that direct or indirect communications during a divorce proceeding defeat a finding that a spouse was willfully absent.

4. Carla did not sustain her burden to show that Anne was willfully absent notwithstanding her communication with Hermann through their attorneys during the divorce proceeding. There was no evidence that Anne failed to participate to expedi-

tiously resolve the divorce action, and the nearly complete settlement worked out by the parties suggested frequent and detailed communication between Anne and Hermann through their attorneys. Under these circumstances, Anne was not willfully absent from Hermann for more than a year before his death.

Affirmed.

Justice ZAHRA, joined by Justice VIVIANO, dissenting, noted that in *Erwin* the Supreme Court held that a person is willfully absent from their decedent spouse under EPIC if that person engaged in intentional acts that brought about a situation of divorce in practice, even when the legal marriage was not formally dissolved. The probate court applied the "totality of the circumstances" test for willful absence from *Erwin* and found that Anne was willfully absent from Hermann under MCL 700.2801(2)(e)(*i*). Justice ZAHRA opined that the majority unjustifiably altered the *Erwin* test and created a per se rule with no connection to the statute. The majority concluded that *Erwin* did not limit the "willfully absent" inquiry to direct contacts between spouses and that communication driven solely by the parties' legal counsel is sufficient to defeat a finding that a spouse was intentionally and completely emotionally absent from the decedent spouse. In so concluding, the majority improperly modified the *Erwin* test in a manner at odds with a fair and reasonable reading of *Erwin*. The *Erwin* test directed the court to ask whether, given the totality of the circumstances, Anne intended to be physically and emotionally absent from Hermann, resulting in a practical end to their marriage. Anne was physically absent from Hermann for 13 months before his death, and communicated with him only through her legal counsel during the divorce proceedings. According to Justice ZAHRA, this behavior plainly constituted a complete physical and emotional absence that resulted in the practical end of the marriage. Further, Justice ZAHRA objected to the classification of attorney-driven communications as emotionally supportive, connective, and caring, and therefore as sufficient to establish a lack of willful absence under MCL 700.2801(2)(e)(*i*). An attorney's professional communications during divorce proceedings were not equivalent to spousal communications, let alone spousal communications that are emotionally supportive. Therefore, it cannot be that communication via legal counsel automatically negates a finding of complete emotional absence. Moreover, because there will always be communication by and through attorneys during divorce proceedings, it was impossible for there to be willful absence under the statute, according to the terms of

the majority's test. The majority's per se rule was not contemplated by either MCL 700.2801(2)(e)(*i*) or *Erwin*.

Justice VIVIANO, dissenting, joined Justice ZAHRA's dissent in full, but wrote separately to emphasize that the effect of the majority's opinion was to overrule its decision in *Erwin*, at least in the context of pending divorce actions. *Erwin* held that for a surviving spouse to forfeit their entitlement to the intestate share of the decedent's estate under MCL 700.2801(2)(e)(*i*), the surviving spouse must have been emotionally absent from the relationship for one year or more before the decedent's death. Justice VIVIANO objected that the majority opinion created a presumption that when a divorce action has been filed, even by the surviving spouse, the surviving spouse is not willfully absent and that the majority had created a new totality-of-the-circumstances test to determine whether indirect communications between opposing counsel in a divorce action were sufficient to negate a finding of willful absence. *Erwin* placed the focus on whether the departing spouse was emotionally absent, but the majority boiled this requirement down to the question of whether any contact at all was maintained between the parties while a divorce action was pending. Therefore, the focus of the inquiry was no longer whether the departing spouse continued to provide emotional support. Justice VIVIANO opined that, according to the majority, when a divorce action has been filed, the emotional-absence component of the statute vanished—with the result that the same statutory text has different meanings in different factual contexts. This was contrary to normal interpretive principles and rendered the statute meaningless. Justice VIVIANO stated that a more principled way to reach the majority's outcome would have been to overrule its opinion in *Erwin* and adopt the *Erwin* dissent, which would have allowed the statute to maintain a single interpretation. But Justice VIVIANO stated that it would have been better for the law to retain the interpretation of the statute offered by *Erwin* than to tack another flawed interpretation onto the statute.

DIVORCE — SPOUSAL SURVIVORSHIP — ESTATES AND PROTECTED INDIVIDUALS CODE — WILLFULLY ABSENT SPOUSES.

When a party files an action for divorce and the other spouse subsequently dies before the divorce is finalized, there is a rebuttable presumption that the surviving spouse was not willfully absent from the decedent spouse under MCL 700.2801(2)(e)(*i*) of the Estates and Protected Individuals Code, MCL 700.1101 *et seq*.; the challenging party can rebut the presumption by showing that, under the totality of the circum-

> stances, the surviving spouse's communications, or lack thereof, with the decedent spouse prior to their death were inconsistent with a recognition of the continued existence of the legal marriage; however, if there were spousal communications, whether direct or indirect, during the divorce proceedings that were consistent and made in connection with the legal termination of the marriage, then the spouse was not willfully absent and is entitled to the benefits of a surviving spouse under the statute.

Barron, Rosenberg, Mayoras & Mayoras, PC (by *Jonathan M. Colman*) for Carla J. Von Greiff.

McDonald & Wolf, PLLC (by *William I. McDonald*) for Anne Jones-Von Greiff.

Amici Curiae:

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CAVANAGH, J. Under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., a "surviving spouse" has certain rights upon the death of their spouse, including the right to receive a share of the estate. See MCL 700.2202(1) and (2).[1] But a spouse can lose these rights if they are "willfully absent from the

[1] MCL 700.2202(1) addresses a surviving spouse's right to recover if the decedent dies intestate, while MCL 700.2202(2) addresses a surviving spouse's right to recover if the decedent died with a will. Because the decedent in this case died intestate, only MCL 700.2202(1) applies. However, the determination of whether one is considered a surviving spouse under EPIC will affect one's rights to recover from the estate in either scenario.

decedent spouse" for more than a year before that spouse's death. MCL 700.2801(2)(e)(*i*). This reflects the legislative intent that one should not receive the benefits of a "surviving spouse" if one has engaged in "intentional acts that bring about a situation of divorce in practice, even when the legal marriage has not been formally dissolved." *In re Erwin*, 503 Mich 1, 15; 921 NW2d 308 (2018). The question in this case is whether one who has filed for divorce but has not yet obtained that divorce when their spouse dies is "willfully absent" and therefore ineligible for benefits as a "surviving spouse."

The Court of Appeals majority held that, as a matter of law, one cannot be considered "willfully absent" under MCL 700.2801(2)(e)(*i*) while a divorce proceeding is ongoing. We disagree; there is no statutory basis for a categorical rule that filing for divorce precludes a finding of willful absence. However, the filing of a divorce action and communications between spouses through their attorneys while in the process of obtaining a divorce are strong evidence that the spouse was not absent, and we hold that the filing of a divorce action creates a presumption that the spouse was not willfully absent. If the spousal communications during the divorce proceedings are consistent and made in connection with the legal termination of the marriage, then the spouse is not willfully absent and is entitled to the benefits of a surviving spouse.

In this case, the decedent's daughter, Carla Von Greiff, has failed to rebut the presumption that the purported surviving spouse, Anne Jones-Von Greiff, was not willfully absent, given that Anne promptly filed for divorce and pursued the entry of a divorce judgment via communications with the decedent

through her attorney. Accordingly, we affirm the judgment of the Court of Appeals on different grounds.

I. FACTS AND PROCEDURAL HISTORY

Carla is the daughter of the decedent, Hermann Von Greiff. Hermann died intestate on June 17, 2018. At the time of his death, Hermann was legally married to Carla's stepmother, Anne, although Anne and Hermann were in the process of getting divorced. Carla petitioned the probate court for a declaration that Anne was willfully absent for more than a year before Hermann's death and therefore was not his surviving spouse under MCL 700.2801(2)(e)(*i*).

Anne and Hermann were originally married in 2000, divorced several months later, and then remarried in 2003. The marriage was rocky, as both parties suffered physical and mental health problems and Hermann admitted to infidelity. On May 16, 2017, Hermann and Anne argued over whether Hermann should undergo spinal fusion surgery. Hermann got very angry and told Anne to leave the marital home. After this fight, Anne believed that Hermann wanted her to permanently leave the home and that he intended to seek a divorce. Two days later, Carla arrived to take Hermann to his surgery, and Anne collected her belongings and moved out of the marital home. Hermann asked her to stay, but Anne refused. Anne did not see Hermann or have any direct contact with him after May 18, 2017.[2]

On June 1, 2017, Anne filed for divorce. She also sought and eventually obtained an ex parte order that (1) granted her exclusive use of the marital home and

[2] Anne exchanged text messages with Carla regarding Hermann's condition after his surgery. Carla and Anne stopped exchanging messages on May 31, 2017.

required Hermann to pay all of the expenses associated with the home, (2) ordered Hermann to restore the marital accounts,[3] and (3) described how the parties' assets would be divided, preserved, and used during the pendency of the divorce proceedings. On July 17, 2017, the parties stipulated to a modified ex parte order. The modified order still provided Anne with the exclusive right to live in the home but gave Hermann or his agent the right to enter the home to retrieve his belongings if he provided Anne seven days' notice. The modified order also provided, in greater detail, how the financial assets of the parties were to be maintained and used during the pendency of the divorce proceedings.

After his surgery, Hermann resided in an assisted living facility in Michigan and eventually moved to Florida. Hermann did not contact Anne or inform her of his new residences, and Anne did not ask him where he was living. On April 18, 2018, a hearing was held solely on the issue of spousal support—all other issues pertaining to the divorce had been resolved by the parties. The probate court issued an opinion granting Anne spousal support on May 29, 2018. The opinion stated that Anne could include the court's findings of fact in the judgment. The judgment of divorce was submitted on notice of presentment, and objections were set to be heard. See generally MCR 2.602. However, Hermann died on June 17, 2018, before the scheduled hearing, and the matter was subsequently dismissed without entry of the judgment.

As previously mentioned, Carla filed a petition in the probate court seeking a declaration that Anne was

[3] Before she filed for divorce, Anne checked the status of a joint bank account she held with Hermann and discovered that much of the money had been withdrawn from the account.

not Hermann's surviving spouse because she was willfully absent for more than a year before Hermann's death. Relying on this Court's decision in *In re Erwin*, the probate court concluded that Anne had willfully absented herself from Hermann for more than a year before he died (from May 18, 2017, until Hermann's death on June 17, 2018), and therefore, she was not Hermann's "surviving spouse." The court found that Anne intended to be physically absent on the basis of her decision to seek an ex parte order that kept Hermann from entering the marital home and her admission that she did not see Hermann between May 18, 2017 and June 17, 2018. The court also found that Anne intended to be emotionally absent from Hermann for more than a year before he died, given that she acknowledged that she had no direct contact with him and provided him no emotional support. The court further noted that Anne acknowledged that she and Hermann effectively lived as a divorced couple during this time and that she intended to leave the marriage and obtain a divorce.

Anne appealed the probate court's decision and the Court of Appeals reversed in a split decision. *In re Estate of Von Greiff*, 332 Mich App 251; 956 NW2d 524 (2020). The majority held that, as a matter of law, any period of time consumed by a divorce proceeding did not constitute "willful absence" that would disinherit an otherwise qualified surviving spouse. Judge M. J. KELLY dissented, arguing that no such exemption was contained in the statute and that the probate court did not clearly err by finding that Anne was willfully absent from Hermann under the standard in *Erwin*. Carla appealed in this Court, and we ordered oral argument on the application, directing the parties to address "whether the period of time after the filing of a complaint for divorce is counted when considering

whether a spouse was 'willfully absent' from the decedent for more than a year before his or her death. MCL 700.2801(2)(e)(*i*); *In re Estate of Erwin*, 503 Mich 1 (2018)." *In re Estate of Von Greiff*, 507 Mich 904 (2021).

II. LEGAL STANDARD

MCL 700.2801 describes who is not considered a "surviving spouse" for the purposes of EPIC. MCL 700.2801(1) provides that one is not a "surviving spouse" if that individual is divorced from the decedent or the marriage has been annulled at the time of death. MCL 700.2801(2) describes various circumstances under which, although the marriage has not been legally terminated at the time of death, an individual is nonetheless not considered a "surviving spouse." Finally, MCL 700.2801(3)—added in 2016—creates distinct rules for determining when one is a "surviving spouse," but only for the purposes of MCL 700.3206, which governs who has the authority to make funeral arrangements for the decedent.[4] Because Anne was legally married to Hermann at the time of his death and funeral arrangements are not at issue here, the pertinent section is MCL 700.2801(2).

Carla claims that Anne was not Hermann's "surviving spouse" pursuant to MCL 700.2801(2)(e)(*i*), which provides that an individual is not a "surviving spouse" if, "for 1 year or more before the death of the deceased

[4] A person is not considered a "surviving spouse" for the purposes of MCL 700.3206 if they are "[a]n individual described in [MCL 700.2801(2)(a)] to (d)" or "[a]n individual who is a party to a divorce or annulment proceeding with the decedent at the time of the decedent's death." MCL 700.2801(3). Under MCL 700.3206(3), the "surviving spouse" serves as the funeral representative for the decedent unless the decedent specifically designated someone else to perform that task or the decedent was a service member and someone has been designated by law to direct the disposition of the service member's remains.

person," that individual "[w]as willfully absent from the decedent spouse." MCL 700.2801(2)(e)(*i*).[5] The proper interpretation of the term "willfully absent from the decedent spouse" is a question of statutory interpretation that is reviewed de novo. *Erwin*, 503 Mich at 9. A trial court's factual findings in making a determination of whether a spouse was willfully absent are reviewed for clear error. *Id*.

"The burden is on the party challenging a legal spouse's status to show that the spouse was in fact 'willfully absent' for the year or more leading up to the decedent's death." *Id*. at 17. A showing of physical absence alone is not enough for a spouse to be considered willfully absent under MCL 700.2801(2)(e)(*i*). *Id*. at 16.[6] Rather, in order to sustain their burden, the party seeking to disinherit the surviving spouse, i.e., the challenging party, must show that, under the "totality of the circumstances," there existed a "complete absence" from the decedent spouse. *Id*. at 17. This complete absence "must be continuous for at least a year leading up to the spouse's death." *Id*. at 23 n 15.

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[5] A person is also not considered a "surviving spouse" under EPIC if, "for 1 year or more before the death of the deceased person," they either "[d]eserted the decedent spouse," MCL 700.2801(2)(e)(*ii*), or "[w]illfully neglected or refused to provide support for the decedent spouse if required to do so by law." MCL 700.2801(2)(e)(*iii*). Neither of these provisions is at issue here.

[6] The majority opinion in *Erwin* suggested that a challenger is required to show, at minimum, a physical absence from that deceased spouse in order to be considered willfully absent. *Id*. at 27. Justice CLEMENT—whose vote was necessary to create a majority—joined the majority opinion "except to the extent the opinion addresses whether evidence of physical absence is needed to support a finding that a spouse was willfully absent." *Id*. at 28. Because it is clear that Anne was physically absent from Hermann for more than a year before his death, we need not decide whether one can be physically present yet still be considered willfully absent under MCL 700.2801(2)(e)(*i*).

Moreover, this complete absence must be "willful," that is, the spouse must "act with the intent to be away from his or her spouse for a continuous period of one year immediately preceding the death." *Id*. at 11. "[T]he statute does not require the surviving spouse to make a continuous effort to maintain the marital relationship. . . . [T]he inquiry is into whether the surviving spouse did the 'absenting,' not whether the surviving spouse did enough to prevent the absence." *Id*. at 23 n 15. Additionally, it is irrelevant whether the spouse intended to abandon their marital rights and dissolve the marriage; the question is only whether there existed an intent to be absent from the spouse. *Id*. at 24-25.

To summarize, in order to establish that a decedent's spouse is not entitled to the benefits of a "surviving spouse" under MCL 700.2801(2)(e)(*i*), the challenging party must show, under the totality of the circumstances: (1) that the surviving spouse was completely absent from the decedent spouse, (2) that this absence persisted for a continuous period of at least one year before the decedent's death, and (3) that the surviving spouse acted with a specific intent to be absent from the decedent spouse.

III. ANALYSIS

Anne was legally married to Hermann when he died, but she intended to divorce him and did not contact him for over a year prior to his death, except through her attorney with regard to their ongoing divorce proceedings. Under these circumstances, was Anne willfully absent from Hermann?

The Court of Appeals majority held that, as a matter of law, Anne was not willfully absent under MCL 700.2801(2)(e)(*i*) simply because she had filed for di-

vorce. *In re Von Greiff*, 332 Mich App at 256-257. Such a per se rule is unwarranted. As explained more fully below, the phrase "willfully absent from the decedent spouse" does not encompass a categorical rule that precludes a divorcing spouse from losing the benefits of a "surviving spouse." It is possible that a divorcing spouse could act with the intention of being completely and continuously absent for the year preceding the decedent's death. Moreover, there is no other statutory provision that would support such a per se rule.

The majority's reliance on MCL 700.2801(3) and the *expressio unius est exclusio alterius* canon of statutory interpretation in creating a per se rule was misplaced. See *Bronner v Detroit*, 507 Mich 158, 173 n 11; 968 NW2d 310 (2021) ("*Expressio unius est exclusio alterius* means '[e]xpress mention in a statute of one thing implies the exclusion of other similar things.' "), quoting *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931) (alteration in *Bronner*). MCL 700.2801(3)(b) was amended by 2016 PA 57 to provide that, for the purposes of determining who may make decisions regarding the decedent's funeral arrangements under MCL 700.3206, a surviving spouse does not include "[a]n individual who is a party to a divorce or annulment proceeding with the decedent at the time of the decedent's death." The majority reasoned that because this provision precludes a party to a divorce action from being a surviving spouse only for the purposes of funeral arrangements, this means that in all other contexts a divorcing spouse necessarily is a "surviving spouse." But MCL 700.2801(3)(b) was enacted *after* the "willfully absent" provision in MCL 700.2801(2)(e)(*i*), and this Court has recognized that it is questionable "to infer legislative intent through silence in an earlier enactment, which is only 'silent' by virtue of the subsequent enactment." *People v Watkins*, 491 Mich

450, 482; 818 NW2d 296 (2012). Even assuming that the enactment of MCL 700.2801(3)(b) has some bearing on the appropriate interpretation of "willful absence," the amendment's exclusion of a party to a divorce action from being a "surviving spouse" for purposes of making funeral arrangements indicates only that the Legislature did not intend to *categorically preclude* a spouse who files for divorce from being a "surviving spouse" in other contexts. This is entirely different from concluding, as the majority did, that one who files for divorce is *necessarily* a surviving spouse for all purposes other than funeral arrangements.

The Court of Appeals majority also erred by relying substantially on the common law of other jurisdictions to interpret or supplement the provisions of EPIC, which is a comprehensive scheme governing the transfer of a decedent's property. See *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) ("In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.") (quotation marks and citation omitted). The common law of other jurisdictions can provide persuasive authority when developing Michigan's common law, see, e.g., *Estate of Livings v Sage's Investment Group, LLC*, 507 Mich 328, 341-342; 968 NW2d 397 (2021), but it is generally inappropriate to rely on such authority when interpreting a comprehensive Michigan statutory scheme unless the statutory scheme incorporates a common-law term of art. See MCL 8.3a; *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211, 218 n 18; 884 NW2d 238 (2016) (citing caselaw from other states in support of its interpretation of a

common-law term of art incorporated into a Michigan statute). Neither the Court of Appeals majority nor any party to this case has suggested that the term "willfully absent" is a common-law term of art such that the understanding of this term in other jurisdictions could be useful to determining the Legislature's intent in enacting this provision. To the contrary, this particular statutory provision—first enacted in 1978 as part of the Revised Probate Court (RPC) and retained in 2000 when the Legislature adopted EPIC to replace the RPC—"is unique to Michigan law." *Erwin*, 503 Mich at 31 n 8 (VIVIANO, J., dissenting).[7] Therefore, it was inappropriate to rely on the common law of other jurisdictions in interpreting the "willfully absent" provision. See *Ross v Consumers Power Co*, 415 Mich 1, 18; 327 NW2d 293 (1982) (noting the inapplicability of caselaw from other states where the Michigan statute at issue was unique).

The probate court correctly viewed this as a factual inquiry that required an analysis of the totality of the circumstances. However, the probate court applied an incorrect legal standard when assessing whether Anne was willfully absent from Hermann. Relying on *Erwin*, the probate court concluded that Anne intended to be physically and emotionally absent from Hermann, resulting in the end of the marriage for practical purposes. The court relied on evidence that Anne and Hermann did not see each other and were not in *direct* contact for over a year before Hermann's death. But nothing in *Erwin* limits the inquiry to *direct* contacts between spouses. To the contrary, in holding that

[7] The *sui generis* nature of this provision is reflected by the fact that both the majority and dissenting opinions in *Erwin* sought to interpret the phrase according to its plain meaning and not as a common-law term of art. See *Erwin*, 503 Mich at 10-11; *id*. at 32-36 (VIVIANO, J., dissenting).

physical absence alone is insufficient to be considered willfully absent, *Erwin* recognized that the term "absent" can mean that one is "exhibiting inattentiveness toward another." *Erwin*, 503 Mich at 10. A person is not "exhibiting inattentiveness toward another" if they are communicating with a spouse indirectly, such as through their attorneys. In this case, it is clear from the record that Anne and Hermann were in contact with each other through their attorneys while litigating the divorce action. At minimum, we know that they stipulated to a modification of the original ex parte order regarding living arrangements and use of finances, and they worked out a settlement of everything but spousal support before Hermann's death, which suggests frequent and detailed communications between the attorneys and their respective clients. The probate court was required to assess the nature and extent of these communications when determining whether Anne was willfully absent and erred by failing to do so.

The fact that the parties were communicating, standing alone, does not defeat a finding of willful absence. Rather, as suggested by *Erwin*, only a certain type of communication is sufficient to defeat such a finding. The *Erwin* Court stated that a finding of willful absence requires a "complete physical and emotional absence" that "result[s] in an end to the marriage for practical purposes." *Id*. at 27. This framing made sense in the context of that case, in which the spouses were living apart but neither had filed for divorce and there was no evidence that either spouse wanted to end the marital relationship. See *id*. at 25-27. But the Court did not address what "absence" would look like in the context of a spouse who intends to legally end the marriage by filing for divorce. Nor did the Court indicate that a presence sufficient to

defeat a finding of willful absence had to be consistent with the behavior of one who intended to remain married. To the contrary, *Erwin* specifically held that it was irrelevant to the willful-absence inquiry whether a spouse intended to abandon their marital rights. *Id*. at 24-25. Therefore, we reject the probate court's understanding of *Erwin* as requiring an emotional presence akin to what one would provide if they intended to remain married in order to defeat a finding of willful absence.[8]

Instead, we conclude that a spouse might not be willfully absent even if they intend to legally terminate the marriage and act consistently with that intent. In holding that the term "absence" is not defined solely by physical absence, *Erwin* examined MCL 700.2801(2)(e) as a whole and concluded that its provisions "describe acts on behalf of a surviving spouse that for all intents and purposes are inconsistent with the very existence of a legal marriage." *Erwin*, 503 Mich at 15; see also *id*. at 21 (concluding that the statutory scheme as a whole "contemplates that one only loses his or her status as a 'surviving spouse' if he or she takes action that is akin to a complete repudiation of the marriage"). Consistent with this context, we hold that a spouse is only "absent" if they interact with their spouse in a manner that is "inconsistent with the very existence of a legal marriage." When one spouse unilaterally and without any consideration of the other spouse's desires cuts off all direct or indirect contact with their spouse for over a year, they have taken action "inconsistent with the very existence of a legal marriage." However, when there are communications between the spouses,

[8] When there is an emotional presence that reflects a desire to retain the marriage bonds, this evidence will be sufficient to defeat a finding of willful absence under *Erwin* notwithstanding a physical absence.

whether directly or indirectly, the trial court must assess the totality of the circumstances to determine whether these communications are consistent with a recognition that the legal marriage still exists.[9]

Generally, when a spouse is "emotionally absent" from the decedent spouse as contemplated by *Erwin*, they have taken action "inconsistent with the very existence of a legal marriage." But a divorce action is different. By its nature, filing a complaint for divorce tends to recognize the existence of a legal marriage—if the marriage did not exist, why would one need to seek a divorce? Thus, in the context of a divorce action, a court should presume that the surviving spouse was not willfully absent. Divorce is a final act that is legally and practically understood to mean that the parties are married until the final act is completed. Divorce actions can easily last more than one year, especially when the marriage is lengthy, there are children involved, or the parties' assets are complex. It is also common, and sometimes necessary, for divorcing spouses to live separately and cease all direct contact while a divorce is pending. This reality supports a

[9] This is an objective inquiry and does not turn on whether the spouse subjectively believed that the legal marriage still existed or that they were acting in a manner inconsistent with a recognition of the legal marriage. In other words, while the spouse must have intended to act in a particular manner that was inconsistent with a recognition of the legal marriage, they need not have subjectively intended for their actions to actually be inconsistent with a recognition of the legal marriage. Contrary to the understanding of the dissenting justices, we do not assert that communications between attorneys while seeking a divorce are "emotionally supportive" communications. Rather, we hold that where there is a pending divorce action, the willful-absence determination does not turn on whether the communications were emotionally supportive. Accordingly, a lack of emotionally supportive communications does not mandate a finding of willful absence.

holding that filing for divorce creates a rebuttable presumption that one is not willfully absent.[10]

However, it is possible, under rare circumstances, that a challenging party could show that the spouse who filed for divorce nevertheless did not behave in a manner consistent with a recognition of the continued existence of the legal marriage for a year prior to the spouse's death. We need not catalog in this opinion the circumstances in which willful absence might be shown despite continuing communications during a divorce action. But we emphasize that trial courts must consider the totality of the circumstances in making this determination and that the challenging party bears the burden to rebut the presumption that direct or indirect communications during a divorce proceeding defeat a finding that a spouse was willfully absent. *Id*. at 17.[11]

IV. APPLICATION

Carla has not sustained her burden to show that Anne was willfully absent notwithstanding her com-

[10] Justice VIVIANO is incorrect when he asserts that we are holding that "the same statutory text has different meanings in different factual contexts." Instead, we merely recognize that the willful-absence inquiry is fact specific and that, under the appropriate legal standard, the filing of a divorce action is highly relevant to this inquiry. It is hardly a "stupefying departure from normal interpretive principles" to examine how a legal standard applies under a particular factual scenario. And we reiterate that neither spouse in *Erwin* had filed for divorce, so the Court did not address that factual scenario.

[11] Contrary to the repeated assertions of the dissenting justices, we do not hold that there is a per se rule that *any* communication during a pending divorce action necessarily defeats a finding of willful absence—we need not opine on facts not presently before the Court. Rather, we merely hold that there is a rebuttable presumption that such communications defeat a finding of willful absence and that, on the facts of this case, Carla has not rebutted this presumption.

munications with Hermann through their attorneys while attempting to secure an attorney-negotiated judgment of divorce. There is no evidence that Anne failed to participate with Hermann to expeditiously resolve the divorce action. To the contrary, Anne filed for divorce less than two weeks after their last direct contact and the judgment of divorce was close to being entered when Hermann died scarcely a year after filing. Moreover, during the divorce proceedings both Anne and Hermann stipulated through their attorneys to the occupancy of the marital home and the appropriate use of marital funds, and they worked out a settlement of everything but spousal support before Hermann's death, which implies frequent and detailed communications between the spouses through their attorneys. Under these circumstances, Anne was not willfully absent from Hermann for more than a year before his death.[12]

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[12] We agree with the dissenting justices that the probate court's factual findings are entitled to deference. But we are not deciding this case on the basis of the trial court's findings as to the actions and intentions of Anne and Hermann, which we assume for the sake of this opinion were not clearly erroneous. Instead, we hold that the trial court erred in analyzing these findings when concluding that Anne was willfully absent. See *People v Douglas*, 496 Mich 557, 599; 852 NW2d 587 (2014) (distinguishing between the trial court's factual findings and the court's analysis of the legal effect of those factual findings); *Gentris v State Farm Mut Auto Ins Co*, 297 Mich App 354, 364; 824 NW2d 609 (2012) (holding that the trial court did not clearly err in its factual findings but the trial court committed legal error in assessing the legal implications of those findings). More specifically, the trial court misunderstood the legal significance of the communications between Anne and Hermann through their attorneys while seeking a divorce when assessing whether Anne was willfully absent. This erroneous application of the appropriate legal standard is reversible error.

V. CONCLUSION

A party who files an action for divorce is not thereby precluded from being considered "willfully absent from the decedent spouse" under MCL 700.2801(2)(e)(*i*). However, the filing of such an action is strong evidence that the spouse was not absent, and the challenging party bears the burden of rebutting the presumption that the spouse was not absent. The challenging party can satisfy their burden by showing that, under the totality of the circumstances, the surviving spouse's communications, or lack thereof, were inconsistent with a recognition of the continued existence of the legal marriage. On this record, Carla has not satisfied that burden. Accordingly, we affirm the judgment of the Court of Appeals.

MCCORMACK, C.J., and BERNSTEIN, CLEMENT, and WELCH, JJ., concurred with CAVANAGH, J.

ZAHRA, J. (*dissenting*). In 2018, this Court interpreted the very same provision of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., that is now before us: MCL 700.2801(2)(e)(*i*). In that case, *In re Erwin*,[1] we held that a person who is "willfully absent" from their spouse for more than a year before the spouse's death is ineligible to receive "surviving spouse" benefits under MCL 700.2202(1) and (2) if that person has engaged in "intentional acts that bring about a situation of divorce in practice, even when the legal marriage has not been formally dissolved."[2] In the instant case, the probate court made detailed factual findings on that very issue. On that

[1] *In re Erwin*, 503 Mich 1; 921 NW2d 308 (2018).

[2] *Id*. at 15.

basis, and applying the totality-of-the-circumstances test for willful absence that this Court set forth in *Erwin*, the probate court found that respondent, Anne Jones-Von Greiff, was "willfully absent" from the decedent, Hermann A. Von Greiff, under MCL 700.2801(2)(e)(*i*). The probate court's factual findings are reviewed for clear error and are owed respectful deference from this Court. The majority opinion makes no attempt, however, to call into question the probate court's factual findings, nor could it, given how clear and undisputed they are. Instead, to escape the import of the factual record under *Erwin*'s willful-absence test, the majority opinion simply rewrites that test. Then, on the basis of its brand-new test, which creates a per se rule that is untethered from the statutory text, the majority opinion affirms the judgment of the Court of Appeals. I respectfully dissent and would reverse the Court of Appeals.

I. BASIC FACTS

Anne left the marital home over Hermann's protests on May 18, 2017. Anne departed two days after she and Hermann had an argument about whether Hermann should undergo spinal surgery. Thereafter, Anne and Hermann had no direct contact.[3] On May 31, 2017, Anne signed a complaint for divorce, which was filed on June 1, 2017. And on June 2, 2017, that complaint was served on Hermann while he was still in the hospital

[3] Anne also testified that her last personal, *indirect* contact with Hermann was through text messages that she sent to his daughter, Carla J. Von Greiff, inquiring into Hermann's well-being; the last text exchange occurred on May 31, 2017. In addition, Carla texted Anne on at least two occasions between May 18 and May 31, 2017, asking her to come to the hospital to see and speak with Hermann. But because Anne did not think it was a good idea, she did not visit Hermann in the hospital.

recovering from his surgery.[4] Alongside her complaint for divorce, Anne moved for an ex parte order, seeking (among other things not relevant to this appeal) the exclusive right to live in the marital home, which was granted.[5] From May 18, 2017, until Hermann's death more than a year later, on June 17, 2018, Anne testified that she provided no emotional support to Hermann. The probate court provided a succinct summary of this unfortunate situation:

> At no time after filing the divorce [on June 1, 2017], did Anne . . . ever express a desire to live with Hermann. [Anne] further agreed that after the filing of the divorce, she never had an intention to return to the marriage. *She agreed that for all intents and purposes, that she and Hermann lived as a divorced couple from May 18, 2017 until his death on June 17, 2018.*[6]

In sum, the probate court found that Anne—who never personally spoke to, met with, or even laid eyes on Hermann after May 18, 2017—was "willfully absent" under MCL 700.2801(2)(e)(*i*) because she intended to completely physically and emotionally absent herself from Hermann beginning on that date, she did so, and then she continued to physically and emotionally absent herself from Hermann for more than a year until his June 17, 2018 death.[7]

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[4] Sometime after Anne filed for divorce, Hermann moved to Mill Creek, an assisted-living facility. Later, Hermann moved to Florida, where he died.

[5] On July 17, 2017, the parties stipulated to a modified ex parte order, which preserved Anne's exclusive right to live in the marital home but also granted Hermann or his agent the right to enter the marital home to retrieve his belongings, provided that Anne was given seven days' notice.

[6] Emphasis added.

[7] The relevant portion of Anne's testimony, which was quoted by the probate court in its findings of fact, is as follows:

II. STANDARD OF REVIEW AND LEGAL BACKGROUND

We review questions of statutory interpretation de novo.[8] And we review a trial court's factual findings for clear error.[9] "A finding is 'clearly erroneous' if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made."[10] Therefore, "under the clear-error standard, 'a reviewing court should not substitute its judgment on questions of fact

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Q. Okay. And [Anne], you had no direct personal contact with Hermann . . . after May 18, 2017, is that correct?

A. Correct.

Q. Okay. And that includes no physical contact, no telephone contact, or no other direct contact with Hermann?

A. No.

Q. Is that correct?

A. Correct.

Q. Thank you. Additionally, after May 18, 2017, the only emotional support you alleged to have offered Hermann was via text message to Hermann's daughter, Carla. Is that correct?

A. Correct.

Q. Okay. And you ceased sending those messages to Carla on May 31, 2017?

A. Correct.

Q. Okay. And so *based on your testimony, you had no physical contact with Hermann . . . after May 18, 2017 and offered no emotional support to him after May 31, 2017, correct?*

A. *Correct*. [Emphasis added.]

[8] *Dep't of Talent & Economic Dev v Great Oaks Country Club, Inc*, 507 Mich 212, 226; 968 NW2d 336 (2021); see also *Erwin*, 503 Mich at 9.

[9] *Erwin*, 503 Mich at 9, citing *People v Knight*, 473 Mich 324, 338; 701 NW2d 715 (2005); see also MCR 2.613(C).

[10] *In re COH*, 495 Mich 184, 203-204; 848 NW2d 107 (2014) (quotation marks and citation omitted).

unless the factual determination clearly preponderates in the opposite direction.' "[11]

MCL 700.2801(2)(e)(*i*) provides, in relevant part, that a surviving spouse does not include "[a]n individual who . . . for 1 year or more before the death of the deceased person" "[w]as willfully absent from the decedent spouse." *Erwin* set forth a totality-of-the-circumstances test for assessing whether a person was "willfully absent" under MCL 700.2801(2)(e)(*i*).[12] In deciding whether there is willful absence, the trial court must determine "whether a spouse's complete absence brought about a practical end to the marriage."[13] The burden to show the requisite willful absence is on the party challenging a legal spouse's status.[14] If there are not "indicia of a complete absence in terms of emotional support and contact, [then] courts should conclude that the marriage endured and allow the remaining legal spouse to retain his or her 'surviving spouse' status."[15] At bottom, the touchstone of *Erwin*'s willful-absence test is whether the absenting spouse took "action that [was] akin to a complete

[11] *Id*. at 204, quoting *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010).

[12] *Erwin*, 503 Mich at 17.

[13] *Id*. The complete absence "must be continuous for at least a year leading up to the spouse's death." *Id*. at 23 n 15. And it must have been "willful"; that is, the spouse must "act with the intent to be away from his or her spouse for a continuous period of one year immediately preceding the death." *Id*. at 11. Moreover, "the statute does not require the surviving spouse to make a continuous effort to maintain the marital relationship. . . . [T]he inquiry is into whether the surviving spouse did the 'absenting,' not whether the surviving spouse did enough to prevent the absence." *Id*. at 23-24 n 15.

[14] *Id*. at 17.

[15] *Id*.

repudiation of the marriage."[16] That is, *Erwin* directs us to ask "whether, given the totality of the circumstances, [Anne] intended to be physically and emotionally absent from [Hermann], resulting in a practical end to their marriage."[17]

III. ANALYSIS

The majority opinion's analysis and holding are erroneous. I conclude that the majority opinion unjustifiably alters the *Erwin* test. In doing so, the majority opinion creates a per se rule for divorce cases vis-à-vis whether there is willful absence—a per se rule that is just as untethered from the text of MCL 700.2801(2)(e)(*i*) as the per se rule created by the Court of Appeals.

The majority opinion states that "nothing in *Erwin* limits the inquiry to *direct* contacts between spouses"; rather, according to the majority opinion, *Erwin* suggests that indirect contact may be sufficient to establish that there is not willful absence.[18] Noting that "*Erwin* recognized that the term 'absent' can mean that one is 'exhibiting inattentiveness toward another,' " the majority opinion claims that a spouse is "not 'exhibiting inattentiveness toward another' if they are communicating with a spouse indirectly, such as through their attorneys."[19] Thus, the probate court "was required to assess the nature and extent of these

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[16] *Id*. at 21.

[17] *Id*. at 25. I agree with the majority that the inquiry properly focuses on whether the emotional bond and connection between Anne and Hermann were completely absent during the divorce proceedings because it is undisputed that Anne was completely physically absent from Hermann for more than one year before his death.

[18] *Ante* at 307-308.

[19] *Ante* at 308, citing *Erwin*, 503 Mich at 10.

[legal] communications when determining whether Anne was willfully absent . . . ."[20] The majority opinion concludes that the communications between Anne and Hermann during their pending divorce action, *performed solely by counsel*, automatically bar a finding that Anne was intentionally and completely emotionally absent from Hermann and, consequently, bar a ruling that she was "willfully absent" under MCL 700.2801(2)(e)(*i*).

In setting forth this holding, the majority opinion creates a modified *Erwin* test, a test that the majority opinion refuses to recognize exceeds the boundaries clearly expressed in *Erwin*. Importantly, the probate court's factual findings are owed deference. And they should be rejected by this Court only if, after reviewing the record, we are "left with the *definite and firm* conviction that a mistake has been made"[21] and "the factual determination *clearly preponderates* in the opposite direction."[22] Tellingly, the majority opinion does not attempt to articulate disagreement with the detailed record built by the probate court, which plainly shows: (1) Anne never had an intention to return to the marriage, and (2) she and Hermann effectively lived as a divorced couple for more than a year before his death.[23] Therefore, to circumvent the record's impact in

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[20] *Ante* at 308.

[21] *In re COH*, 495 Mich at 203-204 (quotation marks and citation omitted; emphasis added).

[22] *Id*. at 204, quoting *Pierron*, 486 Mich at 85 (quotation marks omitted; emphasis added).

[23] In a footnote, the majority opinion explains that the probate court committed reversible error because it did not apply the appropriate legal standard in this case. *Ante* at 312 n 12. I disagree. As I will explain, the probate court without question faithfully applied *Erwin*. But what that court cannot be faulted for is failing to anticipate the majority opinion's modification of the *Erwin* test.

light of *Erwin*'s test, the majority opinion simply changes that test. But the new test is at odds with a fair and reasonable reading of *Erwin*.

As noted, *Erwin*'s fundamental inquiry is whether the absenting spouse took "action that [was] akin to a complete repudiation of the marriage."[24] In other words, the test asks us to determine "whether, given the totality of the circumstances, [Anne] intended to be physically and emotionally absent from [Hermann], resulting in a practical end to their marriage."[25] For 13 months before Hermann's death, Anne was not in Hermann's physical presence, and she communicated with Hermann only through her legal counsel as she pursued a divorce. That behavior plainly constitutes "complete physical and emotional absence" that "result[ed] in an end to the marriage for practical purposes."[26]

Divorce and willful absence are not mutually exclusive phenomena.[27] A divorcing spouse is not automatically "willfully absent" from the other; there is no necessary connection between those two things.[28] But it is nonsensical to classify attorney-driven communi-

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[24] *Erwin*, 503 Mich at 21.

[25] *Id*. at 25.

[26] *Id*. at 27.

[27] An allegation of divorce is premised on a thorough "breakdown" of the marriage relationship such that "the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." MCL 552.6(1). That definition does not say that when undergoing a divorce, the parties cannot emotionally support one another; that is, it plainly does not *require* the severance of all emotional bonds.

[28] Indeed, as *Erwin* noted, "If two married people decide to live apart but maintain an element of emotional support and contact, courts have no business second-guessing that life decision." *Erwin*, 503 Mich at 16-17.

cations, e.g., e-mails that a person receives from the attorney of his or her soon-to-be ex-spouse, as *emotionally supportive, connective, and caring*—and therefore as establishing a lack of willful absence under MCL 700.2801(2)(e)(*i*). Common sense suggests that such attorney-driven communications would come across as professional, cold, and perhaps even hostile—not emotionally supportive, connective, and caring.

An attorney is, of course, authorized to represent a client in legal proceedings.[29] But that is a highly dubious foundation on which to rest the holding, as the majority opinion does, that an attorney's professional legal communications during divorce proceedings constitute, or are somehow equivalent to, *spousal* communications—let alone *emotionally supportive, connective, and caring* spousal communications. An attorney is many things,[30] but a *conduit of spousal emotional intimacy* is not one of them. Moreover, it is not enough to maintain, as the majority opinion does, that because "absent" can mean "inattentive," it is therefore true that Anne, who communicated with Hermann only through her legal counsel for the 13

[29] MCL 600.901 provides, in relevant part, that "[n]o person is authorized to practice law in this state unless he complies with the requirements of the supreme court [under MCL 600.904] with regard thereto." And MCL 600.916(1) provides, in relevant part:

> A person shall not practice law or engage in the law business, shall not in any manner whatsoever lead others to believe that he or she is authorized to practice law or to engage in the law business, and shall not in any manner whatsoever represent or designate himself or herself as an attorney and counselor, attorney at law, or lawyer, unless the person is regularly licensed and authorized to practice law in this state.

[30] See MRPC 1.0, preamble, ¶ 3. The preamble to the Michigan Rules of Professional Conduct, while not a binding rule itself, helpfully lists the "various functions" that a lawyer can "perform[]": "advisor," "advocate," "negotiator," "intermediary between clients," and "evaluator."

months before Hermann's death, was not completely emotionally absent from Hermann during that time. That conclusion confers aggrandized significance to a single line from *Erwin* at the expense of the opinion's overall thrust. Any "attentiveness," to use that word loosely, that Anne might have expressed to Hermann through her attorney before Hermann's death is simply not the emotional support, connection, and care contemplated by a good-faith reading of *Erwin*, or, for that matter, suggested by everyday experience and common sense.

The fundamental inquiry dictated by *Erwin* is whether Anne's intentional absence brought about an end to her marriage *for practical purposes*. There is no other way to describe what Anne did here—absolutely zero personal emotional support for, connection with, or care for Hermann—as anything other than Anne's complete emotional absence from Hermann for more than a year before his death, which rises to the level of willful absence under MCL 700.2801(2)(e)(*i*). Communication through lawyers simply cannot reasonably be said to constitute, or be equivalent to, emotionally supportive, connective, and caring communication between spouses.[31] Thus, it cannot be that communication via legal counsel automatically negates a finding of complete emotional absence, in particular when, as here, there is no court order forbidding emotional involvement.

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[31] Indeed, the preamble to the Michigan Rules of Professional Conduct stresses that, "[a]s intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, *to a limited extent*, as a spokesperson for each client." *Id*. (emphasis added). That language confirms an obvious point: Communications via counsel are limited in their scope, nature, and purpose; they are not spousal communications, let alone spousal communications that are emotionally supportive, connective, and caring.

The Court of Appeals held that, as a matter of law, Anne was not "willfully absent" under MCL 700.2801(2)(e)(*i*) simply because she had filed for divorce.[32] The majority opinion rightly rejects this rule as "unwarranted."[33] After all, not only can such a per se rule not be derived from the text of MCL 700.2801(2)(e)(*i*), but "there is no other statutory provision that would support such a per se rule."[34] Nonetheless, in the same breath, the majority opinion fashions a per se rule of its own.

According to the majority opinion, if there is *any* attorney communication during a pending divorce action, then a finding of complete emotional absence—and therefore willful absence under MCL 700.2801(2)(e)(*i*)—is inappropriate. But because there will *always* be attorney communications during divorce proceedings, under the majority opinion's new test, it is *impossible* for there to be willful absence during divorce proceedings under MCL 700.2801(2)(e)(*i*), no matter how completely absent the absenting spouse otherwise is during that time. In effect, the majority opinion creates a loophole for the worst actors to exploit to their benefit, in defiance of the text of MCL 700.2801(2)(e)(*i*) and *Erwin*'s sensible willful-absence test. The majority opinion, even as it rejects the Court of Appeals per se rule, nonetheless arrives at the very same result that the Court of Appeals reached, though by a different path.[35] A per se

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[32] See *In re Estate of Von Greiff*, 332 Mich App 251, 256-257; 956 NW2d 524 (2020).

[33] *Ante* at 304-305.

[34] *Id*.

[35] The majority opinion bristles at my characterization of its test as a per se rule, maintaining instead that its true position is that attorney communications merely create a rebuttable presumption against a

rule is not contemplated either by MCL 700.2801(2)(e)(*i*) or by *Erwin*. The majority opinion creates a test in search of an outcome, converting *Erwin*'s totality-of-the-circumstances test for willful absence into a single-factor test: If there are *any* attorney communications during a pending divorce action, an absenting spouse can *never* be "willfully absent" under MCL 700.2801(2)(e)(*i*). But EPIC is clear. Where a spouse is willfully absent from the decedent spouse for more than a year before the decedent spouse's death, the absent spouse will lose the right to proceeds from the estate. To the extent this

finding of willful absence. *Ante* at 311 n 11. But the manner in which the majority opinion actually applies its test to these facts strongly suggests that it has created a per se rule. Here, Anne never personally spoke to, met with, or even laid eyes on Hermann for more than 13 months before his death—and yet the majority opinion somehow finds it appropriate to hold that Carla has *not* rebutted the presumption against a finding of willful absence under MCL 700.2801(2)(e)(*i*). Further, the majority opinion opts to not remand this case to the probate court to give Carla a chance to rebut the presumption. To be blunt, I cannot imagine any set of facts that more strongly evidences a person's intention to be willfully absent from their spouse, bringing about an end to the marriage for *practical purposes*—except for these facts plus an absence of attorney communications. But again, attorney communications will *always* happen during a divorce action. Therefore, if these facts do not defeat the majority opinion's alleged rebuttable-presumption-against-willful-absence test, then no set of facts can or will, and so we can say that the majority has created a per se rule. Moreover, the majority opinion's decision to affirm the Court of Appeals rather than remand this case to the probate court for it to determine whether the presumption is rebutted clearly demonstrates that the majority intends for its new test to be treated as a per se rule—viz., if there are attorney communications, no matter how poorly the absenting spouse treated the decedent spouse, there is no willful absence under MCL 700.2801(2)(e)(*i*). If the majority opinion is correct about its test, then the majority should remand this case to the probate court for it to apply the test.

result is inequitable, the proper venue to fashion a remedy is the Legislature, not this Court.[36]

IV. CONCLUSION

The majority opinion, without adequate justification or explanation, rejects the probate court's detailed, germane, and thoughtful findings of fact on the basis of its preferred result, which rests on a slender reed: that communication solely through one's attorney for more than a year before a spouse's death is sufficient to defeat a finding of complete emotional absence during a pending divorce action. To avoid the result that the factual record compels under a straightforward reading of *Erwin*'s totality-of-the-circumstances test for willful absence, the majority opinion invents a new test and improperly makes the existence of attorney communications dispositive against a finding of complete emotional absence and, therefore, willful absence under MCL 700.2801(2)(e)(*i*). Not only is the majority opinion's new test inconsistent with a fair and reasonable reading of the holding and logic of *Erwin*, but it also generates a per se rule that is unsupported either by the text of MCL 700.2801(2)(e)(*i*) or by *Erwin*. I respectfully dissent.

VIVIANO, J., concurred with ZAHRA, J.

VIVIANO, J. (*dissenting*). I join Justice ZAHRA's dissent in full. As the author of the dissent in *In re Estate of Erwin*, 503 Mich 1; 921 NW2d 308 (2018), I write to make a few additional observations.

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[36] See, e.g., *People v Dunbar*, 499 Mich 60, 71-72; 879 NW2d 229 (2016) (explaining that the authority to rewrite statutes rests with the Legislature, not this Court).

As should be evident to even a casual reader of that opinion, I vigorously disagreed with the *Erwin* majority's interpretation of the willful-absence provision of the forfeiture statute, MCL 700.2801(2)(e)(*i*). The lead opinion in *Erwin* held that, under this provision, a spouse is excluded from inheriting as a surviving spouse if there was a "complete physical and emotional absence from the deceased spouse." *Id*. at 21. The concurring justice agreed that emotional absence is required to bar the surviving spouse from inheriting, but she was unwilling to sign onto the portion of the opinion addressing the requirement of physical absence. *Id*. at 28-29 (CLEMENT, J., concurring). Thus, the emotional-absence requirement in *Erwin* had majority support and therefore is precedentially binding.

To summarize, *Erwin* held that for a surviving spouse to forfeit his or her entitlement to collect the intestate share of the decedent's estate under the willful-absence provision, the surviving spouse must have been emotionally absent from the relationship for one year or more before the decedent's death.[1] Applying that holding to the present case, it is clear, for the reasons Justice ZAHRA explains, as well as those given by the dissenting judge in the Court of Appeals and the trial court, that respondent was "willfully absent" from the decedent for more than one year prior to his death.

[1] Although the *Erwin* dissenters did not agree that a finding of emotional absence was required, we did agree that physical absence was required by the statute. Thus, a clear majority of justices agreed that the provision requires physical absence. Even the concurring justice acknowledged that such a proposition was not controversial: "To be fair, a physical-absence requirement is unlikely to cause mischief—I don't doubt that in a typical case, a finding that a spouse was 'willfully absent' will be supported by, among other things, record evidence of physical absence." *Erwin*, 503 Mich at 29 (CLEMENT, J., concurring).

The effect of the majority's opinion in this case is to overrule *Erwin*'s emotional-absence holding *sub silentio*, at least in the context of pending divorce actions. The majority creates out of whole cloth a presumption that, when a divorce action has been filed—even one filed by the person claiming to be the surviving spouse—a surviving spouse is not willfully absent. Even more strangely, the majority creates a new totality-of-the-circumstances test to determine whether indirect communications between opposing counsel in the divorce action are sufficient to negate a finding of willful absence.[2] Instead of applying the *Erwin* analysis and considering whether the surviving spouse was emotionally absent, the majority here

[2] That our Court continues to make a hash out of this statute is perhaps best demonstrated by the present majority's creation of a new presumption without any support in the text of the statute. The Legislature could have adopted a statute with a bright-line test for forfeiture—like the Uniform Probate Code, which requires a definitive legal act to bar the surviving spouse. See *Erwin*, 503 Mich at 31 n 8 (VIVIANO, J., dissenting). The Legislature could have stipulated that a person could not be barred from inheriting as a surviving spouse while a divorce action was pending. But it did not do so. The separation of powers demands that we respect that legislative choice. In a similar vein, the present majority's creation of a second totality-of-the-circumstances test atop the one created by the *Erwin* lead opinion is befuddling. See *Erwin*, 503 Mich at 27 ("Absence in this context presents a factual inquiry based on the totality of the circumstances, and courts should evaluate whether complete physical and emotional absence existed, resulting in an end to the marriage for practical purposes."). What does it mean for a court to decide whether the communications are consistent with the recognition of a marriage *under the totality of the circumstances*? Is this any different than just considering whether the communications are consistent with the recognition of marriage? Moreover, to the extent that the challenger bears the burden of rebutting the presumption, it seems utterly incoherent to instruct the trial court to examine all the circumstances on its own. Successful rebuttal forces the challenging side to produce the evidence sufficient to overcome the presumption. See *Price v Austin*, 509 Mich 938, 941 (2022) (VIVIANO, J., dissenting).

harvests some stray remarks from *Erwin* to create a new test in the context of divorce actions. When a spouse files for divorce, there is a presumption that the spouse is not willfully absent. To rebut that presumption, "[t]he challenging party can satisfy their burden by showing that, under the totality of the circumstances, the surviving spouse's communications, or lack thereof, were inconsistent with a recognition of the continued existence of the legal marriage." *Ante* at 313.[3] These innovations cannot be squared with *Erwin*, which clearly places the focus on whether the departing spouse was emotionally absent.[4]

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[3] It is puzzling how the majority derives this meaning. The majority looks to *Erwin*'s discussion of the subparagraphs surrounding MCL 700.2801(2)(e)(*i*), which *Erwin* interpreted as "describ[ing] acts on behalf of a surviving spouse that for all intents and purposes are inconsistent with the very existence of a legal marriage" and that represent a "complete repudiation of the marriage." *Erwin*, 503 Mich at 15, 21, discussing MCL 700.2801(2)(e)(*ii*) and (*iii*). *Erwin* concluded that MCL 700.2801(2)(e)(*i*), as a neighboring provision, should be interpreted similarly. For that reason, in part, the *Erwin* lead opinion read MCL 700.2801(2)(e)(*i*) as requiring both physical and emotional absence. In the present case, the majority ignores the results of *Erwin*'s labors, i.e., the actual interpretation, and instead reaches back into the analysis for the observation that these statutory provisions seem to capture acts inconsistent with the existence of a marriage. The majority launches its analysis from that bare observation, leaving behind the ultimate interpretive conclusions that *Erwin* drew from that observation. It is almost as though that observation is being treated as a legislative purpose, which the majority endeavors to further. But of course, it is no such thing (and even if it were, it would not justify departures from the text). Instead, it is just a stray line that formed part of the rationale for *Erwin*'s holding.

[4] See *Erwin*, 503 Mich at 16-17 (holding that a surviving spouse should not be deemed "willfully absent" if he or she "maintain[s] an element of emotional support and contact"); *id*. at 17 ("[W]ithout additional indicia of a complete absence in terms of emotional support and contact, courts should conclude that the marriage endured . . . ."); *id*. at 17 n 9 ("[T]he trial court should ascertain whether that spouse has been *completely* absent from the [decedent spouse], both emotionally

By boiling this requirement down to the question of whether any contact at all was maintained between the parties—even indirect contact through opposing counsel—while a divorce action was pending, the majority significantly undermines *Erwin*. It can no longer be said that the focus of the inquiry is whether the departing spouse continued to provide emotional support. Instead, it appears that any form of contact—even a profanity-laced tirade sent via text message or e-mail—might be a sufficient "recognition that the legal marriage still exists." *Ante* at 310.

The majority suggests that they are simply carving out a different rule for when a divorce action is filed. But *Erwin* read the language of the statute as requiring emotional absence. When a divorce action is filed, the majority today holds that the emotional-absence component somehow vanishes from the semantic content of the statute. Thus, the majority essentially holds that the same statutory text has different meanings in different factual contexts.

This represents a stupefying departure from normal interpretive principles. The United States Supreme Court has rejected "the dangerous principle that judges can give the same statutory text different meanings in different cases." See *Clark v Martinez*, 543 US 371, 386; 125 S Ct 716; 160 L Ed 2d 734 (2005). Such an

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and physically."); *id*. at 17 n 10 ("This general rule supports our conclusion that neither physical nor emotional absence in isolation is sufficient for purposes of MCL 700.2801(2)(e)(*i*). Rather, a complete absence is required, both physical *and* emotional."); *id*. at 18 ("One who is physically absent can still be 'attentive' by providing emotional support and communication; conversely, one who is physically absent can also be 'inattentive' by withholding emotional support and communication."); *id*. at 18 n 11 ("[T]here is nothing outlandish about stating that emotional support and communication can be absent from a personal relationship, nor with characterizing one who withholds such support as being emotionally absent from that relationship.").

approach would "render every statute a chameleon." *Id*. at 382; see also *Carter v Welles-Bowen Realty, Inc*, 736 F3d 722, 730 (CA 6, 2013) (Sutton, J., concurring) ("[A] statute is not a chameleon. Its meaning does not change from case to case. A single law should have one meaning . . . ."). Courts thus have an "obligation to maintain the consistent meaning of words in statutory text" because "the meaning of words in a statute cannot change with the statute's application." *United States v Santos*, 553 US 507, 522-523; 128 S Ct 2020; 170 L Ed 2d 912 (2008) (plurality opinion).

Today, the majority disregards these principles, holding that the statute has one meaning when a divorce complaint has been filed and another meaning when one has not been filed. As new fact patterns arise, the Court will have endless opportunities to divine even more new meanings, making it impossible for a person to know what the law is in advance: when a statute is forced to bear proliferating meanings, it really has no meaning at all.

There is a more principled way to reach the outcome the majority evidently desires. The *Erwin* dissenters interpreted the phrase "willfully absent" as requiring a unilateral decision by the departing spouse:

> A decision made with the consent of the other spouse is not a willful decision—that is, it is not a decision made "following one's own will unreasoningly." Therefore, by using the phrase "*willfully* absent," the statute refers to a spouse who is physically absent as a result of a unilateral decision by that spouse. By contrast, spouses who live apart by mutual choice would be considered surviving spouses under the forfeiture provision because the absent spouse did not make a unilateral decision to be absent. [*Erwin*, 503 Mich at 37-38 (VIVIANO, J., dissenting).]

The majority here nods at the *Erwin* dissent when it states that "[w]hen one spouse unilaterally and without any consideration of the other spouse's desires cuts off all direct or indirect contact with their spouse for over a year, they have taken action 'inconsistent with the very existence of a legal marriage.' " *Ante* at 309.[5] In this case, it is clear that even if Anne was deemed absent, she did not make a unilateral decision to be absent. Arguably, when she initially left the home for a brief period, Anne did not do so voluntarily; rather, she was compelled to do so because Hermann was verbally abusive and ordered her to leave. See *id*. at 37-40 & n 36. Anne only temporarily left the marital home; then, she returned to it and continued to live there by mutual agreement for most of the period that the divorce action was pending. After Hermann's surgery, he lived in an assisted living facility in Michigan and later moved to Florida. Under these circumstances, I would find that Hermann, not Anne, made the unilateral decision to be absent.

As the author of the *Erwin* dissent, I am, of course, partial to it and believe it is faithful to the ordinary meaning of the statute. Instead of undermining *Erwin* and rewriting the statute for this new context, the majority could have placed its cards on the table, overruled *Erwin*,[6] and adopted the *Erwin* dissent. The statute would have maintained a single meaning. Instead, the majority shreds binding precedent by

[5] The *Erwin* majority also appears to have borrowed from the *Erwin* dissent when it said that "the inquiry is into whether the surviving spouse did the 'absenting,' not whether the surviving spouse did enough to prevent the absence." *Erwin*, 503 Mich at 23 n 15.

[6] I acknowledge that no party asked us to overrule *Erwin*, so I would have supported either supplemental briefing or granting leave on this question to give the parties and any interested amici an opportunity to brief and argue the issue.

according the same text in the same statute multiple meanings. I believe it would be far better for the law to retain a flawed interpretation than to tack another new, even more flawed interpretation onto it. For these reasons, I dissent.

MEEMIC INSURANCE COMPANY v JONES

Docket No. 161865. Argued on application for leave to appeal November 10, 2021. Decided June 14, 2022.

Meemic Insurance Company filed a subrogation claim in the Wayne Circuit Court against Angela Jones, seeking to recover from Jones money it had paid to CitiMortgage, Inc., the mortgagee of a residential house owned by Jones and insured by Meemic, after fire damaged the property. In 2014, Meemic had issued a homeowner's policy to Jones; later, the parties renewed the insurance policy for an additional year. The policy contained express terms equating to a standard mortgage clause, which created two contracts of insurance within the single policy—the risk contract (between Jones and Meemic) and the lienholder contract (between CitiMortgage, the lienholder identified by the mortgage clause, and Meemic). The policy provided that the interests of the mortgagee (here, CitiMortgage) would not be affected by any actions by Jones, the mortgagor. The policy additionally provided that if Meemic paid the mortgagee for any loss and denied payment to Jones, Meemic could either (1) subrogate itself to all the rights of the mortgagee under the mortgage on the property or (2) pay the mortgagee the mortgage balance and receive a full assignment and transfer of the mortgage. In September 2015, Jones was living at the house when it was damaged by a fire. In response to the claim filed by Jones, Meemic paid her $2,500 in partial payment of the claim for insurance benefits. During Meemic's ensuing investigation, Jones admitted that at the time she secured the policy in 2014, she did not reside at the house but, instead, rented it to a third party. Meemic claimed that Jones's failure to disclose in the initial policy that her home was being rented to others constituted a material misrepresentation. On the basis of the misrepresentation, Meemic rescinded and voided the insurance policy from its inception and returned Jones's policy payments. After rescinding the policy, Meemic paid $53,356.49 to CitiMortgage under the lienholder contract of the policy. Jones filed an action against Meemic, claiming breach of contract and seeking to recover under the insurance policy. Meemic moved for summary disposition, arguing that it had properly rescinded the policy given Jones's misrepresentation in the initial policy. The

court, John H. Gillis, Jr., J., denied the motion, reasoning that there was no fraud because her answers in the policy's renewal application—that she was residing at the property—were correct at the time Jones renewed the policy. Meemic filed an application for leave to appeal in the Court of Appeals. In an unpublished order entered April 19, 2017 (Docket No. 337041), the Court of Appeals summarily reversed the trial court's order denying Meemic's motion for summary disposition and remanded to the trial court. The Supreme Court denied Jones's application for leave to appeal. 501 Mich 951 (2018). On remand from the Court of Appeals, the trial court reversed its earlier order denying Meemic's motion for summary disposition, granted Meemic's motion for summary disposition, and dismissed Jones's complaint with prejudice. In 2018, Meemic filed the instant action against Jones, seeking to recover the $2,500 advance payment made to Jones and the $53,356.49 it had paid to CitiMortgage under the lienholder contract. Jones moved for summary disposition, arguing that she was relieved from any obligations under the insurance policy because Meemic had rescinded the insurance policy; Meemic opposed the motion and filed a countermotion for summary disposition. The court granted Meemic's countermotion for summary disposition and denied Jones's motion for summary disposition; the court later denied Jones's motion for reconsideration. In an unpublished per curiam opinion issued May 21, 2020 (Docket No. 346361), the Court of Appeals, MURRAY, C.J., and SWARTZLE and CAMERON, JJ., reversed the trial court's order and remanded for proceedings consistent with its opinion. The Court reasoned that while Meemic's rescission of Jones's policy did not affect the lienholder contract between Meemic and CitiMortgage, the contract only granted Meemic the right of subrogation if it paid CitiMortgage and refused to pay Jones's claim under the policy. Because Meemic took the extra step of annulling Jones's rights under the policy by declaring it void *ab initio*, Meemic was not entitled to subrogation against Jones. The Court later denied Meemic's motion for reconsideration. Meemic filed an application for leave to appeal in the Supreme Court. The Supreme Court ordered and heard oral argument on whether to grant Meemic's application for leave to appeal or take other action. 507 Mich 854 (2021).

In an opinion by Justice ZAHRA, joined by Chief Justice MCCORMACK and Justices VIVIANO, BERNSTEIN, and CLEMENT, the Supreme Court *held*:

When an insurance policy contains a mortgage clause that equates to a standard mortgage clause—which contains both a

risk contract and a lienholder contract within the same policy—a misrepresentation in the mortgagor's insurance application does not void the lienholder contract between the insurer and the mortgagee even when the misrepresentation renders the policy void *ab initio* as to the mortgagor; the intent of the parties, as discerned from the terms of the contract, controls whether portions of the rescinded contract are enforceable. Thus, an insurer who rescinds a homeowner's insurance policy that contains a mortgage clause may seek subrogation from the insured under its rescinded policy for the amount paid to the mortgagee under the lienholder contract. The Court of Appeals judgment was reversed because it erred by concluding that Meemic's rescission of the risk contract precluded it from denying payment to Jones and then asserting rights under the subrogation provision of the lienholder contract.

1. Insurance policies are contracts. A standard mortgage clause in a homeowner's insurance policy creates two contracts within the single policy: one contract is between the insured and insurer (the risk contract), and the second contract is between the lienholder identified by the mortgage clause and the insurer (the lienholder contract). A standard mortgage clause protects the mortgagee as stipulated in the policy and cannot be destroyed or impaired by the mortgagor's acts or by those of any person other than the mortgagee or someone authorized to act for the mortgagee. Thus, when an insurance policy contains a standard mortgage clause, a misrepresentation in the mortgagor's application for insurance does not void the contract between the insurer and the mortgagee even when the misrepresentation renders the policy void *ab initio* as to the mortgagor. To determine whether portions of a rescinded contract are enforceable, a court must review the terms of the rescinded contract to determine the intent of the parties; if it is clear from the language of the contract that the parties intended a portion of the contract to remain enforceable notwithstanding rescission, the court must enforce that intent. If the parties intended that result, when an insurance policy contains a mortgage clause that equates to a standard mortgage clause, a misrepresentation in the mortgagor's application for insurance does not void the lienholder contract between the insurer and the mortgagee even when the misrepresentation renders the policy void *ab initio* as to the mortgagor.

2. The policy in this case provided (1) that the interest of the mortgagee would not be affected by any action or neglect by Jones and (2) that if Meemic paid the mortgagee (CitiMortgage) for any loss and denied payment to Jones, Meemic could either be

subrogated to all of the mortgagee's rights under the mortgage or pay the mortgagee the principal on the mortgage and receive a full assignment and transfer of the mortgage. The policy's denial-of-payment language under the subrogation provision was independent from the validity of the risk contract. The subrogation provision only became relevant after Meemic paid CitiMortgage, and when that occurred, the issue was whether Meemic denied payment to Jones under the insurance policy. The language did not require an additional assessment of the reasons underlying Meemic's denial of payment. Because Meemic paid CitiMortgage under the terms of the risk contract and denied payment to Jones, the subrogation clause was enforceable. The subrogation provision applied to the lienholder contract and it was not rescinded by Meemic's rescission of the insurance policy. While Jones may or may not have been a party to the lienholder contract, she paid the consideration for both the risk and lienholder contracts, agreed to the policy's subrogation provision, and stood to benefit from Meemic's payment to CitiMortgage. As a result, Jones could not challenge Meemic's reliance on the subrogation provision. While the Court of Appeals correctly recognized that the language in the policy equated to a standard mortgage clause and that Jones's action or neglect with regard to the application did not prevent CitiMortgage from recovering under the policy as the mortgagee and Meemic, in turn, as the subrogee of CitiMortgage, the Court erred by concluding that the subrogation clause did not survive Meemic's rescission of the policy by declaring it void *ab initio* and by holding that Jones was not obligated to pay Meemic under the terms of the policy the amount of money Meemic had paid to CitiMortgage under the lienholder contract.

Court of Appeals judgment reversed; final judgment of the trial court reinstated.

Justice WELCH, joined by Justice CAVANAGH, dissenting, agreed with the majority that Meemic remained contractually obligated under the lienholder contract to pay CitiMortgage for the loss even though it had rescinded the policy, that Meemic was entitled to seek reimbursement under the standard mortgage clause, and that the Court of Appeals erred by holding otherwise. She wrote separately because the majority opinion failed to address whether the trial court erred by granting summary disposition and awarding damages to Meemic before first deciding CitiMortgage's right to recover against Jones, which would then determine Meemic's rights as subrogee of CitiMortgage to recover against Jones. The purpose of a standard mortgage clause is to protect the mortgagee from loss even if the insured is denied coverage; it allocates the

risk to the insurer because the insurer is better positioned than the mortgagee to evaluate the insured's underwriting risk. Under the lienholder contract, Meemic could have pursued its rights by either (1) subrogating itself to CitiMortgage's rights under the mortgage or (2) paying the remaining principal on the mortgage debt and obtaining a full assignment and transfer of the mortgage and related securities. Because Meemic failed to obtain an assignment of the mortgage from CitiMortgage, Meemic was only able to recover from Jones as subrogee of CitiMortgage. In its complaint and motion for summary disposition, Meemic never detailed the scope of CitiMortgage's rights as the mortgagee, and because of that, Meemic failed to set forth the scope of Meemic's rights as subrogee, a necessary element of a claim for subrogation under a contract. Relevant here, Meemic's mere assertion that it was contractually entitled to recover directly from Jones the amount it had paid to CitiMortgage because it was subrogated to CitiMortgage's rights did not provide a sufficient legal basis for Meemic to immediately obtain a judgment in that amount. Thus, Meemic failed to carry its burden as the plaintiff and summary-disposition movant to establish that CitiMortgage's rights would provide Meemic through subrogation a basis for the relief requested. Accordingly, Meemic should not have prevailed on summary disposition. Justice WELCH would have held that the Court of Appeals correctly reversed the trial court's order granting summary disposition to Meemic but for the wrong reason.

INSURANCE — HOMEOWNER'S INSURANCE POLICIES — STANDARD MORTGAGE CLAUSES — RESCISSION OF POLICY BECAUSE OF MISREPRESENTATION IN APPLICATION — AVAILABILITY OF SUBROGATION AFTER RESCISSION.

When an insurance policy contains a mortgage clause that equates to a standard mortgage clause—which contains both a risk contract and a lienholder contract within the same policy—a misrepresentation in the mortgagor's insurance application does not void the lienholder contract between the insurer and the mortgagee even when the misrepresentation renders the policy void *ab initio* as to the mortgagor; the intent of the parties, as discerned from the terms of the contract, controls whether portions of the rescinded contract are enforceable; if it is clear from the contract language that the parties intended a portion of the contract to remain enforceable notwithstanding rescission, the court must enforce that intent; if the parties intended that result, when an insurance policy contains a mortgage clause that equates to a standard mortgage clause, a misrepresentation in the mortgagor's application for insurance does not void the

> lienholder contract between the insurer and the mortgagee even when the misrepresentation renders the policy void *ab initio* as to the mortgagor.

Harvey Kruse, PC (by *Michael F. Schmidt* and *Nathan Peplinski*) for Meemic Insurance Company.

Jo Robin Davis, PLLC (by *Jo Robin Davis*) for Angela Jones.

ZAHRA, J. Defendant, Angela Jones, procured from plaintiff, Meemic Insurance Company, a homeowner's insurance policy that contained a mortgage clause protecting the interests of her mortgagee, CitiMortgage. Fire damaged the insured property, and Jones asserted a claim under the policy. Meemic, however, rescinded the policy and declared it void *ab initio*[1] after

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[1] There is little, if any, daylight between a rescinded policy and one deemed void *ab initio*. "Void *ab initio*" means "[n]ull from the beginning, as from the first moment when a contract is entered into," *Black's Law Dictionary* (11th ed), and this Court, in *Titan Ins Co v Hyten*, 491 Mich 547, 567-568; 817 NW2d 562 (2012), has approvingly cited the following outline of the nature of rescission:

> To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it. But this by itself would constitute no more than a breach of the contract or a refusal of performance, while the idea of rescission involves the additional and distinguishing element of a restoration of the *status quo*. [*Lash v Allstate Ins Co*, 210 Mich App 98, 102; 532 NW2d 869 (1995) (quotation marks and citation omitted).]

Despite marginal differences, if any, between the two concepts, we use the term "rescind" to indicate that the policy at issue was both rescinded and voided *ab initio*.

Jones admitted to making a material misrepresentation in the original policy application. Meemic paid the balance of the mortgage lien to CitiMortgage under the terms of the policy's mortgage clause, and it later filed a subrogation claim against Jones. Jones defended the suit, claiming that the policy under which Meemic asserts subrogation was rescinded and deemed void *ab initio*. Therefore, Jones contended, she is not accountable for the funds Meemic paid to her mortgagee. The question presented is whether an insurer who rescinds a homeowner's policy of insurance that contains a mortgage clause may nonetheless seek subrogation under its rescinded policy for the amount paid to a mortgagee under the mortgage clause.

We hold that an insurer can pursue subrogation under this type of insurance policy. We read each insurance policy under the specific terms of that policy and rely on our settled caselaw to confirm the meaning and intended operation of those terms. In this case, we are presented with a typical homeowner's insurance policy that contains express terms equating to a "standard mortgage clause."[2] This is a clause intended to create two contracts of insurance within a single "in-

[2] At one time, homeowner's policies contained a clause known as an "ordinary mortgage clause." Under the ordinary mortgage clause, the interests of lienholders were not adequately protected. *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 383-384; 486 NW2d 600 (1992). This resulted in an evolution to the standard mortgage clause. *Id*. While there appear to be minor deviations between a classic standard mortgage clause and the mortgage clause at issue in this case, the litigants generally agree that the mortgage clause at issue is a standard mortgage clause. In its supplemental brief, Meemic refers throughout to the instant provision as a standard mortgage clause. And Jones's supplemental brief in this Court states, "Even though the *standard mortgage provision* created a separate contract between Meemic and CitiMortgage, the subrogation provision was directed solely at the named insured, Ms. Jones[.]" (Emphasis added.)

surance policy." One contract is between the insured and the insurer (the risk contract), and the second contract is between the lienholder identified by the mortgage clause and the insurer (the lienholder contract).[3] We reaffirm our caselaw holding that when an insurance policy contains a mortgage clause that equates to a standard mortgage clause, a misrepresentation in the mortgagor's application for insurance does not void the lienholder contract between the insurer and mortgagee even when the misrepresentation renders the policy void *ab initio* as to the mortgagor.[4]

Given this affirmation, the only remaining question is whether the subrogation provision in the insurance policy at issue in this case remains enforceable against the insured. We hold that it is. The Court of Appeals

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[3] Typically, the lienholder or any of its subrogees will bring an action against the insurer that refuses to pay under the lienholder contract. See *Foremost Ins Co*, 439 Mich at 382-383. In *Foremost*, for example, a bank was the lienholder and its subrogee was its insurer, which brought suit. *Id*. at 381-383. But there may be other parties holding an interest in the property that can also bring suit under the lienholder contract. Although not raised by the parties, we highlight that the language of the instant mortgage clause does provide Jones a right to enforce the lienholder contract as a third-party beneficiary. See MCL 600.1405. Specifically, the language provides that "[i]f a mortgagee is named in the Declarations, any payment for loss under Coverage A or B will be made to the mortgagee and **you**, as interests appear." This provision would provide a right to payment if, for instance, the lienholder's interest in the property is less than the amount of the loss. Although this circumstance does not appear to be present in this case, we believe it worth noting to repudiate the assertion by Jones that she is a stranger to the lienholder contract.

[4] See *Foremost*, 439 Mich at 383-385; *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 529-530; 847 NW2d 657 (2014). See also 4 Couch, Insurance, 3d (rev ed), § 65:65, pp 115-117.

erred by concluding that Meemic's rescission of the risk contract precluded it from denying payment to Jones and from asserting rights and privileges under the subrogation provision. Jones provided the consideration for both the risk and lienholder contracts, agreed to the subrogation provision within the insurance policy, and only stood to benefit from Meemic's payment of the mortgage principal to CitiMortgage. Accordingly, we reverse the Court of Appeals' decision and reinstate the Wayne Circuit Court's final judgment.

I. BASIC FACTS AND PROCEDURAL HISTORY

Jones owned residential property at 4244 Lakepointe Street in Detroit, Michigan. She applied to purchase a homeowner's insurance policy from Meemic. The application provided, "I understand that Meemic may declare this policy null and void, not only as to the applicant(s), but as to any insureds, claimants, or anyone with an interest in the insured property, if any answers or any information on this application are false, misleading, or materially affect the risk that Meemic assumes by issuing the policy." Meemic issued Jones an insurance policy that was effective from July 28, 2014 through July 28, 2015. The parties later renewed the insurance policy for an additional year.

Fire damaged the property on September 28, 2015. At the time of the fire, Jones resided in the home. On September 28, 2015, Meemic provided Jones an advance payment of $2,500 in partial payment of the claim for insurance benefits. The advance-payment receipt and reservation-of-rights document, which was signed by Jones, stated, "I further understand that if the policy or the claim is not valid and additional

payment is not required by [Meemic], I will repay this partial payment to [Meemic]."

During Meemic's investigation following the fire, Jones gave a recorded statement to Meemic in which she admitted that she did not reside at 4244 Lakepointe Street when she submitted her application and that, instead, she rented 4244 Lakepointe Street to Gwendolyn Sommers. Meemic alleged Jones made a misrepresentation in her application for insurance by not listing 4244 Lakepointe Street as a "Private Structure[] Rented to Others" or as an "Additional Residence[] rented to Others." After discovering this misrepresentation, Meemic sent a letter on February 19, 2016, to Jones rescinding and voiding the insurance policy from its inception because of the material misrepresentation.

The insurance policy provided, in relevant part, the following clauses:

> Rights and Duties of Mortgagee. The term "mortgagee" includes a trustee or a land contract holder, if applicable.
>
> If a mortgagee is named in the Declarations, any payment for loss under Coverage A or B will be made to the mortgagee and **you**, as interests appear. . . .[5]
>
> The interest of the mortgagee under this policy will not be affected by any action or neglect by **you**. The interest of the mortgagee under this policy will terminate unless it notifies **us** of any change of ownership, occupancy or substantial change in risk of which the mortgagee has knowledge and pays upon demand any premium due if **you** fail to do so.

A second related clause provides:

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[5] The mortgagee on the policy declaration was listed as CitiMortgage, Inc.

> If **we** pay the mortgagee for any loss and deny payment to **you**:
>
> A. **we** will be subrogated to the extent of **our** payment to all the rights that the mortgagee has under the mortgage on the property; or
>
> B. at **our** option, **we** may pay to the mortgagee the whole principal on the mortgage and any interest due. In this event, **we** may receive a full assignment and transfer of the mortgage and all securities held as collateral for the mortgage debt.

After rescinding the policy, Meemic paid $53,356.49 to Jones's mortgagee, CitiMortgage, under the lienholder contract.

On March 4, 2016, Jones filed suit against Meemic, alleging breach of contract and seeking to recover under the insurance policy. Meemic answered the complaint and later moved for summary disposition, arguing that the insurance policy was appropriately rescinded because of the misrepresentation made by Jones in the application. Jones opposed the motion. On December 28, 2016, the trial court entered an order denying Meemic's motion for summary disposition, reasoning, "[T]here was no fraud because [Jones] renewed the policy and the answers were correct at the time of the renewal and [Jones] was a resident [of the home] at the time of the fire."

Meemic applied for leave to appeal the trial court's decision concerning its motion for summary disposition. On April 19, 2017, the Court of Appeals summarily reversed the trial court's December 28, 2016 order denying Meemic's motion for summary disposition and remanded the matter to the trial court.[6] This Court denied an application for leave to appeal filed by

[6] Specifically, the panel stated:

Jones.[7] On remand, the trial court entered an order (1) reversing its December 28, 2016 order denying Meemic's motion for summary disposition, (2) granting Meemic's motion for summary disposition, and (3) dismissing Jones's complaint with prejudice.

On May 15, 2018, Meemic filed suit against Jones, seeking recovery of the $2,500 advance payment and the $53,356.49 paid to CitiMortgage. Under Count I, Meemic alleged that it was entitled to recovery of the $2,500 because the insurance policy was void *ab initio*. Under Count II, Meemic alleged that it was entitled to subrogation for the $53,356.49 it paid to CitiMortgage because it properly denied coverage to Jones and rescinded the policy on the basis of the misrepresentation made in the insurance policy application. On June 22, 2018, Jones moved for summary disposition under MCR 2.116(C)(8) and (10). She argued that Meemic's rescission of the insurance policy relieved Jones of any obligation relating to the insurance policy. Meemic responded to Jones's motion for summary

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Pursuant to MCR 7.205(E)(2), the Court orders that the trial court's December 28, 2016 order denying defendant's motion for summary disposition is REVERSED. It is undisputed that but for plaintiff's initial misrepresentation about her residence, defendant would not have issued the policy. Accordingly, plaintiff's misrepresentation was material and it entitled defendant to rescind her policy regardless of intent. *Titan Ins Co* [491 Mich at 556]; *Lash* [210 Mich App at 103]; see also *Keys v Pace*, 358 Mich 74, 81; 99 NW2d 547 (1959). That plaintiff's misrepresentation was no longer false at the time her policy renewed and on the date of loss is of no moment since plaintiff's eligibility for the renewal hinged on the representations made in her initial application. *21st Century Premier Ins Co v Zufelt*, 315 Mich App 437, 446-447; 889 NW2d 759 (2016). Defendant's motion for summary disposition should have been granted. [*Jones v Meemic Ins Co*, unpublished order of the Court of Appeals, entered April 19, 2017 (Docket No. 337041).]

[7] *Jones v Meemic Ins Co*, 501 Mich 951 (2018).

disposition and filed a countermotion for summary disposition. Meemic argued that it was entitled to the return of the $2,500 advance payment because it was unaware of Jones's misrepresentation at the time it made the payment and that Jones owed Meemic $53,356.49 because the lienholder contract is a separate contract under the insurance policy that required Meemic to pay CitiMortgage.

On October 5, 2018, the trial court issued an opinion granting summary disposition in favor of Meemic, and it entered a corresponding order. The court also denied Jones's motion for summary disposition. Jones moved for reconsideration of the trial court's decision; the court denied the motion.

Jones appealed.[8] In an unpublished per curiam opinion, the Court of Appeals reversed the trial court and remanded for proceedings consistent with its opinion.[9] Meemic moved for reconsideration, arguing again that the language of the policy provided it with subro-

[8] The Court of Appeals noted, "Jones does not challenge the trial court's holding that Meemic was entitled to summary disposition on its claim that it was entitled to recovery of the $2,500 that it paid to Jones." *Meemic Ins Co v Jones*, unpublished per curiam opinion of the Court of Appeals, issued May 21, 2020 (Docket No. 346361), p 3 n 3.

[9] *Id*. at 3-7.

gation rights and supported a theory of statutory[10] and equitable subrogation.[11] The Court of Appeals denied the motion.[12]

Meemic appealed in this Court. We directed the Clerk of this Court to schedule oral argument on the application.[13]

II. APPLICABLE STANDARDS OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim and is subject to de novo review.[14] "In resolving such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . . If the evidence fails to establish a genuine issue regarding any material fact, the movant is en-

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[10] MCL 500.2833.

[11] Meemic relies on *French v Grand Beach Co*, 239 Mich 575, 580; 215 NW 13 (1927), which explained:

> The doctrine of subrogation rests upon the equitable principle that one who, in order to protect a security held by him, is compelled to pay a debt for which another is primarily liable, is entitled to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect. This doctrine is sometimes spoken of as "legal subrogation," and has long been applied by courts of equity. [Citation omitted.]

[12] *Meemic Ins Co v Jones*, unpublished order of the Court of Appeals, entered July 7, 2020 (Docket No. 346361).

[13] We asked the litigants to address:

> [W]hether its declaration that a homeowners insurance policy was void *ab initio* should be considered a denial of a claim under the policy such that it may invoke its right to subrogation when it was required by a standard mortgage clause to pay the balance of the appellee's mortgage. [*Meemic Ins Co v Jones*, 507 Mich 854 (2021).]

[14] See *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

titled to judgment as a matter of law."[15] Further, "[w]e review de novo, as a question of law, the proper interpretation of a contract."[16]

III. ANALYSIS

Insurance policies are contracts.[17] We interpret contracts by giving plain meaning to the words and phrases used by the parties.[18] Where the policy lends itself to a clear understanding between the parties, a court will enforce the policy as written.[19] Our interpretation of this policy starts by looking at the provision that identifies the rights and duties of the mortgagee:

> **Rights and Duties Of Mortgagee**. The term "mortgagee" includes a trustee or a land contract holder, if applicable.
>
> If a mortgagee is named in the Declarations, any payment for loss under Coverage A or B will be made to the mortgagee and **you**,[20] as interests appear. If more than one mortgagee is named, payment will be made in the order of priority of the mortgagees.
>
> *The interest of the mortgagee under this policy will not be affected by any action or neglect by* **you**. The interest of the mortgagee under this policy will terminate unless it notifies **us** of any change of ownership, occupancy or

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[15] *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 85; 878 NW2d 816 (2016) (quotation marks and citation omitted).

[16] *Innovation Ventures v Liquid Mfg*, 499 Mich 491; 885 NW2d 861 (2016).

[17] *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005).

[18] See *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367; 817 NW2d 504 (2012).

[19] See *Henderson v State Farm Fire and Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999).

[20] The policy defines the word "you" to include Jones, the named insured.

> substantial change in risk of which the mortgagee has knowledge and pays upon demand any premium due if **you** fail to do so.
>
> * * *
>
> If **we** pay the mortgagee for any loss and deny payment to **you**:
>
> A. **we** will be subrogated to the extent of **our** payment to all the rights that the mortgagee has under the mortgage on the property; or
>
> B. at **our** option, **we** may pay to the mortgagee the whole principal on the mortgage and any interest due. In this event, **we** may receive a full assignment and transfer of the mortgage and all securities held as collateral for the mortgage debt.[21]

The cited policy language equates to a standard mortgage clause. The lienholder named in the policy declaration is the mortgagee, CitiMortgage. Per the policy language, CitiMortgage's interests are not "affected by any action or neglect by [Jones]."

Michigan courts have repeatedly construed such provisions and reasoned:

> [A] lienholder is not subject to the exclusions available to the insurer against the insured because an independent or separate contract of insurance exists between the lienholder and the insurer. In other words, there are two contracts of insurance within the policy—one with the lienholder and the insurer and the other with the insured and the insurer.[22]

Thus, the standard mortgage clause presented in this case "effects a new and independent insurance [that] protects the mortgagee as stipulated, and which

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[21] Emphasis added.

[22] *Foremost Ins Co*, 439 Mich at 384 (citations omitted).

cannot be destroyed or impaired by the mortgagor's acts or by those of any person other than the mortgagee or someone authorized to act for him and in his behalf."[23] Consequently, when an insurance policy contains a standard mortgage clause, a misrepresentation in the mortgagor's application for insurance does not void the contract between the insurer and mortgagee even when the misrepresentation renders the policy void *ab initio* as to the mortgagor.[24]

The Court of Appeals understood that the insurance contract contained a standard mortgage clause that created a separate, independent contractual obligation (the lienholder contract) between Meemic and CitiMortgage. The panel also recognized that Jones's misrepresentation in her application for insurance did not void the lienholder contract, even though the misrepresentation rendered at least the risk contract void *ab initio* as to Jones.[25] And the panel correctly determined that the plain language of the insurance policy provides that "any action or neglect" by Jones (the named insured) would not prohibit recovery by CitiMortgage (the mortgagee). Ultimately, the panel correctly concluded that this clause created a separate, independent contractual obligation between Meemic and CitiMortgage and that the acts of Jones at the time she procured the insurance policy did not affect the independent contractual obligation between Meemic and CitiMortgage.[26]

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[23] *Id*. at 389-390 (quotation marks and citation omitted).

[24] See, e.g., *Wells Fargo Bank, NA*, 304 Mich App at 529-530. See also Couch, § 65:65, pp 115-117.

[25] See, e.g., *Wells Fargo Bank, NA*, 304 Mich App at 529-530.

[26] *Meemic Ins Co*, unpub op at 5.

The Court of Appeals then turned to the question whether Meemic possesses subrogation rights against Jones even though Meemic declared the policy rescinded. Again, we turn to the language of the policy to determine the intent and understanding of the parties. The insurance policy provides:

> If **we** pay the mortgagee for any loss and deny payment to **you**:
>
> A. **we** will be subrogated to the extent of **our** payment to all the rights that the mortgagee has under the mortgage on the property; or
>
> B. at **our** option, **we** may pay to the mortgagee the whole principal on the mortgage and any interest due. In this event, **we** may receive a full assignment and transfer of the mortgage and all securities held as collateral for the mortgage debt.

The plain language of the subrogation clause provides that if Meemic paid CitiMortgage "for any loss" *and* "denied" payment to Jones, Meemic would have rights of subrogation under the policy. Because the policy does not define the term "deny," the Court of Appeals turned to dictionary definitions to decipher its meaning.[27] The panel looked to *Random House Webster's College Dictionary* (1997), which defines "deny" as "to refuse to agree or accede to" and as "to withhold something from, or refuse to grant a request[.]" In contrast, the same dictionary defines "rescind" as "to revoke, annul, or repeal." The panel concluded that the contract only granted Meemic the right of subrogation if it paid CitiMortgage and denied Jones's claim under

[27] See *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007).

the insurance policy—as opposed to rescinding Jones's rights under the insurance policy.[28]

Meemic argues that "the misrepresentations and the resulting rescission of the policy are merely the basis for the denial of coverage, not something separate and distinct from the denial." Meemic similarly points out that *Random House Webster's College Dictionary* (2001) defines "deny" as "to refuse to agree or accede to"; as "to withhold the possession, use, or enjoyment of"; as "to withhold something from, or refuse to grant a request of"; and as "to refuse to recognize or acknowledge, disavow, repudiate[.]" Meemic argues:

> Applying this definition, the question is whether Meemic refused to agree to Jones'[s] claim, whether it refused to grant her request for coverage, and whether it disavowed and repudiated her claim. The only answer to these questions is yes it did. And that is exactly why it told Jones that her claim was denied.

Both the Court of Appeals' and Meemic's interpretation of the subrogation provision miss the mark. We first highlight that the language expressly at issue relates to the denial of "payment," not the denial of a "claim." Meemic clearly did not rescind payment to Jones. Indeed, if Meemic had rescinded payment, this would imply that the payment was made, not denied. Further, while the rescission of the policy is arguably different from the denial of a "claim" under that policy, the same cannot be said about the denial of "payment" under the separate provision allowing Meemic to recoup payments made under the lienholder contract. The denial-of-payment language under this subrogation provision is independent from the validity of the

[28] *Meemic Ins Co*, unpub op at 6-7.

risk contract. The subrogation provision becomes relevant when the insurer pays the mortgagee for any loss due under the lienholder contract. When this occurs, the simple question under the subrogation provision is whether Meemic denied payment under the insurance policy to Jones. In other words, the language does not require an additional assessment of the reasons underlying the denial of payment. In this case, the lienholder contract required Meemic to pay Citibank for the loss, and Meemic denied payment to Jones. These facts remain true regardless of whether Meemic rescinded the policy with Jones. Accordingly, we conclude that because Meemic paid CitiMortgage for a loss and denied payment to Jones, the subrogation clause is enforceable.

We reject Jones's argument that because "Meemic elected to declare the policy void *ab initio* from date of inception, the subrogation provision upon which Meemic attempted to rely, never existed." We also reject the notion that the parties to the insurance contract intended the subrogation provision to apply to the risk contract and not to the lienholder contract. Meemic could have and, indeed, should have been more precise in executing its rescission, which applied to the risk contract in the insurance policy. Nonetheless, Meemic's lack of precision is not fatal to its claim. Portions of a rescinded contract may nonetheless be enforceable.[29] We look to the terms of the rescinded contract to determine the intent of the parties. If it is evident from the contract language that the parties intended a portion of the contract to remain enforceable notwithstanding rescission, courts must execute

[29] *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 640-641; 534 NW2d 217 (1995).

the intent of the parties.[30] As previously established, Michigan courts have long held that a standard mortgage clause is a separate contract within the policy that protects a lienholder regardless of "any action or neglect by [the insured]." In procuring the policy, Jones signed documents acknowledging that any misrepresentation on her part could result in rescission of the policy. Taken together, we conclude that the parties understood that at least the lienholder contract would survive if the actions or neglect of Jones resulted in rescission of the policy. Thus, the question turns on whether the subrogation provision applies to the lienholder contract, which survives rescission, or whether, instead, it is consumed by the risk contract, which was properly rescinded because of Jones's misrepresentations. We hold that the subrogation provision applies to the lienholder contract and that it therefore was not rescinded along with the risk contract. The risk contract "covers risk and outlines exclusions for the insured and the insurer."[31] The subrogation provision plainly does not pertain to risk and exclusions, and as explained earlier, the subrogation provision is only operable when the lienholder contract is triggered. Again, a policy with a standard mortgage clause "constitutes two separate contracts of indemnity [that] relate to the same subject matter, but cover distinct interests therein[.]"[32] Further, "[u]nder the standard loss payable clause, the consideration for the insurer's contract with the lienholder is that which the insured paid for the policy itself."[33] And by returning all the

[30] *Id*.

[31] *Foremost*, 439 Mich at 388.

[32] *Id*. at 390 (quotation marks and citation omitted).

[33] *Id*. at 384.

policy payments Jones had made, Meemic thereby refunded the consideration for both contracts to Jones.

It follows that the subrogation provision is not rescinded by Meemic's act of rescission of the insurance policy. Even though the lienholder contract is an independent contract between Meemic and CitiMortgage, we discern no basis to question Meemic's assertion of the subrogation provision against Jones. While Jones may or may not be a party[34] to the lienholder contract, she nonetheless supplied the consideration for both the risk and lienholder contracts; she agreed to the subrogation provision within the policy; and she only stood to benefit from Meemic's payment to CitiMortgage. Accordingly, we hold that Jones has provided no basis in law or equity to challenge Meemic's reliance on the subrogation provision. We reverse the judgment of the Court of Appeals and reinstate the final judgment of the Wayne Circuit Court.[35]

MCCORMACK, C.J., and VIVIANO, BERNSTEIN, and CLEMENT, JJ., concurred with ZAHRA, J.

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[34] But see note 3 of this opinion.

[35] The dissent acknowledges that "Meemic was entitled to invoke its rights to seek reimbursement under the standard mortgage clause and that the Court of Appeals clearly erred by holding otherwise." (Citation omitted.) The Court is unanimous on this point. The dissent faults the Court's opinion because it does not address "whether the trial court erred by granting summary disposition in favor of Meemic, awarding a monetary judgment in the amount of $53,356.49 . . . ." We disagree. The trial court properly granted summary disposition in favor of Meemic because there is no question that Meemic established that "[*e*]*xcept as to the amount of damages*, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10) (emphasis added).

In regard to the amount of damages, we do not dispute that throughout these proceedings, Meemic has relied only on the policy language to recover a money judgment against Jones for the balance of

WELCH, J. (*dissenting*). In this case, we consider whether Meemic Insurance Company's declaration that Angela Jones's homeowner's insurance policy was void *ab initio* "should be considered a denial of a claim under the policy such that it may invoke its right to subrogation when it was required by a standard mortgage clause to pay the balance" of Jones's mortgage. *Meemic Ins Co v Jones*, 507 Mich 854 (2021). I agree with the majority that, under these circumstances, Meemic was entitled to invoke its rights to seek reimbursement under the standard mortgage clause and that the Court of Appeals[1] clearly erred by holding otherwise. I respectfully dissent from the majority opinion because it does not address whether the trial

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the mortgage, though the policy language recites a remedy that may also have been available in equity under the common law of subrogation. If so, Meemic might have been able to plead an action for equitable subrogation outside of the policy language, but it did not. Arguably, after the Court of Appeals held that Jones was entitled to relief under MCR 2.116(C)(8), plaintiff could have sought to amend its complaint under MCR 2.116(I)(5) rather than filing an application for leave to appeal in this Court. The dissent acknowledges as much, noting it would allow Meemic "to invoke equity as a theory for relief . . . [and] return to the trial court and seek leave to amend its complaint to add a claim for equitable subrogation. MCR 2.118(A)(2)." This acknowledgement alone belies the dissent's assertion that "Meemic's claim of a legal right to repayment needed to be justified with specific reference to CitiMortgage's rights under the mortgage on the property." Despite the myriad questions of procedure and remedy that relate to actions in this context, see Comerford, Jr., *When is Money Paid The Mortgagee Recoverable?—Is the Counterclaim Compulsory?*, 22 Tort Trial & Ins Prac LJ 113, 123 (1986), the fact remains that Jones has never challenged the propriety or amount of the money judgment. Indeed, the issue that the dissent discusses is not only unpreserved, the issue has not even been presented before any court. Contrary to the dissent's claim, we choose not to "set the future course of Michigan's caselaw" by declining to address this peripheral issue. We decide the case only on the facts and legal arguments presented to us.

[1] *Meemic Ins Co v Jones*, unpublished per curiam opinion of the Court of Appeals, issued May 21, 2020 (Docket No. 346361).

court erred by granting summary disposition in favor of Meemic, awarding a monetary judgment in the amount of $53,356.49, without first determining that CitiMortgage's rights as a mortgagee would have entitled it to recover against Jones so that Meemic, who was acting as a subrogee of CitiMortgage, would also be entitled to recover against Jones. Although the Court of Appeals made a legal error in its rationale for reversing the trial court, it does not necessarily follow that the trial court's rationale for granting summary disposition was correct. Because Meemic has not identified, specifically, why the standard mortgage clause entitles CitiMortgage, and thus subrogee Meemic, to reimbursement from Jones as a matter of law, I would hold that the Court of Appeals correctly reversed the trial court's order granting summary disposition but for the wrong reason. To the extent the majority's opinion suggests otherwise, I respectfully dissent.

"It is well settled that a policy's standard mortgage clause constitutes a separate and distinct contract between a mortgagee and an insurance company for payment on the mortgage." *Singer v American States Ins*, 245 Mich App 370, 379; 631 NW2d 34 (2001); *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 384; 486 NW2d 600 (1992). Its purpose is to allocate the risk to the insurer that the insured might, as here, act in a manner that jeopardizes insurance coverage because the insurer is better positioned than the mortgagee to evaluate the insured's underwriting risk. *Foremost Ins Co*, 439 Mich at 384. The result is that the mortgagee will be protected from loss even if the insured is denied coverage. *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 526-527; 847 NW2d 657 (2014). Accordingly, I agree with the majority that Meemic remained contractually obligated under this separate and distinct contract to pay CitiMortgage (Jones's mortgagee) for

the loss that would have otherwise been covered absent Jones's conduct that resulted in the rescission of her homeowner's insurance policy.

This payment, however, does not leave Jones with a windfall in the amount of her paid-off mortgage. Rather, in addition to requiring payment to the mortgagee, the standard mortgage clause provides the insurer two paths for potential reimbursement. In *Wilson v Home Owners Mut Ins Co*, 148 Mich App 485, 490-491; 384 NW2d 807 (1986), our Court of Appeals correctly explained that the standard mortgage clause "provides that an insurer may make a payment of loss to a mortgagee, and to the extent of that payment, may be subrogated to all the mortgagee's rights of recovery *or* the insurer may pay off the mortgage debt and require an assignment of the mortgage." In other words, the insurer "choose[s] between pursuit of its rights as a subrogee of a mortgagee or to pursue its rights as an assignee of the mortgagee." *Id*. at 491. The policy language at issue in this case presented Meemic with that same choice:

> If **we** pay the mortgagee for any loss and deny payment to **you**:
>
> A. **we** will be *subrogated to the extent of* **our** *payment to all the rights that the mortgagee has under the mortgage on the property*; or
>
> B. at **our** option, **we** may pay to the mortgagee the whole principal on the mortgage and any interest due. *In this event,* **we** may receive a full assignment and transfer of the mortgage and all securities held as collateral for the mortgage debt. [Emphasis added.][2]

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[2] The inclusion of a standard mortgage clause is mandated by MCL 500.2833(1)(j) for fire insurance policies, and "it is to be presumed that the parties contracted with the intention of executing a policy satisfying the statutory requirements, and intended to make the contract to carry

Even if it has a pathway for reimbursement, Meemic has never explained *how* it is legally entitled to recover from Jones the amount of its payment to CitiMortgage. In its complaint, Meemic cited the standard mortgage clause and claimed it "is entitled to be subrogated to the extent of its payments to all rights that the mortgagee has under the mortgage on the property and has a full assignment and transfer of the mortgage and all securities." This allegation, which was not pleaded in the alternative, should give us pause. Under the standard mortgage clause, Meemic could choose to either (1) subrogate itself to the mortgagee's rights under the mortgage on the property or (2) pay the whole principal of the mortgage debt and any interest due and obtain a full assignment and transfer of the mortgage and related securities. The standard mortgage clause does not allow for both options. In its summary-disposition motion that led to this appeal, Meemic set aside its earlier assertion that it had received an assignment and transfer of the mortgage from CitiMortgage, and there is no evidence in the record of any such assignment and transfer. If Meemic had actually received a full assignment and transfer of the mortgage and related securities from CitiMortgage, then it could pursue the mortgagee's rights directly. Meemic's decision not to pursue this path means that its only path to reimbursement is based on its status as a subrogee of CitiMortgage.

The problem remains that Meemic has never set forth the scope of CitiMortgage's rights as the mortgagee and thus never set forth the scope of its rights as a subrogee. In its countermotion for summary disposition, Meemic merely contended that it was contractu-

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out its purpose." *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525 n 3; 502 NW2d 310 (1993) (quotation marks and citation omitted).

ally entitled through subrogation to recover directly from Jones the amount it had paid to CitiMortgage and "[a]s such, Meemic is entitled to judgment as a matter of law." I am unconvinced that this bare assertion, without more, engenders a sufficient legal basis for Meemic to immediately obtain a judgment in the amount it paid to CitiMortgage. "As a subrogee, one stands in the shoes of the subrogor and acquires no greater rights than those possessed by the subrogor." *Yerkovich v AAA*, 461 Mich 732, 737-738; 610 NW2d 542 (2000). What are the legal rights possessed by CitiMortgage as subrogor? Meemic has not provided this information, and it is neither our job nor the trial court's job to speculate. Meemic has not carried its burden as the plaintiff and summary-disposition movant to establish CitiMortgage's rights that, when subrogated, would provide Meemic with a basis for the relief requested.

Generally, "subrogation" is "[t]he substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor." *Black's Law Dictionary* (11th ed). There are two forms of subrogation: conventional and equitable. "Conventional subrogation" is "[s]ubrogation that arises by contract." *Id*., p 1726. "Equitable subrogation" or "legal subrogation" is "[s]ubrogation that arises by operation of law or by implication in equity to prevent fraud or injustice." *Id*. It usually arises, by way of one example, when a "party pays to protect its own rights or property." *Id*. Michigan law has long been in accordance with these understandings. See *French v Grand Beach Co*, 239 Mich 575, 580; 215 NW 13 (1927); 23 Michigan Civil Jurisprudence, Subrogation (2020 rev), § 3, pp 5-6 ("The right to subrogation may arise: (1) by virtue of an agreement between the subrogee and the subrogor, or

by way of contractual assignment; (2) through judicial device, or by operation of law from the relations of various involved parties under equitable principles; and (3) by virtue of statute.") (citations omitted).

Despite repeated references to equity or equitable subrogation in its briefing, Meemic never pleaded a right to equitable relief.[3] Instead, it only pleaded a claim for conventional subrogation arising out of contract. Accordingly, Meemic can claim under the contract only "the rights that the mortgagee has under the mortgage on the property"—that is, the rights CitiMortgage had to give. If Meemic stands in the shoes of CitiMortgage and obtains no greater rights than CitiMortgage would have had, *Yerkovich*, 461 Mich at 738, Meemic's claim of a legal right to repayment needed to be justified with specific reference to CitiMortgage's rights under the mortgage on the property. That never occurred in this case.

Contrary to the majority's assertion, this issue is not merely about the amount of damages; it is at the core of the legal theory upon which Meemic's legal claim for monetary recovery must be based. Even if Meemic is ultimately entitled to some form of monetary recovery (thereby avoiding a windfall to Jones), this Court should not overlook the incomplete showing and flawed legal theory for relief in this matter. Nor should it set the future course of Michigan's caselaw by it.

The weight of caselaw states that when a mortgagor's fraud vitiates a policy, the mortgagor has no right to have the insurer's payment to the mortgagee under a standard mortgage clause applied to reduce the mortgage debt. See, e.g., *Wholesale Sports Warehouse*

[3] If Meemic seeks to invoke equity as a theory for relief, it could return to the trial court and seek leave to amend its complaint to add a claim for equitable subrogation. MCR 2.118(A)(2).

Co v Pekin Ins Co, 587 F Supp 916, 920 (SD Iowa, 1984) (applying Iowa law); *Northwest Farm Bureau Ins Co v Althauser*, 90 Or App 13, 17; 750 P2d 1166 (1988); *American Central Ins Co v Lee*, 273 Ga 880, 882-883; 548 SE2d 338 (2001); 16 Couch, Ins, 3d, § 224:27, pp 44-48 (citing decisions from, among other places, Connecticut, Maryland, New York, and West Virginia). Instead, following the insurer's payment to the mortgagee, the opportunity for the insurer's potential reimbursement generally proceeds only through the former legal position of the mortgagee. The Connecticut Supreme Court explained:

> The effect of this mortgage clause is that from the time the policy becomes void as to the mortgagor the insurance is only in favor of the mortgagee on its interest as such and not an insurance on the property generally, to which the mortgagor, or his successor in interest therein, should be entitled. That the mortgagee should receive the primary benefit, *and the insurers the opportunity for ultimate reimbursement through such security as the mortgage note and mortgage may afford,* accords with the general legal and equitable rights of the parties. *The insurers, through their subrogation, virtually occupy the position of a purchaser from the mortgagee for value. The payment, by them, does not operate to reduce or extinguish the mortgage debt or discharge the mortgage, but to satisfy,* pro tanto*, the mortgagee's claim and assign it to the insurers, leaving it in full force as against the mortgagor and those claiming under him, with no right, on their part, to claim a reduction of the debt by the payment to the mortgagee.* [*Savings Bank of Ansonia v Schancupp*, 108 Conn 588, 596; 144 A 36 (1928) (citations omitted; emphasis added).]

As a subrogee, Meemic stands in CitiMortgage's shoes and proceeds "through such security as the mortgage note and mortgage may afford," akin to a purchaser for value. See *id*. Meemic never established CitiMortgage's rights as the mortgagee that, when

subrogated, provide the basis for the relief requested. Meemic should not have prevailed on summary disposition—at least not yet and not on the basis of an incomplete articulation of its legal right to recovery as a subrogee. I therefore respectfully dissent.

CAVANAGH, J., concurred with WELCH, J.

JAMES TOWNSHIP v RICE

Docket No. 163053. Argued April 6, 2022 (Calendar No. 1). Decided June 22, 2022.

James Township filed a nuisance action in the 70th District Court against Daniel Rice, alleging that Rice had violated the township's blight ordinance as well as the Michigan Residential Code by having junk cars, unpermitted construction, and fences of an improper height on his property. Rice moved to dismiss the portions of the citation related to the improper height of his fence and the unpermitted construction, arguing that, under the Right to Farm Act (RTFA), MCL 286.471 *et seq*., the township was prohibited from enforcing against farms or farm operations local ordinances governing those structures. The township opposed the motion, arguing that the property was not protected by the RTFA because it had not previously been used for farming. Following a hearing on the motion, the district court, Elian E. H. Fichtner, J., found that Rice's use of the property constituted a "farm" or "farm operation" for purposes of the RTFA and that the RTFA was an affirmative defense to those portions of the civil citation. The district court dismissed the specified portions of the citation and denied the parties' individual requests for costs and fees. Rice moved for reconsideration, arguing that, under MCL 286.473b, he was entitled to costs and expenses, as well as reasonable and actual attorney fees; the district court denied the motion. The district court later dismissed the remaining portions of the citation and dismissed the action with prejudice. Rice appealed in the Saginaw Circuit Court the district court order denying costs and fees; the circuit court, Andre R. Borrello, J., affirmed the district court's order. The Court of Appeals thereafter denied Rice's application for leave to appeal the circuit court's order. In lieu of granting leave to appeal, the Michigan Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 505 Mich 1038 (2020). On remand, in an unpublished per curiam opinion issued on May 27, 2021 (Docket No. 349558), the Court of Appeals, JANSEN, P.J., and RONAYNE KRAUSE and GADOLA, JJ., affirmed the circuit court's legal conclusions, holding that an award of costs, expenses, and fees was not mandatory under MCL 286.473b, but the Court of Appeals re-

manded the case to the district court for articulation of the district court's reasons for the discretionary denial. Rice sought leave to appeal, and the Supreme Court granted Rice's application. 508 Mich 951 (2021).

In an opinion by Justice ZAHRA, joined by Chief Justice MCCORMACK and Justices VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, the Supreme Court *held*:

Under MCL 286.473b of the RTFA, a prevailing farm or farm operation is entitled to its actual costs and expenses reasonably incurred, together with reasonable and actual attorney fees, when the farm or farm operation requests those costs, expenses, and fees. Once the prevailing farm or farm operation makes the request for costs, expenses, and attorney fees, the trial court does not have discretion whether to award the requested costs, expenses, and attorney fees but, rather, has discretion only as to the amount to be awarded. Rice requested his costs, expenses, and fees, and he was entitled to them as the prevailing farm or farm operation in the nuisance action. The judgment of the Court of Appeals was reversed, and the case was remanded to the district court for it to determine the amount of actual costs and fees that were reasonably incurred by Rice in defending the RTFA action as well as the amount of his reasonable and actual attorney fees.

1. The RTFA was enacted to protect farmers from nuisance suits. Relevant here, MCL 286.473b provides that in any nuisance action brought in which a farm or farm operation prevails, the defendant farm or farm operation may recover from the plaintiff the actual amount of costs and expenses determined by the court to have been reasonably incurred by the farm or farm operation in connection with the defense of the action, together with reasonable and actual attorney fees. To establish an affirmative defense to a nuisance action, a defendant must prove that (1) the challenged condition or activity constitutes a "farm" or "farm operation" and (2) the farm or farm operation conforms to generally accepted agricultural and management practices. To protect farms and farm operations, MCL 286.474(6) provides that a farmer's activities falling within the purview of the RTFA cannot be barred by local ordinances; in that way, the provision preempts local ordinances.

2. Michigan follows the general "American rule" with regard to the award of attorney fees and costs. Under that rule, attorney fees and costs are generally not recoverable unless a statute, court rule, or common-law exception so allows. The purpose of MCL 286.473b is to modify the general American rule. Under the RTFA, a defendant farm or farm operation may recover the actual

amount of costs and expenses determined by the court to have been reasonably incurred in connection with its defense of the action, together with the reasonable and actual attorney fees; thus, a prevailing farm or farm operation is entitled to the actual amount of costs and expenses reasonably incurred, together with reasonable and actual attorney fees, when so demanded. The word "may" is generally permissive, and as used in MCL 286.473b, it grants discretion to the prevailing farm or farm operation, not to the trial court; said differently, the statute states that the prevailing farm or farm operation "may recover" those expenses, costs, and attorney fees, not that the trial court may award them. As discussed in *Bocquet v Herring*, 972 SW2d 19 (Tex, 1998), and *Aaron Rents, Inc v Travis Central Appraisal Dist*, 212 SW3d 665 (Tex App, 2006), statutes providing that a court "may award attorney fees" afford a trial court discretion in deciding whether to award attorney fees. In contrast, when a statute provides that a party "may recover" such fees, the award is not discretionary. Accordingly, MCL 286.473b bestows the entitlement to recover costs, expenses, and attorney fees to the prevailing farm or farm operation. Thus, *when requested* by a prevailing farm or farm operation, an award of costs, expenses, and fees under MCL 286.473b is not discretionary. While the trial court does not have discretion to decline to award the actual costs and fees reasonably incurred, it does have discretion to determine the amount of costs and fees that were reasonably incurred by the prevailing farm or farm operation, as well as the amount of the prevailing farm or farm operation's reasonable and actual attorney fees.

3. In this case, Rice was the prevailing farm or farm operation in the nuisance action brought by the township, and under MCL 286.473b, he was entitled to recover the costs and expenses he reasonably incurred, as well as his reasonable and actual attorney fees. The Court of Appeals judgment was reversed because it erred when it concluded that the district court had discretion under the statute to deny Rice's request for costs, expenses, and attorney fees. Once Rice made that request, the district court possessed discretion only as to the amount of costs, expenses, and fees to be awarded. The case was remanded to the district court for it to determine that amount.

Court of Appeals judgment reversed; case remanded to the district court for further proceedings.

Justice WELCH, dissenting, disagreed with the majority's interpretation of MCL 286.473b as granting the prevailing farm or farm operation discretion to request recovery of the specified

costs, expenses, and attorney fees and as only allowing a trial court discretion to determine the amount of the award. The majority's interpretation of the statute was inconsistent with the Supreme Court's and the Legislature's longstanding approach to the recovery of attorney fees. Under MCL 600.2405, Michigan's general costs provision, the items listed may be taxed and awarded as costs and attorney fees can be taxed only when authorized by statute or court rule. Thus, an award of attorney fees to the prevailing litigants is the exception rather than the rule in Michigan. Moreover, the Legislature uses express terms when it has created a right to receive attorney fees, which are not present in MCL 286.473b. Further, the majority's interpretation of the statute eroded the power of trial courts to weigh the facts before them in determining whether a party is even entitled to have a fee award considered. Justice WELCH would have held that the "may recover" language in the statute (1) authorizes a prevailing farm or farm operation to request the award of attorney fees and (2) grants the trial court discretion to decide whether an award is warranted under the facts and, if so, the amount to be awarded.

STATUTES — RIGHT TO FARM ACT — PREVAILING FARM OR FARM OPERATION — COSTS, EXPENSES, AND ATTORNEY FEES.

MCL 286.473b of the Right to Farm Act provides that in any nuisance action brought in which a farm or farm operation prevails, the defendant farm or farm operation may recover from the plaintiff the actual amount of costs and expenses determined by the court to have been reasonably incurred by the farm or farm operation in connection with the defense of the action, together with reasonable and actual attorney fees; a prevailing farm or farm operation is entitled to the actual amount of costs and expenses reasonably incurred in connection with the defense of the action, together with reasonable and actual attorney fees, when so demanded; the trial court does not have discretion whether to award costs, expenses, and attorney fees but, rather, has discretion only as to the amount to be awarded (MCL 286.471 *et seq*.).

Brandt, Gilbert, Thompson & Campbell (by *Gary R. Campbell*) for plaintiff.

Outside Legal Counsel PLC (by *Philip L. Ellison*) for defendant.

ZAHRA, J. At issue is whether defendant, Daniel Rice, a prevailing farm or farm operation under the Right to Farm Act (RTFA),[1] is entitled to costs, expenses, and attorney fees under MCL 286.473b of the act, which provides, in pertinent part, that in a nuisance action, a prevailing farm or farm operation "may recover from the plaintiff the actual amount of costs and expenses determined by the court to have been reasonably incurred by the farm or farm operation in connection with the defense of the action, together with reasonable and actual attorney fees." The Court of Appeals affirmed the circuit court's legal conclusion that the term "may," as used in MCL 286.473b, afforded the district court the complete discretion to award defendant costs, expenses, and attorney fees, but the Court remanded the case to the district court to articulate the reasons for its decision not to award them.[2]

We disagree with the Court of Appeals and, instead, hold that MCL 286.473b of the RTFA entitles a prevailing farm or farm operation to the actual amount of costs and expenses reasonably incurred in connection with the defense of the action, together with reasonable and actual attorney fees, when so demanded. While the term "may" is ordinarily considered to be permissive, meaning that its use in MCL 286.473b gives discretion rather than imposing a mandatory condition, the statute gives that discretion to the prevailing farm or farm operation, not to the court. MCL 286.473b does not say that the court "may award" costs, expenses, and fees should the farm or farm operation prevail but that the prevailing farm or farm operation "may recover" them. Because defendant, as

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[1] MCL 286.471 *et seq*.

[2] *James Twp v Rice*, unpublished per curiam opinion of the Court of Appeals, issued May 27, 2021 (Docket No. 349558), pp 1-3.

the prevailing farm or farm operation, exercised his discretion by seeking to recover costs, expenses, and fees, the district court is required to award the costs, expenses, and fees provided for in MCL 286.473b. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the district court for it to determine the amount of actual costs and fees that were reasonably incurred by defendant in defending the RTFA action, as well as the amount of defendant's reasonable and actual attorney fees.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff, James Township, filed a municipal civil-infraction citation against defendant on June 12, 2018, alleging violations of the township's blight ordinance and the Michigan Residential Code because of junk, junk cars, unpermitted construction on an adjacent building, and improper fence height on defendant's property. Defendant moved to dismiss those portions of the citation addressing his fencing and unpermitted construction on the ground that the RTFA prohibited enforcement of local ordinances governing such structures. In its responsive brief, plaintiff contended that the property was not protected by the RTFA because it had not previously been used for farming.

After a hearing, the district court issued an opinion and order on September 26, 2018, finding that defendant's use of the property constituted a "farm" or "farm operation" under the RTFA and that the RTFA was therefore an affirmative defense to those portions of the citation challenging defendant's unpermitted construction and fence-height violations. The district court ordered that those components of the citation be dismissed. The court then denied both parties' requests for costs and fees, stating that "the court acknowledges

that both parties requested sanctions including costs and fees to be imposed in this matter. The court is denying sanctions as to both parties." Defendant moved for reconsideration of the costs-and-fees portion of the district court's order, arguing that the plain language of MCL 286.473b requires the award of costs and expenses "reasonably incurred by the farm or farm operation in connection with the defense of the action, together with reasonable and actual attorney fees." The district court denied defendant's motion for reconsideration. The district court subsequently conducted a hearing on the remaining portions of the citation, after which it dismissed the matter with prejudice and closed the case.

Defendant appealed in the circuit court the district court's order denying costs and fees, and the circuit court affirmed the district court's decision. Defendant then appealed that decision in the Court of Appeals, and the Court of Appeals denied leave for lack of merit in the grounds presented. Defendant filed an application in this Court, and pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remanded the case to the Court of Appeals for consideration as on leave granted.[3] On remand, the Court of Appeals affirmed the circuit court's legal conclusions in an unpublished per curiam opinion, agreeing with the circuit court that "the term 'may,' as used in MCL 286.473b, afforded the district court discretion whether to award defendant attorney fees and costs."[4] The panel nevertheless remanded the case to the district court for it to articulate the reasons for its discretionary decision to decline to award costs and fees.

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[3] *James Twp v Rice*, 505 Mich 1038 (2020).

[4] *James Twp*, unpub op at 2.

Defendant filed an application for leave to appeal in this Court. We granted the application to consider whether the statutory language in MCL 286.473b "providing that a 'farm or farm operation may recover from the plaintiff the actual amount of costs and expenses . . .' entitles a successful farm or farm operation under the statute to recover costs and expenses, or whether the award of costs and expenses is subject to the discretion of the trial court."[5]

II. STANDARD OF REVIEW AND APPLICABLE RULES OF STATUTORY INTERPRETATION

This Court reviews de novo questions of statutory interpretation.[6] "The role of this Court in interpreting statutory language is to ascertain the legislative intent that may reasonably be inferred from the words in a statute."[7] Our analysis must focus on "the statute's express language, which offers the most reliable evidence of the Legislature's intent. When the statutory language is clear and unambiguous, judicial construction is limited to enforcement of the statute as written."[8]

III. ANALYSIS

"The RTFA was enacted to protect farmers from nuisance lawsuits."[9] The RTFA provides an affirmative defense to a nuisance action if a defendant can prove

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[5] *James Twp v Rice*, 508 Mich 951 (2021).

[6] *Sanford v Michigan*, 506 Mich 10, 14-15; 954 NW2d 82 (2020) (quotation marks omitted).

[7] *Id*. (quotation marks and citation omitted).

[8] *Id*. at 15 (quotation marks and citation omitted).

[9] *Williamstown Twp v Hudson*, 311 Mich App 276, 290; 874 NW2d 419 (2015) (quotation marks and citation omitted).

two conditions: (1) the challenged condition or activity constitutes a "farm" or "farm operation" and (2) the farm or farm operation conforms to the generally accepted agricultural and management practices.[10] In addition, the RTFA was amended, effective March 10, 2000, to include MCL 286.474(6), which preempts local ordinances such that a farmer's activities falling within the purview of the act cannot be barred by ordinance.[11]

Under the general "American rule," attorney fees and costs are ordinarily not recoverable unless a statute, court rule, or common-law exception so allows.[12] With MCL 286.473b, the RTFA provides such a statute with respect to the award of costs, expenses, and attorney fees. The statute states:

> In any nuisance action brought in which a farm or farm operation is alleged to be a nuisance, if the defendant farm or farm operation prevails, the farm or farm operation may recover from the plaintiff the actual amount of costs and expenses determined by the court to have been reasonably incurred by the farm or farm operation in connection with the defense of the action, together with reasonable and actual attorney fees.[13]

Because defendant invoked the protections of the RTFA and successfully defended the nuisance action that the township brought against him, he is considered a prevailing farm or farm operation for purposes of MCL 286.473b. The question presented in this case is whether the phrase "may recover," as used in this statute, entitles defendant to recover the actual

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[10] *Lima Twp v Bateson*, 302 Mich App 483, 496; 838 NW2d 898 (2013).

[11] *Id*. at 493; 1999 PA 261.

[12] *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004).

[13] MCL 286.473b.

amount of costs and expenses reasonably incurred in connection with the defense of the action, together with reasonable and actual attorney fees, or whether the award of those costs, expenses, and fees is entirely subject to the discretion of the trial court.

We agree with defendant that, under MCL 286.473b, a prevailing farm or farm operation is entitled to the actual amount of costs and expenses reasonably incurred, together with reasonable and actual attorney fees, when so demanded. In concluding to the contrary, the Court of Appeals primarily focused on the discretionary nature of the term "may." We acknowledge that the term "may" is ordinarily considered to be permissive.[14] The use of that term in MCL 286.473b therefore gives discretion, rather than imposing a mandatory condition. But this does not end the inquiry because it is necessary to ascertain to whom the statute gives that discretion. And MCL 286.473b gives that discretion to the prevailing farm or farm operation, not to the trial court. That is, MCL 286.473b does not say that the court "may award" costs, expenses, and fees but that the prevailing farm or farm operation "may recover" them.[15] There are only two contingencies in the

[14] See *In re Bail Bond Forfeiture*, 496 Mich 320, 328; 852 NW2d 747 (2014) ("While the term 'may' is permissive, not mandatory, the term 'shall,' as discussed, is a 'mandatory term, not a permissive one[.]' ") (citation omitted); *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008) ("In general, our courts have said that the term 'may' is 'permissive,' as opposed to the term 'shall,' which is considered 'mandatory[.]' ") (citation omitted).

[15] Contrast MCL 286.473b's use of the word "may" in relation to the recovery of costs, expenses, and fees with the language of MCL 15.240(6) of the Freedom of Information Act, MCL 15.231 *et seq*., which provides, "If the person or public body prevails in part, the *court may, in its discretion, award* all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements." (Emphasis added.) That statute also uses the word "may," but it nonetheless makes clear that the discretion

statute: (1) the filing of "any nuisance action . . . in which a farm or farm operation is alleged to be a nuisance" and (2) "the defendant farm or farm operation prevails[.]"[16] The statute does not impose an additional contingency of whether the court chooses to grant the requested relief. Instead, the phrase "may recover" in MCL 286.473b entitles the prevailing farm or farm operation to recover what the statute permits: the actual amount of costs and expenses reasonably incurred in connection with the defense of the action, together with reasonable and actual attorney fees.

While there are no binding Michigan cases directly on point,[17] we find persuasive the reasoning of a pair of cases from Texas. In *Bocquet v Herring*,[18] the Supreme Court of Texas interpreted a state statute providing

to award fees and costs rests entirely with the court. If the Legislature intended for the court to maintain the discretion to decline to award fees for any reason in the RTFA, it could have used language similar to MCL 15.240(6) and stated that, if a farm or farm operation prevails under the act, "*the court may award* the actual amount of costs and expenses determined by the court to have been reasonably incurred by the farm or farm operation in connection with the defense of the action, together with reasonable and actual attorney fees."

[16] MCL 286.473b.

[17] Our decision in *Lane v Ruhl*, 103 Mich 38; 61 NW 347 (1894), is consistent with today's decision. There, the prevailing plaintiff sought an award of treble damages under How Stat 8306, which provided that certain prevailing plaintiffs in trespass actions "may recover treble damages . . . ." *Id*. at 39. The trial court denied treble damages because the jury "found that defendant held possession because he in good faith believed that he had a lawful right so to do." *Id*. On appeal, we held that the plaintiff was entitled to treble damages. While we did not perform a detailed analysis of the statute's text, we rejected the defendant's contention that the jury finding should be dispositive because "to hold that the language of this section applies only to exceptional cases arising under the act would be to import something into the statute which is at variance with its evident meaning." *Id*. at 43.

[18] *Bocquet v Herring*, 972 SW2d 19, 20 (Tex, 1998).

that "the court may award costs and reasonable and necessary attorney's fees as are equitable and just."[19] It held that the statute "does not require an award of attorney fees to the prevailing party" because "it provides that the court 'may' award attorney fees," meaning "[t]he statute . . . affords the trial court a measure of discretion in deciding whether to award attorney fees or not."[20] The Court expressly contrasted this with "[s]tatutes providing that a party 'may recover', 'shall be awarded', or 'is entitled to' attorney fees," in which case, the award is "not discretionary."[21] In *Aaron Rents, Inc v Travis Central Appraisal Dist*,[22] the Court of Appeals of Texas further fleshed out *Bocquet*'s reasoning as follows:

> [T]he determination of whether a statute requires the imposition of attorney's fees or vests the trial court with the discretion to decide does not depend exclusively on whether the statute uses the word "may" or "shall." *Cf. Bocquet*, 972 S.W.2d at 20. Under the current state of the law, the determination primarily depends on whether the legislature has bestowed a power to trial courts or an entitlement to litigants.
>
> In *Bocquet*, the supreme court distinguished between statutes that vest a trial court with the discretion to award attorney's fees and statutes that require the court to award attorney's fees. See *id*.; *compare* Tex. Fam. Code Ann. § 106.002 (West Supp. 2005) (court may render judgment for reasonable attorney's fees), *with* Tex. Civ. Prac. & Rem. Code Ann. § 38.001 (West 1997) (person may recover attorney's fees). Statutes providing that a "court may award" attorney's fees grant courts a measure of

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[19] Tex Civ Prac & Rem Code Ann 37.009.

[20] *Bocquet*, 972 SW2d at 20 (citations omitted).

[21] *Id*. (citations omitted).

[22] *Aaron Rents, Inc v Travis Central Appraisal Dist*, 212 SW3d 665 (Tex App, 2006).

> discretion in awarding attorney's fees, but statutes providing that a "party may recover," "party shall be awarded," or "party is entitled to" attorney's fees mandate an award of fees that are reasonable and necessary. See *Bocquet*, 972 S.W.2d at 20. The distinction drawn by the supreme court seems to hinge upon whether the statute in question speaks to what the *litigant may receive* or what the *court may award*.[23]

We find the quoted analysis persuasive and equally applicable to this case; MCL 286.473b bestows the entitlement to recover costs, expenses, and attorney fees to the prevailing farm or farm operation.[24] In fact, the language of MCL 286.473b is clearer in granting the prevailing litigant the right to recover costs, expenses, and fees than was the statute at issue in *Aaron Rents*.[25] In short, upon request by a prevailing farm or farm operation, an award of costs, expenses, and fees under MCL 286.473b is mandatory, not discretionary.[26]

Of course, the trial court is not stripped of all discretion under this reading of the statute. The trial court maintains the discretion to determine the

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[23] *Id*. at 671-672 (some citations omitted).

[24] To be clear, we do not suggest that the phrase "may recover" *requires* the prevailing farm or farm operation to recover costs, expenses, and fees; it simply gives them the discretion to do so.

[25] The statute at issue in *Aaron Rents*, Tex Tax Code Ann 42.29(a), provided that a prevailing party "may be awarded reasonable attorney's fees," language that the court struggled to analogize to the types of statutes recognized in *Bocquet* ("court may award" or "party may recover"). At issue in this case is a clear "party may recover" statute.

[26] The dissent calls our holding "hypertextualist" and contrary to "this Court's longstanding approach to the recovery of attorney fees," citing the American rule. But the entire purpose of MCL 286.473b is to modify the general American rule. A reasonable, not "hypertextualist," reading of the statute makes clear that prevailing litigants are entitled to seek recovery of the costs, expenses, and fees set forth therein, an exception to the general rule.

amount of costs and fees that were reasonably incurred by the prevailing farm or farm operation, as well as the amount of the prevailing farm or farm operation's reasonable and actual attorney fees. But the trial court does not possess the discretion to decline to award those actual costs and fees reasonably incurred, nor to decline the amount of reasonable and actual attorney fees incurred, when requested by the prevailing farm or farm operation.[27]

IV. CONCLUSION

We hold that, under MCL 286.473b of the RTFA, a prevailing farm or farm operation is entitled to its actual costs and fees reasonably incurred, together with reasonable and actual attorney fees, when so requested. While the Court of Appeals remanded this case to the district court on this issue, it did so under the mistaken understanding that the district court maintains complete discretion to deny defendant's request for costs, expenses, and fees. Instead, the district court possesses the discretion only to determine the amount of actual costs and expenses that were reasonably incurred by defendant, together with the amount of defendant's reasonable and actual attorney fees. Accordingly, we reverse the judgment of the Court of

[27] Contrary to the dissent's accusation, this Court's holding does not erode the powers of the trial court. It is the Legislature, via the language of MCL 286.473b, that grants the prevailing farm or farm operation the right to seek recovery of costs, expenses, and fees, not this Court. And in making clear that the trial court maintains the discretion to determine the amount of costs and expenses reasonably incurred, as well as the amount of reasonable and actual attorney fees, our holding provides the trial court *greater* discretion than does the dissent's heavily referenced American rule, under which the trial court would possess no discretion whatsoever to award the pertinent costs and fees. With this in mind, we are unsure what "power" our opinion erodes.

Appeals and remand this case to the district court for it to determine the amount of actual costs and fees that were reasonably incurred by defendant in defending the RTFA action, as well the amount of defendant's reasonable and actual attorney fees.[28]

MCCORMACK, C.J., and VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, J., concurred with ZAHRA, J.

WELCH, J. (*dissenting*). I respectfully disagree with the majority's interpretation of the cost, expense, and attorney-fee recovery provision of the Right to Farm Act (RTFA), MCL 286.471 *et seq*. The statute provides that "if the defendant farm or farm operation prevails, the farm or farm operation *may recover* from the plaintiff the actual amount of costs and expenses determined by the court to have been reasonably incurred by the farm or farm operation in connection with the defense of the action, together with reasonable and actual attorney fees." MCL 286.473b (emphasis added). The majority concludes that the phrase "may recover" in the statute means that a prevailing defendant has the unilateral right to decide whether it will seek to recover actual costs and expenses, as well as reasonably incurred attorney fees. Under this reading, the trial court has no discretion to determine *whether* a prevailing defendant is entitled to costs and

[28] Plaintiff argues that defendant is entitled to no costs, expenses, or attorney fees, in part because he refused to provide any evidence of a farm or farm operation to the township until the underlying litigation was initiated. But these allegations do not speak to defendant's right under MCL 286.473b to seek recovery of costs, expenses, and attorney fees as the prevailing party. While it might speak to the amount of actual costs and expenses *reasonably incurred* by defendant in connection with his defense of the RTFA action, or potentially the amount of reasonable and actual attorney fees incurred, we take no stance on this issue. This is an issue for the trial court to decide on remand.

attorney fees and may only calculate the *amount* such defendant is entitled to recover if the defendant chooses to seek recovery under the statute. Thus, the trial court is obligated to award not only the actual costs and expenses, but also reasonable and actual attorney fees, even if that amount is zero. This hypertextualist interpretation of statutory language is inconsistent with the Legislature's and this Court's longstanding approach to the recovery of attorney fees.

As the majority correctly notes, Michigan follows the "American rule," under which attorney fees are only recoverable when expressly authorized by a statute or court rule. MCL 600.2405(6); see also, e.g., *Haliw v Sterling Hts*, 471 Mich 700, 706-707; 691 NW2d 753 (2005). This is not a blanket guarantee that a party seeking attorney fees will receive them. Michigan's general costs provision, MCL 600.2405, states that the items it lists "*may* be taxed and awarded as costs" and that attorney fees can be taxed only when "authorized by statute or by court rule." MCL 600.2405(6) (emphasis added). See also *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994) ("Under this rule, attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides to the contrary. See MCL 600.2405(6); MSA 27A.2405(6).").[1]

In Michigan, awarding attorney fees to prevailing litigants is the exception rather than the rule. When

[1] In the context of the costs provision, "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." MCR 2.625(A)(1). Thus, to the extent MCL 286.473b authorizes the taxation of costs and expenses to a prevailing party, the normal procedural and substantive rules applicable to filing a bill of costs and seeking reimbursement would apply. See, e.g., MCR 2.625(A), (F), (G), (K); MCL 600.2405.

the Legislature has created a right to receive attorney fees, it has done so in express terms. See MCL 15.271(4) ("[T]he person shall recover court costs and actual attorney fees for the action."); MCL 28.425(3) (providing that an individual who obtains mandamus relief after having been denied a concealed weapon application kit "shall be awarded his or her actual and reasonable costs and attorney fees"); MCL 500.3148(1) ("The attorney's fee is a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment."). The "may recover" language appearing in the RTFA has not previously been interpreted by this Court, but our long understanding of "shall" as mandatory and "may" as permissive should compel against interpreting the RTFA's "may recover" language as a mandatory right to recover attorney fees that a plaintiff "may" opt to receive.

With this context in mind, it is my opinion that the costs provision of the RTFA must be read as merely *authorizing* a prevailing farm or farm operation to request the award of attorney fees and that the trial court—not the defendant farm—has discretion to determine whether an award is warranted under the facts and, if so, in what amount. Without that authorization, the American rule would apply and, generally, there would be no common-law or statutory basis for a prevailing farm or farm operation to request attorney fees, much less receive an award. The majority's view that this provision instead vests in a prevailing farm or farm operation the sole discretion to seek and receive attorney fees in some amount (even if zero) is a departure from our longstanding practice of granting

our courts discretion to both determine whether an award of attorney fees is appropriate and, if so, how much to award.[2]

As the majority itself acknowledges, its reading of MCL 286.473b creates a bifurcated process. The prevailing farm or farm operation must first decide that it wants to recover attorney fees, and then the trial court must step in to determine the actual and reasonable amounts to which the fee-seeking party is entitled. But it seems a safe bet that these prevailing parties will want to recover their fees. As previously noted, we have well-established procedures in place for the taxation of costs by a prevailing party. Even if the RTFA arguably broadens the scope of what is taxable by using the word "expenses," the majority's holding creates something new and unnecessary when it comes to attorney fees.

The majority's determination that the discretion as to whether fees and costs are awarded lies with the party rather than the court creates what is, at best, a distinction without a difference and, at worst, an erosion of the powers of trial courts to weigh the facts before them in determining whether a party is even entitled to have a fee award considered. Because the majority has departed from the settled rules by which attorney fees are made available, I dissent.

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[2] The majority's contention that their interpretation provides the trial court greater discretion is perplexing. I agree that the RTFA provides "*greater* discretion than . . . [the] American rule" in that the potential availability of attorney fees is an exception to the general rule that attorney fees cannot be awarded unless authorized. Our disagreement arises from the majority's conclusion that the permissive language of the RTFA grants a prevailing defendant farm a right to reasonable attorney fees on demand, shifting the discretion from the trial court to the party and restricting the court's discretion as to the amount of the award.

PEOPLE v PEELER
PEOPLE v BAIRD
PEOPLE v LYON

Docket Nos. 163667, 163672, and 164191. Argued on application for leave to appeal May 4, 2022. Decided June 28, 2022.

Nancy Peeler (Docket No. 163667), Richard L. Baird (Docket No. 163672), and Nicolas Lyon (Docket No. 164191) were charged with various offenses in the Genesee Circuit Court for actions they took as state employees during the Flint water crisis. The cases did not proceed by the prosecutor issuing criminal complaints and then holding preliminary examinations in open court at which defendants could have heard and challenged the evidence against them. Instead, at the request of the Attorney General's office, the prosecutor proceeded under MCL 767.3 and MCL 767.4, which authorize the use of a "one-man grand jury." Judge David Newblatt served as the one-man grand jury, considered the evidence behind closed doors, and then issued indictments against defendants; defendants' cases were assigned to a Genesee Circuit Court judge. Peeler and Baird moved to remand their cases for a preliminary examination, but the court, Elizabeth A. Kelly, J., denied the motion, holding that indicted persons have no right to a preliminary examination. Peeler and Baird filed interlocutory applications for leave to appeal in the Court of Appeals, challenging the Genesee Circuit Court's denial of their motions for a preliminary examination; the Court of Appeals denied leave. Lyon moved to dismiss the charges against him, arguing that he had a statutory right to a preliminary examination, that MCL 767.3 and MCL 767.4 did not confer the one-man grand jury with charging authority, and that those statutes violated the separation-of-powers doctrine and the right to due process; the Genesee Circuit Court denied the motion. Lyon filed in the Court of Appeals an interlocutory application for leave to appeal that decision. Peeler and Baird sought leave to appeal the Court of Appeals' denial of their applications in the Michigan Supreme Court, and Lyon sought leave to appeal the Genesee Circuit Court's decision in the Michigan Supreme Court prior to a decision by the Court of Appeals. The Supreme Court ordered and heard oral argument on whether to grant the applications for

leave to appeal or take other action. *People v Peeler*, 509 Mich 872 (2022); *People v Baird*, 509 Mich 915 (2022); *People v Lyon*, 509 Mich 882 (2022).

In a unanimous opinion by Chief Justice MCCORMACK, the Supreme Court, in lieu of granting leave to appeal, *held*:

If a criminal process begins with a one-man grand jury under MCL 767.3 and MCL 767.4, the accused is entitled to a preliminary examination before being brought to trial. *People v Green*, 322 Mich App 676 (2018), was overruled to the extent it held that the one-person grand-jury procedure serves the same function as a preliminary examination. The Genesee Circuit Court erred by denying Peeler's and Baird's motions to remand for a preliminary examination. Further, while MCL 767.3 and MCL 767.4 authorize the use of a one-man grand jury to investigate, subpoena witnesses, and issue arrest warrants, those statutes do not authorize that one-man grand jury to issue an indictment initiating a criminal prosecution. The Genesee Circuit Court therefore also erred by denying Lyon's motion to dismiss.

1. The one-man grand-jury statutes were enacted because (1) law enforcement agencies are sometimes unable effectively and lawfully to enforce the laws, particularly with regard to corruption by government officials and (2) the common-law 23-man grand jury is cumbersome and ineffective in the investigation of those crimes. MCL 767.3 and MCL 767.4 authorize a judge to investigate, subpoena witnesses, and issue arrest warrants. Specifically, MCL 767.3 provides that whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record has probable cause to suspect that any crime, offense, or misdemeanor has been committed within their jurisdiction and that any persons may be able to give any material evidence respecting such suspected crime, offense, or misdemeanor, the judge may order that an inquiry be made into the matter and conduct the inquiry. In turn, MCL 767.4 provides that if upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, the judge may cause the apprehension of that person by proper process and, upon the return of the process served or executed, the judge having jurisdiction shall proceed with the case, matter, or proceeding in like manner as upon formal complaint. MCL 767.4 further provides, in relevant part, that the judge conducting the inquiry under MCL 767.3 is disqualified from acting as

the examining magistrate in connection with the hearing on the complaint or indictment and from presiding at any trial arising therefrom.

2. MCL 767.4 provides a right to a preliminary examination. MCL 767.4 refers to a "hearing on the complaint or indictment" and disqualifies the judge who conducted the inquiry from being the "examining magistrate" at that hearing. It is unclear what "hearing" that language could be referring to other than a preliminary examination. Moreover, "examining magistrate" is a term of art used in other statutes; it refers to a judge who conducts a preliminary examination. The statute further provides that the judge should treat a one-man-grand-jury-charged case the same as a case in which a formal complaint has been filed. Thus, a judge should treat a case brought using a one-man grand jury the same as a case in which a formal complaint is filed: an arrest warrant is issued after the formal complaint is filed, the accused is apprehended, and the court holds a preliminary examination before the information may issue. This conclusion is also supported by historical practice; preliminary examinations have been routinely conducted after a one-person grand jury returned an indictment. The preliminary examination is not redundant in this situation, even though the statute requires the judge to find probable cause to believe the defendant committed the crime, because the probable cause necessary for a bindover is greater than that required for an arrest. In these cases, Peeler and Baird were entitled to a preliminary examination under MCL 767.4. Accordingly, the Genesee Circuit Court erred by denying Peeler's and Baird's motions to remand for a preliminary examination.

3. While the citizens grand-jury statutes, MCL 767.24(1) and MCL 767.23, specifically authorize grand juries to issue indictments, MCL 767.4, in its current form, does not. In 1949, the Legislature authorized one-man grand juries to issue indictments, but it later repealed that provision; the current version of MCL 767.4 cannot be interpreted to authorize what the Legislature has explicitly rejected. Further, MCL 767.4 clearly authorizes a judge to issue an arrest warrant, and it did not *explicitly* grant that authorization while at the same time *implicitly* authorizing a judge to issue an indictment. As further evidence that a one-man grand jury cannot initiate charges by issuing indictments, the citizens grand-jury statutes require a jury oath—a hallmark of the jury process—while the one-man grand-jury statutes do not have that requirement. For those reasons, MCL 767.3 and MCL 767.4 authorize a judge to investigate, subpoena

witnesses, and issue arrest warrants, but they do not authorize a judge to issue an indictment initiating a criminal prosecution. Judge Newblatt lacked authority under MCL 767.3 and MCL 767.4 to issue indictments. Accordingly, the Genesee Circuit Court erred by denying Lyon's motion to dismiss, and there was no need to address Lyon's constitutional arguments. Although Peeler and Baird joined in Lyon's motion to dismiss in the Genesee Circuit Court, the only relief they requested in the Michigan Supreme Court was the reversal of the circuit court's order denying their motions to remand for a preliminary examination.

Genesee Circuit Court orders denying Peeler's and Baird's motions to remand for a preliminary examination and denying Lyon's motion to dismiss reversed; cases remanded to the Genesee Circuit Court for further proceedings.

Justice BERNSTEIN, concurring, agreed fully with the Court's opinion but wrote separately to address the significant procedural interests implicated in these cases. The Attorney General's office invoked obscure statutes—MCL 767.3 and MCL 767.4—to deprive defendants of their statutory right to a preliminary examination. A preliminary examination is crucial for criminal defendants in our adversarial system in that it functions, in part, as a screening device to ensure there is a basis for a defendant to face a criminal charge. Allowing the prosecution to opt out of a preliminary examination would run afoul of the basic notions of fairness underlying our adversarial system. The Court remained cognizant of the effect these decisions could have on Flint residents given the unconscionable injustice they suffered as a result of their government's betrayal. Given the magnitude of the harm suffered by Flint's residents, it was paramount to adhere to proper procedure to guarantee to the general public that Michigan's courts could be trusted to produce fair and impartial rulings for all defendants regardless of the severity of the charged crime. The prosecution cannot cut corners—here, by not allowing defendants a preliminary examination as statutorily guaranteed—in order to prosecute defendants more efficiently. The criminal prosecutions provide historical context for this consequential moment in history, and future generations will look to the record as a critical and impartial answer in determining what happened in Flint.

Justice CLEMENT did not participate due to her prior involvement as chief legal counsel for Governor Rick Snyder.

1. STATUTES — ONE-MAN GRAND JURY — AUTHORITY OF JUDGES TO INITIATE CRIMINAL INDICTMENTS.

The statutes authorizing the use of a "one-man grand jury" permit a judge to investigate, subpoena witnesses, and issue arrest warrants, but they do not authorize the judge to issue an indictment initiating a criminal prosecution (MCL 767.3; MCL 767.4).

2. STATUTES — ONE-MAN GRAND JURY — INITIATION OF CRIMINAL PROCESS — ENTITLEMENT TO PRELIMINARY EXAMINATION.

If a criminal process begins with a one-man grand jury, the accused is entitled to a preliminary examination before being brought to trial (MCL 767.3; MCL 767.4).

Fadwa A. Hammoud, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Gallant Fish*, *Daniel Ping*, *Christopher Kessel*, and *Molly Kettler*, Assistant Attorneys General, for the people.

Gurewitz & Raben, PLC (by *Harold Gurewitz*) for Nancy Peeler.

Levine & Levine (by *Randall S. Levine* and *Anastase Markou*) for Richard L. Baird.

Willey & Chamberlain LLP (by *Charles E. Chamberlain, Jr.*, and *Britt M. Cobb*), *Bursch Law PLLC* (by *John J. Bursch*), and *Varnum LLP* (by *Ronald G. DeWaard*, *Brion B. Doyle*, and *Regan A. Gibson*) for Nicolas Lyon.

Amici Curiae:

Doug Lloyd and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

Cramer, Minock & Sweeney PLC (by *John Minock*) and *Matthew Monahan* for the Criminal Defense Attorneys of Michigan.

Dickinson Wright PLLC (by *J. Benjamin Dolan*, *Phillip J. DeRosier*, and *Seth B. Waxman*) for Jarrod Agen.

Ashlii M. Dyer and *Doster Law Offices, PLLC* (by *Eric E. Doster*) for American Conservative Union Foundation.

Warner Norcross + Judd LLP (by *Devin S. Schindler*, *Gaëtan Gerville-Réache*, *Charles Ash*, and *Brian Lennon*) for Governor Richard Snyder.

Rusek Law PLLC (by *Alexander S. Rusek*) for Howard Croft.

MCCORMACK, C.J. Nancy Peeler, Richard L. Baird, and Nicolas Lyon were state employees investigated and charged for their roles in the Flint water crisis. But for some reason, they were not charged the way that almost everyone in Michigan is charged—with a criminal complaint issued by a prosecutor and followed by a preliminary examination in open court at which the accused can hear and challenge the prosecution's evidence. Instead, the prosecution chose to proceed with these cases using what have become known as the "one-man grand jury" statutes, MCL 767.3 and MCL 767.4. A Genesee County judge served as the one-man "grand" jury and considered the evidence not in a public courtroom but in secret, a Star Chamber comeback. The one-man grand jury then issued charges. To this day, the defendants do not know what evidence the prosecution presented to convince the grand jury (i.e., juror) to charge them.

We consider two questions about the one-man grand-jury statutes. First, if charged by a one-man grand jury, is a defendant entitled to a preliminary

examination? Second, can a judge issue an indictment authorizing criminal charges against a defendant?

In *Peeler* and *Baird*, we hold that the answer to the first question is yes. In *Lyon*, we hold that the answer to the second question is no. We therefore reverse the June 16, 2021 order of the Genesee Circuit Court denying Peeler's and Baird's motions to remand for a preliminary examination and reverse the Genesee Circuit Court's February 16, 2022 order denying Lyon's motion to dismiss. We remand all three cases to the Genesee Circuit Court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

These prosecutions have an extremely long procedural history, most of which is not germane to the questions we answer here. Peeler, a former manager of the Early Childhood Health Section of the Michigan Department of Health and Human Services (DHHS), is charged with two counts of misconduct in office (a five-year felony), MCL 750.505, and one count of willful neglect of duty (a misdemeanor), MCL 750.478. Baird, the former "Transformation Manager" and a senior advisor to former Governor Rick Snyder, is charged with misconduct in office; perjury during an investigative-subpoena examination (a 15-year felony), MCL 767A.9; obstruction of justice (a five-year felony), MCL 750.505; and extortion (a 20-year felony), MCL 750.213. Lyon, a former director of the Michigan Department of Community Health and DHHS, is charged with nine counts of involuntary manslaughter (a 15-year felony), MCL 750.321; and one count of willful neglect of duty.

In December 2019, the Attorney General's office requested the appointment of a one-person grand jury.

Genesee Circuit Chief Judge Pro Tem Duncan Beagle granted the motion and appointed Genesee Circuit Judge David Newblatt to act as the one-person grand jury for a six-month term under MCL 767.3 and MCL 767.4. Judge Newblatt later extended his term for six more months.

In January 2021, Newblatt issued indictments against Peeler and Baird, and the cases were then assigned to Genesee Circuit Judge Elizabeth Kelly. Peeler and Baird moved to remand their cases for a preliminary examination, but the trial court denied the motion, holding that "indictees have no right to [a] preliminary examination." The Court of Appeals denied leave in both applications for lack of merit.

Judge Newblatt also issued an indictment against Lyon in January 2021. Lyon moved to dismiss, raising statutory arguments about the right to a preliminary examination, that the statutes do not confer charging authority upon a one-man grand jury, and that MCL 767.3 and MCL 767.4 violate the separation-of-powers doctrine and the right to due process. The trial court denied this motion too. Lyon filed an interlocutory application for leave to appeal in the Court of Appeals, which remains pending.

Peeler and Baird filed applications for leave to appeal in this Court, and Lyon filed a bypass application here, seeking leave to appeal prior to a decision by the Court of Appeals. We ordered oral argument on the application in each case. *People v Peeler*, 509 Mich 872 (2022); *People v Baird*, 509 Mich 915 (2022); *People v Lyon*, 509 Mich 882 (2022). In *Peeler* and *Baird*, we allowed further briefing on "whether a defendant charged with a felony after a proceeding conducted

pursuant to MCL 767.3 and MCL 767.4 is entitled to a preliminary examination." In *Lyon*, we allowed further briefing on these issues:

> (1) whether MCL 767.3 and MCL 767.4 violate Michigan's constitutional requirement of separation of powers, Mich Const 1963, art 3, § 2; (2) whether those statutes confer charging authority on a member of the judiciary; (3) whether a defendant charged after a proceeding conducted pursuant to MCL 767.3 and MCL 767.4 is entitled to a preliminary examination; and (4) whether the proceedings conducted pursuant to MCL 767.3 and MCL 767.4 violated due process, Mich Const 1963, art 1, § 17. [*Lyon*, 509 Mich at 882.]

II. LEGAL BACKGROUND

Whether MCL 767.3 and MCL 767.4 confer charging authority on a member of the judiciary and whether a defendant charged under those statutes is entitled to a preliminary examination are matters of statutory interpretation that we review de novo. *Millar v Constr Code Auth*, 501 Mich 233, 237; 912 NW2d 521 (2018). That means we review the issue independently, without required deference to the trial court. *Id*.

Enacted in 1917, MCL 767.3 and MCL 767.4 are part of a statutory scheme that quickly became known as the "one man grand jury" law. See, e.g., *People v Doe*, 226 Mich 5, 6; 196 NW 757 (1924) (referring to the judge "sitting as a one man grand jury"). The Legislature enacted these statutes because "regularly constituted law enforcement agencies sometimes are unable effectively and lawfully to enforce the laws, particularly with respect to corrupt conduct by officers of government and conspiratorial criminal activity on an organized and continuing basis" and "the common law 23-man grand jury is unwieldy and ineffective for the investigation of such crimes . . . ." *In re Colacasides*,

379 Mich 69, 89; 150 NW2d 1 (1967). Unlike citizens grand juries, which have a centuries-long history, Michigan's one-man grand jury has no such historical pedigree and has been the subject of two successful constitutional challenges so far.[1] Cf. Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U Chi L Rev 613, 613 (1983) (tracing the use of a citizens grand jury to the year 1166); Davidow, *Dealing with Prosecutorial Discretion: Some Possibilities*, 62 Wayne L Rev 123, 126 (2017) (describing the "checkered past" of the one-man grand jury, citing *In re Oliver*, 333 US 257; 68 S Ct 499; 92 L Ed 682 (1948), and *In re Murchison*, 349 US 133; 75 S Ct 623; 99 L Ed 942 (1955)).

Despite its nickname, the word "juror" makes no appearance in the statutes, and the term "grand jury" appears only twice. See MCL 767.3 ("Any person called before the *grand jury* shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt.") (emphasis added); MCL 767.4a ("It shall be unlawful for any person, firm or corporation to possess, use, publish, or make known to any other person any testimony, exhibits or secret proceedings obtained or used in connection with any *grand jury* inquiry conducted prior to the effective date of this act . . . .") (emphasis added).

MCL 767.3 and MCL 767.4 are wordy, but the important language in each is included here.

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[1] The Legislature has since corrected the deficiencies that led to the earlier constitutional challenges. See Davidow, *Dealing with Prosecutorial Discretion: Some Possibilities*, 62 Wayne L Rev 123, 126 (2017).

MCL 767.3:

> Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, *any judge of a court of law and of record shall have probable cause to suspect that any crime, offense or misdemeanor has been committed within his jurisdiction*, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, *such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint . . . and thereupon conduct such inquiry*. [Emphasis added.]

MCL 767.4:

> *If upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, he may cause the apprehension of such person by proper process and, upon the return of such process served or executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint. The judge conducting the inquiry under section 3 shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment*, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena. [Emphasis added.]

III. ANALYSIS

A. RIGHT TO A PRELIMINARY EXAMINATION

We agree with Peeler and Baird that the statutory language provides a right to a preliminary examination. We have said so before, although in dictum: In

People v Duncan, 388 Mich 489, 498-499; 201 NW2d 629 (1972), overruled in part on other grounds by *People v Glass*, 464 Mich 266 (2001), we identified MCL 767.4 as a statute with "specific statutory language" providing for a preliminary examination. MCL 767.4 refers to a "hearing on the complaint or indictment" and disqualifies the judge who conducted the inquiry from being the "examining magistrate" at that hearing. It is unclear what "hearing" that language could be referring to other than a preliminary examination. Moreover, "examining magistrate" is a term of art used in other statutes, so we need not guess what it means—an examining magistrate is a judge who conducts a preliminary examination. See, e.g., MCL 766.1 ("The state and the defendant are entitled to a prompt examination and determination *by the examining magistrate* in all criminal causes . . . .") (emphasis added).

MCL 767.4 also requires that once an accused has been apprehended, "the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint." In other words, the judge should treat the one-man-grand-jury-charged case the same as a case in which a formal complaint has been filed. We know how that process works too: When a formal complaint is filed, an arrest warrant is issued, the accused is apprehended, and the court holds a preliminary examination before an information may issue. See MCL 764.1a(1) ("A magistrate shall issue a warrant or summons upon presentation of a proper complaint alleging the commission of an offense and a finding of reasonable cause to believe that the individual accused in the complaint committed that offense. The complaint must be sworn to before a magistrate or clerk."); MCL 767.42(1) ("An information shall not be filed against any person for a felony until such person has had a preliminary examination there-

for, as provided by law, before an examining magistrate, unless that person waives his statutory right to an examination."). Thus, for a case to proceed "in like manner as upon formal complaint," MCL 767.4, a preliminary examination must be held unless waived by the defendant, MCL 767.42(1). See MCR 6.110(A) ("The defendant may waive the preliminary examination with the consent of the prosecuting attorney.").

There is more evidence in historical practice. We see in our cases evidence that preliminary examinations were routinely conducted after a one-person grand jury returned an indictment. See, e.g., *People v Bellanca*, 386 Mich 708, 711-712; 194 NW2d 863 (1972) (defendant charged by a one-man grand jury was entitled to transcripts of witness testimony given before the grand jury before his preliminary examination on the charges); *In re Slattery*, 310 Mich 458, 464; 17 NW2d 251 (1945) ("[U]nder the laws of this State, hereinbefore referred to, the testimony is kept secret, but if the judge finds that a crime has been committed, he orders a warrant to be issued, *and an examination held in open court before a magistrate* and, if probable cause is shown, the accused is bound over for trial in the proper court.") (emphasis added); *People v McCrea*, 303 Mich 213, 224-225; 6 NW2d 489 (1942) ("As a result of the grand-jury investigation indictments were returned and warrants were issued against McCrea and other defendants. The preliminary examinations were conducted before Judge Ferguson, and McCrea and other defendants were held for trial."). And in other authorities. See, e.g., *Committee Reports (Special Committee to Study and Report Upon the One-Man Grand Jury Law)* (hereinafter *Committee Reports*), 26 Mich St B J 11, 59 (1947) ("Before there can be a trial there must be an accusation, and in Michigan this may come in either of the following three ways: a. An Indictment voted by

a 23-Man Grand Jury; or b. A complaint and warrant issued in the customary way by a justice of the peace or other magistrate; or c. A complaint and warrant issued by a 'One-Man Grand Juror'. *In either of the last two instances the defendant is entitled to an examination before being bound over for trial*.") (emphasis added).

The Attorney General's office believes that because the statutory scheme requires the judge to make a finding of probable cause that the defendant committed the crime, a preliminary examination would be redundant. After all, a preliminary examination's main function is for a court to determine whether there is probable cause. But the argument confuses some basics. Probable cause to *arrest* (which MCL 767.4 requires and authorizes the judge to order) is different from probable cause to *bindover* (which must be found at a preliminary examination to bind the defendant over on felony charges). "[T]he probable cause required for a bindover is 'greater' than that required for an arrest and . . . imposes a different standard of proof. . . . [T]he arrest standard looks only to the probability that the person committed the crime as established at the time of the arrest, while the preliminary hearing looks both to that probability at the time of the preliminary hearing *and* to the probability that the government will be able to establish guilt at trial." LaFave & Israel, *Criminal Procedure* (2d ed, 1992), § 14.3, pp 668-669; see also *People v Cohen*, 294 Mich App 70, 74; 816 NW2d 474 (2011) ("We disagree with the circuit court's conclusion that probable cause to support an arrest is equivalent to probable cause to bind a defendant over for trial."). So the Court of Appeals was wrong in *People v Green*, 322 Mich App 676, 687; 913 NW2d 385 (2018), when it held that the one-person grand-jury procedure "serve[s] the same function" as a preliminary examination. We overrule *Green*.

The circuit court erred by denying Peeler's and Baird's motions to remand for a preliminary examination. We therefore reverse the circuit court's order denying those motions.[2]

B. CHARGING AUTHORITY

Lyon brings another challenge to the application of MCL 767.4: he argues that the statute does not grant the judge conducting the inquiry the authority to issue indictments. We agree.[3]

The word "indictment" appears four times in the statute, and its use is important:

> The judge conducting the inquiry under section 3 shall be disqualified from acting as the examining magistrate *in connection with the hearing on the complaint or indictment*, or from presiding at any trial arising therefrom, or *from hearing any motion to dismiss or quash any complaint or indictment*, or from hearing any charge of contempt under section 5, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena. . . . Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before the judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary

[2] Although Peeler and Baird joined in Lyon's motion to dismiss in the circuit court, the only relief they request in this Court is the reversal of the circuit court's order denying their motions to remand for an evidentiary hearing.

[3] Our order to schedule oral argument on the application asked a more general question: "whether [MCL 767.3 and MCL 767.4] confer charging authority on a member of the judiciary[.]" Because Lyon was charged by an indictment, it is not necessary for the disposition of this case to resolve whether MCL 767.3 or MCL 767.4 confer authority to issue charges by some other method such as a complaint.

> action against attorneys and counselors in this state, any judge conducting the inquiry, any prosecuting attorney and other persons who may at the discretion of the judge be admitted to such inquiry, who shall while conducting such inquiry or while in the services of the judge or after his services with the judge shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in the inquiry, *or who shall disclose the fact that any indictment for a felony has been found* against any person not in custody or under recognizance, or who shall disclose that any person has been questioned or summoned in connection with the inquiry, who shall disclose or publish or cause to be published any of the proceedings of the inquiry *otherwise than by issuing or executing processes prior to the indictment*, or shall disclose, publish or cause to be published any comment, opinion or conclusions related to the proceedings of the inquiry, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than $1,000.00, or both fine and imprisonment in the discretion of the court, and the offense when committed by a public official shall also constitute malfeasance in office. [MCL 767.4 (emphasis added).]

Perhaps not surprisingly, the statute never says a judge may issue an indictment, in specific contrast to the statutes governing citizens grand juries. Cf. MCL 767.24(1) ("An indictment for any of the following crimes may be found and filed at any time[.]"); MCL 767.23 ("No indictment can be found without the concurrence of at least 9 grand jurors; and when so found, and not otherwise, the foreman of the grand jury shall certify thereon, under his hand, that the same is a true bill.").

Indeed, the Legislature amended the statutory scheme to authorize judges to issue indictments, but later removed that authority. In 1949, the Legislature amended the statute to provide for three-judge grand

juries and gave them express authority to issue indictments ("Provided, That orders returning Indictments shall be signed by 3 judges."). See MCL 767.3, as amended by 1949 PA 311. But it repealed that provision several years later. See MCL 767.3, as amended by 1951 PA 276. "Where the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected." *In re MCI Telecom Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999).

And the statute is clear about what it *does* authorize a judge to do. If, after conducting the inquiry, "the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, *he may cause the apprehension of such person by proper process* . . . ." MCL 767.4 (emphasis added). In other words, the judge may authorize an *arrest warrant*. The statute didn't authorize the judge to issue an arrest warrant explicitly and issue an indictment at the same time implicitly.

And while the word "indictment" can be understood narrowly to mean only "[t]he formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person," *Black's Law Dictionary* (11th ed), as in MCL 767.24(1) and MCL 767.23, that is not the case in MCL 767.4. MCL 761.1, which provides definitions for MCL 767.4, defines "indictment" broadly. See MCL 761.1(g):

> "Indictment" means 1 or more of the following:
>
> (*i*) An indictment.
>
> (*ii*) An information.
>
> (*iii*) A presentment.

> (*iv*) A complaint.
>
> (*v*) A warrant.
>
> (*vi*) A formal written accusation.
>
> (*vii*) Unless a contrary intention appears, a count contained in any document described in subparagraphs (*i*) through (*vi*).

This definition encompasses much more than a formal indictment—a charging document initiating a criminal prosecution.

The circuit court and the Attorney General's office have emphasized the purported parallels between the one-man grand-jury and the citizens grand-jury procedures. Thus, the argument goes, because the citizens grand-jury statutes authorize the issuance of indictments, so too must MCL 767.4. But we find the differences between the statutes more important. As the defendants and amici note, the citizens grand-jury statutes—unlike MCL 767.4—expressly authorize the grand jurors to issue indictments and require the grand jurors to swear an oath. See MCL 767.9 (setting forth the oath to be administered to citizen grand jurors). A juror's oath is a significant part of service. See, e.g., *People v Cain*, 498 Mich 108, 123; 869 NW2d 829 (2015) ("The juror's oath involves a conscious promise to adopt a particular mindset—to approach matters fairly and impartially—and its great virtue is the powerful symbolism and sense of duty it imbues the oath-taker with and casts on the proceedings."); *id*. at 134 (VIVIANO, J., dissenting) ("The essence of the jury is, and always has been, the swearing of the oath."). The absence of this hallmark of the grand-jury process is more evidence that the one-man grand-jury statutes do not authorize a judge to initiate charges by issuing indictments.

To be sure, judges serving as one-person grand jurors have issued indictments following investigations. See, e.g., *Colacasides*, 379 Mich at 77-78 ("These documents were the evidentiary basis *upon which appellant had been indicted by Grand Juror Piggins* for conspiracy to bribe a police officer.") (emphasis added); *Green*, 322 Mich App at 681 ("Defendant was indicted by a one-person grand jury . . . ."). But the historical practice has been mixed because the procedure has also been used to authorize warrants. See, e.g., *Bellanca*, 386 Mich at 711 ("[T]he 'grand juror' ordered the issuance of a warrant for the arrest of the defendant so that he might be prosecuted for perjury and such warrant issued on that day."); *People v Dungey*, 356 Mich 686, 687, 688; 97 NW2d 778 (1959) ("[D]efendants in this case were tried in the circuit court of Genesee county *on an information* charging them with conspiracy to violate the laws of the State relating to the suppression of gambling" after "an investigation conducted in said county by a visiting circuit judge, under the provisions of [MCL 767.3]," after which "*the judge issued his warrant for the arrest of 11 individuals*, including the four defendants in this case[.]") (emphasis added); *People v Birch*, 329 Mich 38, 41; 44 NW2d 859 (1950) ("Thereafter Judge Leibrand proceeded to conduct the investigation. Witnesses were called and examined by him, findings made, *and warrants issued including the warrants involved in the above entitled cases*.") (emphasis added). It seems that the power of a judge conducting an inquiry to issue an indictment was simply an unchallenged assumption, until now. See generally *Committee Reports*, 26 Mich St B J at 59 (providing that a "One-Man Grand Juror" may issue a complaint or warrant, while only a citizens grand jury may vote to issue an indictment).

For these reasons, we conclude that MCL 767.4 does not authorize a judge to issue an indictment initiating a criminal prosecution.[4] The trial court therefore erred by denying Lyon's motion to dismiss. Given our statutory holding, we need not address Lyon's constitutional arguments that MCL 767.4 violates separation of powers and due process. See *People v McKinley*, 496 Mich 410, 415-416; 852 NW2d 770 (2014) (applying "the widely accepted and venerable rule of constitutional avoidance").

IV. CONCLUSION

MCL 767.3 and MCL 767.4 authorize a judge to investigate, subpoena witnesses, and issue arrest warrants. But they do not authorize the judge to issue indictments. And if a criminal process begins with a one-man grand jury, the accused is entitled to a preliminary examination before being brought to trial. Accordingly, we reverse the Genesee Circuit Court's orders denying Peeler's and Baird's motions to remand for a preliminary examination and denying Lyon's motion to dismiss. We remand to the Genesee Circuit Court for further proceedings consistent with this opinion.

ZAHRA, VIVIANO, BERNSTEIN, CAVANAGH, and WELCH, JJ., concurred with MCCORMACK, C.J.

BERNSTEIN, J. (*concurring*). I concur fully with the Court's opinion but write separately to address the significant interests implicated in this case. Today, this Court recognizes what we have always known to be

[4] We use "indictment" to refer to a formal indictment issued by a one-person grand jury and not in the broader sense it is used in MCL 761.1(g).

true: procedure matters. It is, in fact, the foundation of our adversarial process. Indeed, our adversarial system of justice "is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question." *Penson v Ohio*, 488 US 75, 84; 109 S Ct 346; 102 L Ed 2d 300 (1988) (quotation marks and citations omitted).

However, the Attorney General has invoked obscure statutes, MCL 767.3; MCL 767.4, to deprive these defendants of their statutory right to a preliminary examination. "A preliminary examination functions, in part, as a screening device to insure that there is a basis for holding a defendant to face a criminal charge." *People v Weston*, 413 Mich 371, 376; 319 NW2d 537 (1982). Our court rules state that a defendant is entitled to "subpoena and call witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination." MCR 6.110(C).

Clearly, and as this Court's decision aptly recognizes, a preliminary examination serves a crucial function for criminal defendants in our adversarial system. It allows defendants to learn about the specific criminal charges they face, confront allegedly incriminating evidence, and prepare a defense. The prosecution argues that the Legislature, through the statutes in question, has given it the discretion to opt out of a preliminary examination, as the prosecution did here. This assertion is quite alarming, and were it true, the prosecution would have the power to decide whether to grant a defendant permission to probe and challenge the charges against them before being formally indicted. Such a result runs afoul of the basic notions of fairness that underlie our adversarial system. I do not believe we can tolerate such a procedural offense.

At the same time, this Court remains cognizant of the impact that this decision might have on the residents of Flint, who have suffered an unconscionable injustice. Residents of Flint have been supplied with water that was contaminated with toxic levels of lead, E. coli, and Legionella bacteria. *Mays v Governor of Michigan*, 506 Mich 157, 201; 954 NW2d 139 (2020) (BERNSTEIN, J., concurring). Despite evidence of contamination, state officials denied that the water was contaminated. *Mays*, 506 Mich at 169-170 (opinion by BERNSTEIN, J.). Later, officials allegedly manipulated data evidencing water contamination and continued to lie to Flint residents. *Id*. at 175. Research suggests that the death toll has been undercounted. See Childress, *We Found Dozens of Uncounted Deaths During the Flint Water Crisis. Here's How.*, PBS Frontline (September 10, 2019), available at <https://www.pbs.org/wgbh/pages/frontline/interactive/how-we-found-dozens-of-uncounted-deaths-during-flint-water-crisis/> (accessed June 3, 2022) [https://perma.cc/H2U3-J3J8]. Lead exposure can also impact fertility rates, birth outcomes, and childhood development. See Matheny, *Study: Flint Water Killed Unborn Babies; Many Moms Who Drank It Couldn't Get Pregnant*, Detroit Free Press (September 20, 2017), available at <https://www.freep.com/story/news/local/michigan/flint-water-crisis/2017/09/20/flint-water-crisis-pregnancies/686138001/> (accessed June 3, 2022) [https://perma.cc/U8N4-HQCR]. We may not know the extent to which the contaminated water has detrimentally affected the health and well-being of Flint residents because the effects of lead poisoning can be long-term and slow to fully develop. See Harvard TH Chan School of Public Health, *High Levels of Lead in Bone Associated With*

Increased Risk of Death From Cardiovascular Disease in Men, 2009 Press Release, available at <https://www.hsph.harvard.edu/news/press-releases/high-levels-lead-bone-risk-of-death-cardiovascular-disease-men/> (accessed June 3, 2022) [https://perma.cc/ZMW9-KTJ2]; Carroll, *What the Science Says About Long-Term Damage From Lead*, New York Times (February 8, 2016), available at <https://www.nytimes.com/2016/02/09/upshot/what-the science-says-about-long-term-damage-from-lead.html> (accessed June 3, 2022) [https://perma.cc/JD8R-GZH9]. Even after Flint's water was declared safe for consumption, Flint residents have remained hesitant to use the water. Robertson, *Flint Has Clean Water Now. Why Won't People Drink It?*, Politico (December 23, 2020), available at <https://www.politico.com/news/magazine/2020/12/23/flint-water-crisis-2020-post-coronavirus-america-445459> (accessed June 3, 2022) [https://perma.cc/Y48U-LLQ7]. If the allegations can be proved, it is impossible to fully state the magnitude of the damage state actors have caused to an innocent group of people—a group of people that they were entrusted to serve. The Flint water crisis stands as one of this country's greatest betrayals of citizens by their government.

Yet the prosecution of these defendants must adhere to proper procedural requirements *because* of the magnitude of the harm that was done to Flint residents. Proper procedure is arguably most necessary in cases of great public significance, particularly where the charged crimes have been characterized as especially heinous and where the court proceedings are likely to be heavily scrutinized by the general public. In such cases, adherence to proper procedure serves as a guarantee to the general public that Michigan's courts can

be trusted to produce fair and impartial rulings for all defendants, regardless of the severity of the charged crime.

The tenets of our system of criminal procedure are only as strong as our commitment to abide by them. Indeed, there would be little credibility to a criminal process that purports to strike a fair balance between adversaries if the guarantees underpinning that criminal process—such as the statutory right to a preliminary examination—could be done away with at the whims of the prosecution. Put simply, the prosecution's power to charge individuals and haul them into court is constrained by certain preconditions. We recognize today that, under these circumstances, one of those preconditions is required by statute—a preliminary examination. The prosecution cannot simply cut corners in order to prosecute defendants more efficiently. To allow otherwise would be repugnant to the foundational principles of our judicial system. This Court's decision reaffirms these principles and makes clear that the government's obligations remain steadfast for all criminal defendants.

In the end, such a prominent criminal prosecution will have a significant impact on the public at large. This criminal prosecution will serve as a historical record. Whether we realize it or not, courts provide historical context to consequential moments in history. See Rhodes, *Legal Records as a Source of History*, 59 ABA J 635, 635 (June 1973) ("The lawyer unwittingly is an agent of history."). What is happening before us cannot be understated. Former state officials, some of whom were elected, are being criminally prosecuted for their alleged roles in perpetrating an egregious injustice that resulted in the various ailments and even deaths of the people they served or represented. Future

generations will look to this record as a critical and impartial answer to the question: what happened in Flint? For both their sake and ours, we should leave no question unanswered and no stone unturned.

For these reasons, I concur.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for Governor Rick Snyder.

SOLE v MICHIGAN ECONOMIC DEVELOPMENT CORPORATION

Docket No. 161598. Argued on application for leave to appeal December 8, 2021. Decided June 29, 2022.

David Sole brought an action against the Michigan Economic Development Corporation under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., seeking the disclosure of information regarding the tax credits that defendant had allowed General Motors LLC (GM) to claim under the Michigan Economic Growth Authority Act, MCL 207.801 *et seq*. (the MEGA Act), which gave defendant the authority to award businesses tax credits through the Michigan Strategic Fund. Defendant had provided plaintiff with a 2016 agreement between GM and defendant regarding the tax credits, but it had redacted the amount of the "tax credit cap," which the agreement defined as the total value of tax credits that GM could claim under the MEGA Act over the term of the agreement. Defendant claimed that the dollar value of the tax credits was exempt from disclosure under the Michigan Strategic Fund Act, MCL 125.2003 *et seq*. The Court of Claims, CHRISTOPHER M. MURRAY, J., granted summary disposition to defendant on the basis that the information was exempt from disclosure under MCL 125.2005(9), which exempts records or data related to financial or proprietary information submitted by the applicant, because the total value of the credits awarded to GM had been prepared using internal financial information provided to defendant for the purpose of calculating the award. The Court of Appeals, RONAYNE KRAUSE, P.J., and SERVITTO and BOONSTRA, JJ., affirmed the Court of Claims decision in an unpublished per curiam opinion issued June 4, 2020 (Docket No. 350764), holding that the requested record was confidential under MCL 125.2005(9) and was not required to be disclosed under MCL 125.2005(11), which provides that certain documents cannot be exempted from disclosure under MCL 125.2005(9) as financial or proprietary information. The Court of Appeals reasoned that MCL 125.2005(11) concerns documents rather than information and that the total value of the tax credits was properly categorized as information. Plaintiff sought leave to appeal in the Supreme Court, which directed oral argument on the application for leave to appeal. 507 Mich 928 (2021).

In a unanimous per curiam opinion, the Supreme Court, in lieu of granting leave to appeal, *held*:

The "tax credit cap" provision of the agreement between defendant and GM fit within the FOIA exemption in MCL 125.2005(9); however, because it also fell under the exception to this exemption set forth in MCL 125.2005(11), it was nonetheless subject to disclosure. The Court of Appeals' judgment to the contrary was reversed.

1. MCL 15.231(2) states that the purpose of FOIA is to provide the people of Michigan with full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees so that they may fully participate in the democratic process. To effectuate this objective, MCL 15.233(1) states that upon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body, except as expressly provided in MCL 15.243. Among the exceptions in this provision is records or information specifically described and exempted from disclosure by statute.

2. MCL 125.2005(9) creates an exemption to FOIA disclosure for records or portions of a record, material, or other data that is received, prepared, used, or retained by the Michigan Strategic Fund if the record is used in connection with an application to or with a project or product assisted by the fund or with an award, grant, loan, or investment. To qualify for this exemption, the record, material, or other data must relate to financial or proprietary information submitted by the applicant, and that information must also be considered by the applicant and acknowledged by the board as confidential. Considering the lay definition of "relate" at the time this provision was enacted, it was apparent that the total possible value of GM's tax credits related to financial or proprietary information for purposes of MCL 125.2005(9). However, MCL 125.2005(11) excludes certain materials from the exemption in MCL 125.2005(9), including any document to which the fund is a party evidencing an agreement that the fund is authorized to enter. Because the agreement extending the tax credits met these conditions, MCL 125.2005(11) prevented it from qualifying for the exemption under MCL 125.2005(9).

3. The Court of Appeals erred by concluding that MCL 125.2005(11) applied to the document but not the information in it, including the potential value of the tax credits under the

agreement. The plain text of MCL 125.2005(11) states that the document itself is not to be considered financial or proprietary information that may be exempt from disclosure under MCL 125.2005(9). By exempting records and other specified materials that relate to "financial and proprietary information," Subsection (9) shields financial and proprietary information from disclosure. Subsection (11), in turn, removes this protection from a class of documents by stating that they are not information protected by Subsection (9). In this way, the statute itself links the terms "document" and "information" in a manner that suggests the two terms have significant overlap in this context, and there would be no need for Subsection (11) to exclude these documents from the scope of "financial or proprietary information" if the documents did not relate to such information. Moreover, the Court of Appeals' interpretation would render Subsection (11) nearly meaningless, as it would not allow disclosure of anything already exempt under Subsection (9). Because the agreement between GM and defendant fell under Subsection (11), it was subject to disclosure even though information contained within it fit within the exemption language of Subsection (9). This conclusion was buttressed by the constitutional-doubt canon, which states that when the constitutional validity of an act is in question, a reviewing court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. Defendant's preferred construction of MCL 125.2005 would raise serious doubts about its constitutionality under Const 1963, art 9, § 23, which states that all financial records, accountings, audit reports, and other reports of public moneys are public records that are open to inspection. In this case, a saving construction of the statute, under which the agreement at issue must be disclosed in full, was not only fairly possible but was plainly required by the ordinary meaning of MCL 125.2005.

Reversed and remanded to the Court of Claims for further proceedings.

STATUTES — MICHIGAN ECONOMIC GROWTH AUTHORITY ACT — MICHIGAN STRATEGIC FUND ACT — FREEDOM OF INFORMATION ACT — EXEMPTIONS — EXCEPTIONS — TAX CREDITS.

The total value of tax credits awardable to a corporate entity by the Michigan Economic Development Corporation pursuant to the Michigan Economic Growth Authority Act, MCL 207.801 *et seq*., fits within the exemption from disclosure under MCL 125.2005(9), an exception to the disclosure requirements of the Freedom of Information Act, MCL 15.231 *et seq*., that is set forth

in the Michigan Strategic Fund Act, MCL 125.2003 *et seq*., but is nonetheless subject to disclosure under MCL 125.2005(11).

Jerome D. Goldberg, PLLC (by *Jerome D. Goldberg*) for plaintiff.

Miller, Canfield, Paddock and Stone, PLC (by *Joseph G. Vernon* and *Paul D. Hudson*) for defendant.

Amici Curiae:

Miller, Canfield, Paddock and Stone, PLC (by *Jeffrey A. Crapko*) for Economic Development Leaders for Michigan.

Honigman LLP (by *J. Michael Huget*, *Peter B. Ruddell*, *Andrew M. Pauwels*, and *Rian C. Dawson*) for the Michigan Chamber of Commerce.

Patrick J. Wright for the Mackinac Center for Public Policy and the Michigan Press Association.

PER CURIAM. In this action under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., plaintiff, David Sole, claims that he is entitled to disclosure of the unredacted version of the agreement between General Motors LLC (GM) and defendant, the Michigan Economic Development Corporation, which would show the total value of tax credits that may be claimed by GM under the Michigan Economic Growth Authority (MEGA) Act, MCL 207.801 *et seq*. Defendant, which administers the credits, argues that the total value of the awardable tax credits is exempt from FOIA disclosure under MCL 125.2005(9) and that the exception to that exemption set forth in MCL 125.2005(11) is inapplicable. In other words, according to defendant, an unredacted version of the agreement is not subject to disclosure. We hold that while the agreement provision

at issue, which is known as the "tax credit cap," fits within the terms of MCL 125.2005(9), it is nonetheless subject to disclosure under MCL 125.2005(11). Accordingly, we reverse the Court of Appeals' judgment to the contrary.

I. FACTS

In 1995, the Legislature enacted the MEGA Act, creating MEGA within the Michigan Strategic Fund (MSF). MCL 207.804(1).[1] Pursuant to the MEGA Act, refundable tax credits were awarded to numerous businesses in the state to promote job creation. Among the businesses receiving tax credits under this program was GM.

In November 2018, plaintiff submitted a FOIA request to defendant seeking, among other things, the total value of the tax credits awarded to GM under the MEGA Act. Defendant eventually provided many documents regarding the credits, but it refused to disclose the "tax credit cap." The "tax credit cap" was defined in the 2016 agreement between GM and defendant as "the total value of MEGA Tax Credits that may be claimed over the Term of the Agreement, up to" a certain dollar value, which was redacted from the agreement provided to plaintiff. Defendant asserted that the total amount of the credits that could be claimed under the tax credit cap was exempt from disclosure under the MSF Act, MCL 125.2001 *et seq*.

Plaintiff filed a complaint under FOIA seeking the amount and terms of the MEGA tax credits issued to GM for each year they were issued along with infor-

[1] Governor Rick Snyder abolished MEGA in 2012 and transferred its powers and responsibilities to the MSF board. Executive Order No. 2012-9.

mation regarding the amendments to the credits, the number of years GM could claim the credits, and related information. Defendant explained that it had provided much of the requested information but again contended that the total amount of the tax credits was confidential and not subject to FOIA's disclosure requirements. The Court of Claims granted summary disposition in favor of defendant on the basis that the information was exempt from disclosure under MCL 125.2005(9), which exempts records or data "relate[d] to financial or proprietary information" submitted by the applicant. The Court explained that the total value of the credits awarded to GM was prepared using internal financial information provided to defendant for the purpose of calculating the award and so fell within the parameters of MCL 125.2005(9). Therefore, defendant was allowed to redact the total possible value of the MEGA credits from documents produced under FOIA. Plaintiff appealed in the Court of Appeals.

The Court of Appeals affirmed the Court of Claims decision in an unpublished per curiam opinion. It held that the requested record was confidential under MCL 125.2005(9). It also held that the requested record was not required to be disclosed under MCL 125.2005(11), which provides that certain documents cannot be exempted from disclosure under MCL 125.2005(9) as financial or proprietary information. It reasoned that MCL 125.2005(11) concerns "document[s]" rather than "information" and that the total value of the tax credits was properly categorized as "information," not a "document." Therefore, it concluded that the Court of Claims acted appropriately by granting defendant's motion for summary disposition. *Sole v Mich Economic Dev Corp*, unpublished per curiam opinion of the Court of Appeals, issued June 4, 2020 (Docket No. 350764). Plain-

tiff then sought leave to appeal in this Court. We granted oral argument on the application for leave to appeal regarding the following issues:

> (1) whether, at the time of the request and pursuant to MCL 125.2005, the total value of tax credits extended to General Motors was exempt from disclosure under the Freedom of Information Act, MCL 15.231 *et seq*., as "financial or proprietary information" or as "[a] record or portion of a record, material, or other data received, prepared, used, or retained by the fund . . . in connection with an application to or with . . . an award, grant, loan, or investment that relates to financial or proprietary information submitted by the applicant that is considered by the applicant and acknowledged by the board or a designee of the board as confidential"; and (2) whether MCL 125.2005(11) requires the full disclosure, without redaction, of the tax credit agreement because "[a]ny document to which the fund is a party evidencing a loan, insurance, mortgage, lease, venture, or other type of agreement the fund is authorized to enter into shall not be considered financial or proprietary information that may be exempt from disclosure under subsection (9)." [*Sole v Mich Economic Dev Corp*, 507 Mich 928, 928-929 (2021).]

II. STANDARD OF REVIEW

This Court reviews a trial court's decision to grant summary disposition de novo. *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 84-85; 878 NW2d 816 (2016). We also review de novo issues of statutory interpretation. *Herald Co v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006). In interpreting statutes, "we seek to discern the ordinary meaning of the language in the context of the statute as a whole." *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 339; 952 NW2d 384 (2020).

III. ANALYSIS

The issue presented in this case is whether the information plaintiff seeks is exempted from FOIA by MCL 125.2005. The parties agree that the tax credit cap, i.e., the total value of the tax credits that GM can claim, is stated in the agreement defendant entered with GM. The question, then, is whether plaintiff is entitled to an unredacted version of that document.

The Legislature has declared that the residents of this state "are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act . . . so that they may fully participate in the democratic process." MCL 15.231(2). To effectuate this objective, FOIA provides, in pertinent part, that "[e]xcept as expressly provided in [MCL 15.243], upon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body." MCL 15.233(1). Thus, "FOIA is intended primarily as a prodisclosure statute . . . ." *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 544; 475 NW2d 304 (1991). However, as this Court has recognized, the Legislature also codified exemptions from the disclosure requirement to "shield[] some 'affairs of government' from public view." *Herald Co*, 475 Mich at 472. This includes "[r]ecords or information specifically described and exempted from disclosure by statute." MCL 15.243(1)(d). We have stated that the FOIA disclosure exemptions must be narrowly construed. *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 360; 616 NW2d 677 (2000).

Here, the parties contest the application of one such exemption, MCL 125.2005(9), part of the MSF Act. Under that provision,

> [a] record or portion of a record, material, or other data received, prepared, used, or retained by the fund or any of its centers in connection with an application to or with a project or product assisted by the fund or any of its centers or with an award, grant, loan, or investment that relates to financial or proprietary information submitted by the applicant that is considered by the applicant and acknowledged by the board or a designee of the board as confidential shall not be subject to the disclosure requirements of the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

Subsection (9) creates an exemption to FOIA disclosure with several layered requirements. It applies to "[a] record" or "[a] portion of a record, material or other data" that is "received, prepared, used, or retained by [the MSF.]" That record must be used "in connection with an application to or with a project or product assisted by the fund" or "with an award, grant, loan, or investment." And it must "relate[] to financial or proprietary information submitted by the applicant." That information must also be "considered by the applicant and acknowledged by the board . . . as confidential." Only if all these requirements are met would the exemption apply.

Two other provisions of the MSF Act provide context for this exemption. MCL 125.2005(12) defines "financial or proprietary information" as "information that has not been publicly disseminated or which is unavailable from other sources, the release of which might cause the applicant significant competitive harm." However, MCL 125.2005(11) excludes certain materials from the exemption in Subsection (9), meaning they are subject to disclosure under FOIA: "Any

document to which the fund is a party evidencing a loan, insurance, mortgage, lease, venture, or other type of agreement the fund is authorized to enter shall not be considered financial or proprietary information that may be exempt from disclosure under subsection (9)."[2]

With regard to the requirements of Subsection (9), the parties do not dispute that the requested information is a "portion of a record" retained by the fund and connected to GM's tax credit application. Nor do they dispute that the credits are awarded on the basis of defendant's review of "financial or proprietary information" submitted by GM. The parties also do not dispute that defendant followed the proper procedure to acknowledge the information submitted by the applicant as confidential. Rather, the parties contest whether the tax credit cap "*relates to* financial or

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[2] The MEGA Act includes its own FOIA exemption and exception, which closely resemble those in MCL 125.2005. Under the exemption,

> [a] record or portion of a record, material, or other data received, prepared, used, or retained by the authority in connection with an application for a tax credit under [MCL 207.809] that relates to financial or proprietary information submitted by the applicant that is considered by the applicant and acknowledged by the authority as confidential shall not be subject to the disclosure requirements of the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246. [MCL 207.805(3).]

MCL 207.805(5) provides the same definition of "financial or proprietary information" as that in the MSF Act, but also states that "[f]inancial or proprietary information does not include a written agreement" under the MEGA Act."

The parties have not addressed the applicability of the MEGA Act to the case before us. Rather, they rely on the MSF Act given the abolition of the MEGA board and the transfer of its powers and duties to the MSF board by Executive Order No. 2012-9. Given the similarities between the exemption and the exception in both acts, it appears that the result would likely be the same under either. Nevertheless, because the parties have framed the case under the MSF Act, we will decide the case under that act and we do not opine on the applicability of the MEGA Act.

proprietary information submitted by the applicant." MCL 125.2005(9) (emphasis added).

In answering this question, we look to the ordinary meaning of the term "relates" at the time the statute was enacted. See *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 563 & n 58; 886 NW2d 113 (2016). Because the statute does not define the term, we may look to a dictionary from the relevant period to ascertain the term's meaning. *Id*. At the time, "relate" was defined to mean "to have reference or relation," and "relation" meant "a significant association between or among things; connection[.]" *Random House Webster's College Dictionary* (1991).

In light of these definitions, it becomes apparent that the total possible value of GM's tax credits relates to financial or proprietary information for purposes of MCL 125.2005(9). The parties agree that GM submitted certain internal financial information with its application for the tax credits, and this information was then used to calculate the value of the tax credits MEGA ultimately awarded. The parties further agree that this information has not been publicly disseminated. Consequently, assuming that the release of it could cause GM significant competitive harm—something the parties do not directly dispute—the information meets the statutory definition of "financial or proprietary information" in MCL 125.2005(12). The part of the record containing the tax credit cap was therefore derived from the financial or proprietary information of an applicant. That is certainly enough to create a "significant association" or "connection" between the record and the information it is derived from. See *Random House Webster's College Dictionary* (1991). As such, it relates to otherwise protected financial or proprietary information.

If this were the end of the analysis, the record would be exempt from disclosure under MCL 125.2005(9). But it is not the end, as MCL 125.2005(11) carves out an exception to MCL 125.2005(9). The question under Subsection (11) is whether the agreement here is a "document to which the fund is a party evidencing . . . [an] agreement the fund is authorized to enter into . . . ." MCL 125.2005(11). If so, then the document cannot be considered financial or proprietary information that can be exempted from disclosure under Subsection (9). The document at issue here is the agreement extending the tax credits. No one contests that defendant is a party to the agreement and that defendant has the authority to enter into that agreement. Therefore, Subsection (11) applies and the agreement is not "financial or proprietary information that may be exempt from disclosure under subsection (9)." The document cannot be exempt under Subsection (9).

Defendant presses the interpretation adopted by the Court of Appeals, which held that Subsection (11) applies to the document but not the information in it. Thus, because the potential value of the tax credits is information that would be exempt under Subsection (9), that information would remain exempt. All that Subsection (11) requires, under this reading, is handing over the agreement—the information in it can be redacted.

Redaction is sometimes required in a document that is otherwise subject to disclosure. FOIA provides that "[i]f a public record contains material which is not exempt under [MCL 15.243], as well as material which is exempt from disclosure under [MCL 15.243], the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." MCL 15.244(1); see also

Bradley v Saranac Community Sch Bd of Ed, 455 Mich 285, 304; 565 NW2d 650 (1997) (noting that redaction of information is sometimes appropriate if the information "falls within an exemption of the FOIA").

The Court of Appeals suggested that MCL 125.2005(11) applies only to documents and not the underlying information "because a document is not the same thing as information." *Sole*, unpub op at 6. That may be true, as far as it goes, but it overlooks the plain text of that provision, which says that the document itself is not to be considered "financial or proprietary *information* that may be exempt from disclosure under subsection (9)." (Emphasis added.) By exempting records and other specified materials that relate to "financial and proprietary information," Subsection (9) shields "financial and proprietary information" from disclosure. Subsection (11), in turn, removes this protection from a class of documents by stating that they are not information protected by Subsection (9). In this way, the statute itself links the term "document" and the term "information" in a manner that suggests the two terms have significant overlap in this context. Indeed, there would be no need for Subsection (11) to exclude these documents from the scope of "financial or proprietary information" if the documents did not relate to such information. It would be a strained interpretation to conclude that the document is not "financial or proprietary information," but its contents are. Thus, there is no basis in the text for the conclusion that Subsection (11) is limited to the document itself and not its contents.

Moreover, the result of the Court of Appeals' reading would seem to be that a defendant could hand over a fully redacted document. It is unclear what purpose such a document would serve. Cf. *Bradley*, 455 Mich at

305 ("This objective [of FOIA to allow citizens to obtain information about their government] is hindered when a citizen requests information, only to be provided with an edited version that gives no indication of the true content of the document."). This interpretation would render Subsection (11) nearly meaningless, as it would not allow disclosure of anything already exempt under Subsection (9). We are loath to interpret statutes in a way that deprives them of all meaning, and we are not compelled to reach a conclusion that does so here. See *People v Pinkney*, 501 Mich 259, 282-283; 912 NW2d 535 (2018) (explaining the interpretive canon against surplusage). Thus, we conclude that because the agreement between GM and defendant falls under Subsection (11), it is subject to disclosure even though information contained within it fits within Subsection (9)'s exemption language.[3]

Our conclusion is buttressed by the constitutional-doubt canon because the contrary interpretation would raise significant doubts about the constitutionality of MCL 125.2005. " 'When the validity of an act . . . is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' " *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 508; 274 NW2d 373 (1979), quoting *Ashwander v Tennessee Valley Auth*, 297 US 288, 348; 56 S Ct 466; 80 L Ed 688 (1936) (quotation marks omitted). Accordingly, under the constitutional-doubt canon, courts reasonably presume that the Legislature did not intend to enact a statute

[3] Whether redaction of information exempt under a provision other than Subsection (9) would be necessary is a question we need not decide.

that "raises serious constitutional doubts." *Clark v Martinez*, 543 US 371, 381; 125 S Ct 716; 160 L Ed 2d 734 (2005).

Here, defendant's preferred construction of MCL 125.2005 raises serious doubts about its constitutionality under Const 1963, art 9, § 23. Under the statute, defendant cannot "disclose financial or proprietary information not subject to disclosure pursuant to subsection (9)" without the applicant's approval. MCL 125.2005(10). Thus, if MCL 125.2005(9) applies, the unredacted tax credit agreement is not available to the public absent GM's approval. This potentially conflicts with Const 1963, art 9, § 23, which commands that "[a]ll financial records, accountings, audit reports[,] and other reports of public moneys shall be public records and open to inspection." Const 1963, art 9, § 23. The Court of Appeals has held that this provision requires disclosure of documents sufficient "to allow the public to keep their finger on the pulse of government spending." *Grayson v Mich State Bd of Accountancy*, 27 Mich App 26, 34; 183 NW2d 424 (1970). In this way, Const 1963, art 9, § 23 and FOIA share the common goal of promoting transparency and "facilitat-[ing] the public's understanding of the operations and activities of government." *Detroit Free Press, Inc v Dep't of Consumer & Indus Servs*, 246 Mich App 311, 315; 631 NW2d 769 (2001) (discussing FOIA).

At the time this text was ratified, the term "financial" was defined as "of or relating to money and its use and distribution" and "record" was defined as "an official document that records the actions of a public body or officer." *Webster's New Collegiate Dictionary* (1973). "Report" means "a usu[ally] detailed account or statement." *Id*. A tax credit agreement like the one here may well fall within these terms. It certainly

relates "to money and its use and distribution." And the agreement itself—a binding legal contract between a public body and a corporation—might be considered the "official document that records the action of" defendant, a public body, or an "account or statement" of the body's financial transactions. Through the agreement, defendant extended billions of dollars of tax credits to GM, thereby allowing GM to reduce its tax liability or claim refunds. See MCL 208.1431(1) (providing that the tax credits may be claimed "against" tax liability); MCL 208.1431(5) ("If the credit allowed under this section exceeds the tax liability of the taxpayer for the tax year, that portion of the credit that exceeds the tax liability of the taxpayer shall be refunded.");[4] see generally *Stege v Dep't of Treasury*, 252 Mich App 183, 194; 651 NW2d 164 (2002) ("[Tax] credits are applied *to* tax liability, if any."). Because the agreement involved the amount of taxes due to the state or direct distributions from the state's coffers, the agreement arguably concerned "public moneys" under Const 1963, art 9, § 23. Cf. *United States v Hoffman*, 901 F3d 523, 537 (CA 5, 2018) ("Tax credits are . . . the functional equivalent of government spending programs."). Thus, a strong argument could be made that the agreement is a "financial record[]" or "other report[] of public moneys . . . ." If so, then the Constitution would require it to be made public. To the extent MCL 125.2005 exempted such agreements from disclosure, the statute would be unconstitutional.

To avoid the doubts raised by defendant's interpretation, the constitutional-doubt canon would require us to adopt any other construction of the statute that is " 'fairly possible.' " *Workman*, 404 Mich at 508, quoting

[4] These provisions have since been repealed, but only with respect to tax years that begin after December 31, 2031. See 2019 PA 90.

Ashwander, 297 US at 348. Here, a saving construction of the statute, under which the agreement must be disclosed in full, is not only fairly possible but is plainly required by the ordinary meaning of MCL 125.2005. We therefore hold that the agreement falls squarely within the terms of MCL 125.2005(11). It does not constitute "financial or proprietary information" protected by the FOIA exemption in MCL 125.2005(9). Consequently, it is subject to disclosure under FOIA.

IV. CONCLUSION

For the reasons above, we conclude that MCL 125.2005(11) requires defendant to disclose an unredacted version of the tax credit agreement containing the "tax credit cap" of the tax credits awarded to GM under the MEGA Act in response to plaintiff's FOIA request. Therefore, we reverse the Court of Appeals judgment and remand to the Court of Claims for further proceedings not inconsistent with this opinion.

MCCORMACK, C.J., and ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, CAVANAGH, and WELCH, JJ., concurred.

McMASTER v DTE ENERGY COMPANY

Docket No. 162076. Argued January 12, 2022 (Calendar No. 2). Decided July 1, 2022.

Dean McMaster brought a negligence action in the Oakland Circuit Court against DTE Energy Company, Ferrous Processing and Trading Company (Ferrous), and DTE Electric Company (DTE), seeking compensation for injuries he sustained when a metal pipe fell out of a scrap container and struck him in the leg. DTE, the shipper, contracted with Ferrous to sell scrap metal generated by its business. As part of the deal, Ferrous placed its large metal roll-off containers at various DTE facilities, and DTE filled the containers with pieces of scrap metal. Ferrous, in turn, subcontracted with P&T Leasing Company (P&T), the carrier, to transport the containers between DTE and Ferrous. McMaster worked as a truck driver for P&T; he picked up containers from DTE and transported them to a Ferrous scrap yard. In October 2014, McMaster arrived at a DTE facility to drop off an empty container and pick up one that DTE had loaded. McMaster inspected the container and saw a large blue steel pipe, approximately the length of the container's width, lying parallel to and up against the back door of the container. McMaster secured the container to his trailer and headed to Ferrous's facility. At the Ferrous scrap yard, McMaster drove to the dumping location as instructed by Ferrous's inspector. He began the typical process of dumping the scrap by getting out of his truck and walking to the back of the trailer that held the container. As was customary, McMaster edged open the container door to ensure that no materials fell out. When nothing fell out, he proceeded to pull the safety chain to fully open the door. After about five minutes, the inspector determined that the scrap should be placed in a different area. McMaster then began to walk toward the front of the truck. At that point, the pipe fell out of the container, hitting McMaster in the back of his left leg and ultimately resulting in a below-the-knee amputation. McMaster brought this action, alleging negligent loading and failure to warn of improper loading. To support his theory, McMaster retained trucking industry expert Larry Baareman, who testified that the orientation of the blue pipe parallel to and up against the container door was hazardous. DTE

and Ferrous moved for summary disposition, and the trial court, Cheryl A. Matthews, J., granted the motion as to DTE but denied the motion as to Ferrous. McMaster settled with Ferrous and appealed with regard to DTE. The Court of Appeals, JANSEN, P.J., and METER and STEPHENS, JJ., affirmed in an unpublished per curiam opinion issued November 8, 2018 (Docket No. 339271) (*McMaster I*), reasoning that DTE did not have a duty to warn of or protect McMaster from a known danger, relying on the open and obvious danger doctrine. McMaster sought leave to appeal in the Supreme Court, and the Supreme Court peremptorily vacated Part III of the opinion and remanded the case to the Court of Appeals for consideration of DTE's legal duty under the law of ordinary negligence. 504 Mich 967 (2019). On remand, the Court of Appeals again affirmed the trial court in an unpublished per curiam opinion issued July 2, 2020 (Docket No. 339271) (*McMaster II*), this time reasoning that Michigan's adoption of federal motor carrier safety regulations at MCL 480.11a of the Motor Carrier Safety Act (the MCSA), MCL 480.11 *et seq*., abrogated DTE's common-law duty to McMaster or, in the alternative, that the "shipper's exception" set forth in *United States v Savage Truck Line, Inc*, 209 F2d 442, 445 (CA 4, 1953), applied to bar McMaster's claim. McMaster again sought leave to appeal in the Supreme Court, and the Supreme Court granted the application. 507 Mich 958 (2021).

In a unanimous opinion by Justice CAVANAGH, the Supreme Court *held*:

Michigan's adoption of the federal motor carrier safety regulations did not abrogate the common-law duty of care shippers owe to carriers; however, under Michigan common law and consistently with the shipper's exception, a shipper responsible for loading cargo is not liable in negligence for a defect in loading that is apparent to the carrier or its agents, but is instead only liable if the defect is hidden. Accordingly, summary disposition for DTE was affirmed; there was no genuine issue of material fact—DTE was not liable to McMaster because, even assuming that DTE was negligent in how it loaded the container, the defect was not hidden given McMaster's admission that he had seen the pipe's position in the container before he transported it and when he cracked the container door open after transport. Further, McMaster's theory that the pipe's placement on top of concealed materials was a latent defect lacked evidentiary support.

1. The MCSA adopted into Michigan law the federal motor carrier safety regulations under 49 CFR 392.9. The MCSA contains no unequivocal statement that the common law has been

abrogated. The Court of Appeals erroneously concluded that the MCSA occupied the field of discernable duties. While the MCSA describes the duties of carriers and drivers in detail, the MCSA does not define the duties of shippers as to their responsibility for loading cargo and therefore does not occupy the field of duties owed by shippers. The Court of Appeals' reasoning was also inconsistent with the underlying premise that the shipper owes a duty of reasonable care at common law. To the extent that the Court of Appeals' reasoning suggested that duties of shippers and carriers to ensure safe transport could not overlap, it failed to consider Michigan's comparative-fault system, in which one party's failure to use ordinary care may reduce the other party's liability without wholly absolving them of it. Accordingly, the MCSA did not repeal the common law, either explicitly or through occupation of the field.

2. The shipper's exception set forth in *Savage*, 209 F2d at 445, was formally adopted: when the shipper assumes the responsibility of loading, the general rule is that it becomes liable for the defects that are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier, but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper. The *Savage* rule properly delineates the duties of shippers and carriers and is consistent with Michigan's common law, Michigan's comparative-fault regime, and the MCSA. The rule is also consistent with considerations governing whether a legal duty exists, including foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, the policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach. Given the responsibilities outlined in the MCSA, the *Savage* rule properly recognizes that a carrier and its drivers are generally in the best position to foresee harm, with limited exceptions, such as latent defects. The shipper is in the best position to know of latent defects caused while the goods were within its exclusive control. The rule also accords with Michigan common law in that a common carrier is the default insurer of damages to goods. Further, the rule is consistent with the federal regulations codified in the MCSA and reflects the balance of responsibilities in the trucking industry. Adoption of the *Savage* rule was not a wholesale adoption of *Savage* and its discussion of the concepts of contributory negligence. The adopted rule does not allow a shipper to wholly escape liability, as might be possible under a contributory-negligence framework. Instead, the shipper's exception defines when liability will attach to the

shipper. A shipper may be liable for negligent loading only when it assumes responsibility for loading and there is a latent defect. Moreover, even in circumstances under which the carrier has some degree of fault, the shipper may still be held liable. In other words, the carrier's negligence does not extinguish liability for the shipper, but the jury could reduce the recovery amount when allocating comparative fault. Such a state of events is exactly what is contemplated by a comparative-fault system—multiple, potentially overlapping duties, with only some breaches giving rise to liability.

3. DTE was properly granted summary disposition because there existed no genuine issue of material fact. To establish a prima facie case of negligence, a plaintiff must prove the existence of a legal duty, the defendant's failure to exercise ordinary care in the performance of that duty, and harm proximately caused by the breach of that duty. In this case, DTE owed McMaster a duty of reasonable care, and Michigan's adoption of the federal motor carrier safety regulations at MCL 480.11a did not abrogate that duty. Further, under the adopted rule, liability for a shipper that is responsible for loading may arise only if there is a latent defect. McMaster's theory of liability was that the blue pipe was improperly loaded parallel to the back of the container. But even assuming that it was negligent to load the pipe in this manner, the placement of the pipe was not a latent defect. McMaster admitted in his deposition that during his safety inspections he saw that the large blue pipe was loaded such that it was parallel to and up against the rear door of the container. He also testified that the position of the pipe did not cause him any concern at that time. Finally, McMaster testified that when he began the unloading process at the Ferrous facility, he cracked open the rear door of the container to see whether any material would fall out and again observed the blue pipe in the back of the container. Because the placement of the pipe that caused the injury was readily observable to McMaster—and, in fact, was observed by McMaster—no reasonable jury could conclude that DTE breached its duty to him. McMaster's additional argument —that the fact that the pipe was loaded on top of other concealed materials was a latent defect that made the pipe more susceptible to rolling out of the container—was too speculative to defeat summary disposition.

Affirmed on alternate grounds.

COMMON LAW — NEGLIGENCE — SHIPPERS AND CARRIERS — DUTY OF CARE — ADOPTION OF THE "SHIPPER'S EXCEPTION."

MCL 480.11a of the Motor Carrier Safety Act, MCL 480.11 *et seq*., adopted into Michigan state law the federal motor carrier safety regulations under 49 CFR 392.9; MCL 480.11a did not abrogate the common-law duty of care shippers owe to carriers; under Michigan common law, consistently with the "shipper's exception" in *United States v Savage Truck Line, Inc*, 209 F2d 442, 445 (CA 4, 1953), a shipper responsible for loading cargo is not liable in negligence for a defect in loading that is apparent to the carrier or its agents, but is instead only liable if the defect is hidden.

Fieger, Fieger, Kenney & Harrington PC (by *Geoffrey N. Fieger* and *Robert Kamenec*) for Dean McMaster.

Cummings McClorey Davis & Acho, PLC (by *Joel B. Ashton*) and *Jacobs and Diemer, PC* (by *Timothy A. Diemer*) for DTE Electric Company.

CAVANAGH, J. This case concerns the duties of shippers, common carriers, and drivers in the trucking industry. The issue presented is whether and when shippers may be held liable for damage to persons and property. The Court of Appeals determined that the common-law duty of a shipper was abrogated by Michigan's passage of MCL 480.11a, which adopted the federal motor carrier safety regulations as part of the Motor Carrier Safety Act (the MCSA), MCL 480.11 *et seq*. We disagree and hold that the common-law duty of care owed by a shipper to a driver was not abrogated by MCL 480.11a. As an issue of first impression, we adopt the "shipper's exception" or "*Savage* rule"[1] to guide negligence questions involving participants in the trucking industry, as this rule is consistent with our laws—including Michigan's comparative-fault paradigm. A shipper responsible for loading cargo may be held liable for injury to persons or property only for hidden defects—those not readily observable by the

[1] *United States v Savage Truck Line, Inc*, 209 F2d 442, 445 (CA 4, 1953).

carrier or its agents. See *United States v Savage Truck Line, Inc*, 209 F2d 442, 445 (CA 4, 1953). Finally, we apply this rule and affirm, on alternate grounds, the grant of summary disposition to DTE Electric Company (DTE) because there exists no genuine issue of material fact that DTE did not breach its duty to plaintiff.

I. FACTS AND PROCEDURAL HISTORY

This is a negligence action seeking compensation for injuries caused when a metal pipe fell out of a scrap container, striking plaintiff, Dean McMaster, in the leg. Defendant DTE, the shipper, contracted with Ferrous Processing and Trading Company (Ferrous) to sell scrap metal generated by its business. As part of the deal, Ferrous placed its large metal roll-off containers at various DTE facilities, and DTE filled the containers with pieces of scrap metal. Ferrous, in turn, subcontracted with P&T Leasing Company (P&T), the carrier, to transport the containers, or boxes, between DTE and Ferrous. McMaster worked as a truck driver for P&T doing just that—picking up containers from DTE and transporting them to a Ferrous scrap yard.

In October 2014, McMaster arrived at DTE's Belle River Power Plant to drop off an empty container and pick up one that had been loaded by DTE. McMaster inspected the container and saw a large blue steel pipe, approximately the length of the box's width, lying parallel to and up against the back door of the container. He observed that the cargo consisted of heavy materials below the top of the box and determined that no tarp was necessary for the trip. McMaster then used his trailer's hydraulic system to lift the roll-off container onto the trailer, secured the container to the trailer, and headed to Ferrous's Pontiac facility.

At the Ferrous scrap yard, McMaster had the truck weighed, drove to the inspection area, and then drove to the dumping location as instructed by Ferrous's inspector. He began the typical process of dumping the scrap by getting out of his truck and walking to the back of the trailer that held the container. As was customary, McMaster kept the hydraulics running while he edged open the container door about 12 inches to ensure that no materials fell out. When nothing fell out, he proceeded to pull the safety chain to fully open the door. McMaster observed that the majority of the load contained I-beams. With the Ferrous inspector and another Ferrous employee, McMaster then stood 8 or more feet behind and in view of the open container to discuss where to dump its contents. After about five minutes, the inspector determined that the scrap should be placed in a different area. McMaster then began to walk toward the front of the truck to turn off the hydraulics, which wouldn't be needed until the container was moved to the new area for dumping. At that point, the pipe fell out of the container, hitting McMaster in the back of his left leg and ultimately resulting in a below-the-knee amputation.

In June 2015, McMaster sued DTE and Ferrous for negligence, alleging negligent loading and failure to warn of such improper loading. To support his theory, McMaster retained trucking industry expert Larry Baareman, who testified at a discovery deposition that DTE loaded the scrap in a dangerous manner. More specifically, Baareman opined that the orientation of the blue pipe parallel to and up against the container door was hazardous. Further, Baareman testified that the pipe being loaded on top of other material that was concealed underneath was a hidden defect that made

the pipe more susceptible to falling off the truck. Baareman concluded that this positioning could have caused the pipe to roll off.

DTE and Ferrous moved for summary disposition under MCR 2.116(C)(10). The trial court granted DTE's motion, stating:

> After considering the legal arguments made by counsel and in looking at the evidence in the light most favorable to the plaintiff, the Court concludes that there's no genuine issue of material fact that exists that would allow reasonable minds to differ in concluding that DTE did not breach the duty of reasonable care owed to plaintiff.
>
> Further, the Court concludes that plaintiff has not sustained his burden as to causation and there's no genuine issue of any material fact remaining as to the elements of negligence analysis.

The trial court denied the motion against Ferrous, and the case continued; McMaster ultimately settled with Ferrous, who is not a party to this appeal. McMaster appealed the final order disposing of the case, and the Court of Appeals affirmed. *McMaster v DTE Energy Co*, unpublished per curiam opinion of the Court of Appeals, issued November 8, 2018 (Docket No. 339271) (*McMaster I*). The Court of Appeals reasoned that DTE did not have a duty to warn of or protect McMaster from a known danger, relying on the open and obvious danger doctrine. *Id*. at 3-4. McMaster appealed in this Court. Because the Court of Appeals erroneously applied open-and-obvious principles to an ordinary-negligence case, we peremptorily vacated Part III of the opinion and remanded for "application of the law of ordinary negligence and for consideration of the issues raised by the parties on the question of the defendant's legal duty." *McMaster v DTE Electric Co*, 504 Mich 967, 967 (2019).

On remand, the Court of Appeals again affirmed the trial court, this time reasoning that Michigan's passage of MCL 480.11a abrogated DTE's common-law duty or, in the alternative, that the shipper's exception or *Savage* rule[2] applied to bar McMaster's claim. *McMaster v DTE Energy Co*, unpublished per curiam opinion of the Court of Appeals, issued July 2, 2020 (Docket No. 339271) (*McMaster II*), pp 5-6.

McMaster appealed, and our June 2021 order granting leave asked the parties to address "(1) whether the enactment of MCL 480.11a abrogated the appellee's common-law duty of ordinary care with respect to loading cargo for transport by a commercial motor vehicle operated by the appellant; and (2) whether the appellee owed a duty to the appellant under the 'shipper's exception.' See *United States v Savage Truck Line, Inc*, 209 F2d 442, 445 (CA 4, 1953)." *McMaster v DTE Energy Co*, 507 Mich 958, 958 (2021).

II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). The court must consider all evidence submitted by the parties in the light most favorable to the party opposing summary disposition. *Id*. Only when the record does not leave open an issue upon which reasonable minds might differ may a motion under MCR 2.116(C)(10) be granted. *Id*. On appeal, the trial court's determination on a motion for summary disposition is reviewed de novo. *Id*. at 159. So too are issues of statutory interpretation, including whether the common law has been abrogated by stat-

[2] *Savage*, 209 F2d at 445.

ute. *Murphy v Inman*, 509 Mich 132, 143; 983 NW2d 354 (2022).

II. ANALYSIS

To establish a prima facie case of negligence, a plaintiff must prove the existence of a legal duty, the defendant's failure to exercise ordinary care in the performance of that duty, and harm proximately caused by the breach of that duty. *Clark v Dalman*, 379 Mich 251, 260; 150 NW2d 755 (1967). Duty and its breach are the focus of our inquiry in this case.

A. COMMON-LAW ABROGATION

Our first question is whether the MCSA supplanted the common-law duty of care owed by a shipper such as DTE to a driver such as McMaster in the loading of cargo for transport. We conclude that it did not.

During its first review of the case, the Court of Appeals determined that McMaster, as an employee of a subcontractor, was owed a duty of reasonable care by DTE. *McMaster I*, unpub op at 3 (describing "the duty 'imposed by law' " as " '[t]he general duty of a contractor to act so as not to unreasonably endanger the well-being of employees of either subcontractors or inspectors, or anyone else lawfully on the site of the project' "), quoting *Clark*, 379 Mich at 261-262. However, on remand the Court of Appeals determined that the common-law duty of reasonable care had been abrogated by the Legislature's adoption of the MCSA. *McMaster II*, unpub op at 5. McMaster argues that the common-law duty of ordinary care coexists with the MCSA and that there was no abrogation. DTE argues that there is no common-law duty, but regardless, that any duty was abrogated by the MCSA.

As a threshold matter, we agree with McMaster and the Court of Appeals that there is a common-law duty of ordinary care in this context. It is well established that "every person engaged in the prosecution of any undertaking [owes] an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark*, 379 Mich at 261. "This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another." *Id*. See also *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 169-170; 809 NW2d 553 (2011). As the Court of Appeals correctly observed, under these facts, with a subcontractor, McMaster, on DTE's premises with its permission, DTE owed McMaster a duty of reasonable care. The question that remains is whether the MCSA abrogated this common-law duty.

As we most recently discussed in *Murphy*, several principles guide whether this Court will deem the common law abrogated by statute:

> Having concluded that corporate directors owe their shareholders certain fiduciary duties under this state's common law, this Court, as "the principal steward of Michigan's common law," [*Price v High Pointe Oil Co, Inc*, 493 Mich 238, 258; 828 NW2d 660 (2013) (quotation marks and citation omitted),] must determine whether the Legislature abrogated these duties when it enacted the [Business Corporation Act, MCL 450.1101 *et seq*.]. "The common law remains in force until 'changed, amended or repealed.' " [*Velez v Tuma*, 492 Mich 1, 11; 821 NW2d 432 (2012), quoting Const 1963, art 3, § 7.] The Legislature may alter or abrogate the common law through its legislative authority. [*Rafaeli, LLC v Oakland Co*, 505 Mich 429, 473; 952 NW2d 434 (2020); Const 1963, art 4, § 1.] Yet the mere existence of a statute does not necessarily mean that the Legislature has exercised this authority. We

> presume that the Legislature "know[s] of the existence of the common law when it acts." [*Wold Architects & Engineers v Strat*, 474 Mich 223, 234; 713 NW2d 750 (2006).] Therefore, we have stated that "[w]e will not lightly presume that the Legislature has abrogated the common law" and that "the Legislature should speak in no uncertain terms when it exercises its authority to modify the common law." [*Velez*, 492 Mich at 11-12 (quotation marks and citations omitted).] As with other issues of statutory interpretation, the overriding question is whether the Legislature intended to abrogate the common law. [*Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) ("Whether a statutory scheme . . . preempts the common law is a question of legislative intent.").] [*Murphy*, 509 Mich at 153 & n 47.]

The MCSA is designed, *inter alia*, "to promote safety upon highways open to the public by regulating the operation of certain vehicles" and "to provide consistent regulation of these areas . . . ." 1963 PA 181, title. As is evident from its title, the MCSA addresses safety in the Michigan trucking industry. In furtherance of those goals, the MCSA adopted several provisions of Title 49 of the Code of Federal Regulations. MCL 480.11a. Germane to our purposes, the MCSA adopted into Michigan state law the federal motor carrier safety regulations under 49 CFR 392.9. MCL 480.11a(1)(b). 49 CFR 392.9 relates to the "[i]nspection of cargo, cargo securement devices and systems" and describes responsibilities for motor carriers and their drivers with regard to the cargo they transport. The statute imposes certain duties on the driver of the cargo to ensure that the cargo is properly secured through inspection and reexamination during the course of the trip. Those duties may be excused under extenuating circumstances, such as a directive not to inspect or impracticability. 49 CFR 392.9 provides, in relevant part:

(a) *General*. A driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a commercial motor vehicle unless—

(1) The commercial motor vehicle's cargo is properly distributed and adequately secured as specified in §§ 393.100 through 393.136 of this subchapter.

* * *

(b) *Drivers of trucks and truck tractors*. Except as provided in paragraph (b)(4) of this section, the driver of a truck or truck tractor must—

(1) Assure himself/herself that the provisions of paragraph (a) of this section have been complied with before he/she drives that commercial motor vehicle;

(2) Inspect the cargo and the devices used to secure the cargo within the first 50 miles after beginning a trip and cause any adjustments to be made to the cargo or load securement devices as necessary, including adding more securement devices, to ensure that cargo cannot shift on or within, or fall from the commercial motor vehicle; and

(3) Reexamine the commercial motor vehicle's cargo and its load securement devices during the course of transportation and make any necessary adjustment to the cargo or load securement devices, including adding more securement devices, to ensure that cargo cannot shift on or within, or fall from, the commercial motor vehicle. Reexamination and any necessary adjustments must be made whenever—

(i) The driver makes a change of his/her duty status; or

(ii) The commercial motor vehicle has been driven for 3 hours; or

(iii) The commercial motor vehicle has been driven for 150 miles, whichever occurs first.

(4) The rules in this paragraph (b) do not apply to the driver of a sealed commercial motor vehicle who has been ordered not to open it to inspect its cargo or to the driver

> of a commercial motor vehicle that has been loaded in a manner that makes inspection of its cargo impracticable.

As an initial matter, it is plain from the statute's text that the MCSA contains no unequivocal statement that the common law has been abrogated. In determining that the common law was nonetheless abrogated, the Court of Appeals compared the case to *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20; 780 NW2d 272 (2010). *McMaster II*, unpub op at 4-5. *Dawe* concerned whether a statute codifying a psychiatrist's duty to warn or protect third parties abrogated the psychiatrist's common-law special-relationship duty to protect their patients. *Dawe*, 485 Mich at 25. The lower court in *Dawe* had found that the statute at issue preempted the field on the mental health professional's duty to warn others. *Id*. But our Court rejected this analysis, holding that the psychiatrist's common-law duty was not completely abrogated because the statute in question only addressed one aspect of a psychiatrist's duties to patients. *McMaster II*, unpub op at 4. The Court of Appeals in this case distinguished *Dawe* on the basis that, unlike the many duties owed by a psychiatrist to their patient, no other tort duties flow from a shipper to a carrier and, therefore, the MCSA occupied the field of discernable duties. *Id*. at 4-5. But the MCSA addresses the duties of drivers, not shippers—so it cannot be said that the field of duties owed by a shipper has been occupied. The Court of Appeals' reasoning is also inconsistent with the underlying premise that the shipper owes a duty of reasonable care at common law.

The panel also made comparisons to *Velez*, in which we held that the Legislature did not intend to abolish the common-law setoff rule in joint and several liability medical malpractice cases. *Velez*, 492 Mich at 12.

This Court reasoned in *Velez* that despite the repeal of a statute acknowledging the common law, the legislation in question was silent as to the application of the common-law rule, and there was no conflict between the common law and legislation. *Id*. The Court of Appeals determined that unlike in *Velez*, there were no other statutes addressing the manner of loading cargo or setting forth a relevant duty. *McMaster II*, unpub op at 5. Again, this reasoning fails to acknowledge the panel's own premise that a common-law duty existed. It also puts the cart before the horse—searching for an intent to maintain the common law when the critical inquiry is whether there was an intent to abrogate it.

To the extent that the Court of Appeals' reasoning suggests that duties of shippers and carriers to ensure safe transport cannot overlap, it fails to consider Michigan's comparative-fault system, in which one party's failure to use ordinary care may reduce the other party's liability without wholly absolving them of it. See *Placek v Sterling Hts*, 405 Mich 638; 275 NW2d 511 (1979); MCL 600.2957. Nothing in the common law or the MCSA indicates that the duties of shippers and carriers are a zero-sum game such that if one has the duty to ensure safe transport, the other does not.

DTE argues that the highly detailed and comprehensive course of conduct set forth in the MCSA supports a reading of abrogation. See *Millross v Plum Hollow Golf Club,* 429 Mich 178, 183; 413 NW2d 17 (1987) (providing that legislative intent to replace the common law may be found "where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions"). In a similar vein, the Court of Appeals suggested that the MCSA occupied the field of duties owed by a shipper to a

carrier. *McMaster II*, unpub op at 5. However, while the MCSA describes the duties of carriers and drivers in detail, the MCSA does not define the duties of shippers as to their responsibility for loading cargo. The shipper's role within the universe of the trucking industry is, of course, contemplated by the MCSA, which defines a "shipper" such as DTE, 49 CFR 390.5, and prohibits shippers from coercing a driver to haul an unsafe load in violation of the regulations, 49 CFR 386.12(c); 49 CFR 390.6. But the MCSA, which regulates "all employers, employees, and commercial motor vehicles that transport property or passengers in interstate commerce," 49 CFR 390.3(a), does not occupy the entire field of liability questions regarding shippers in this industry. It is not fully comprehensive on the question of negligence because it does not speak to the shipper's duties in loading cargo—at all. Legislative silence as to the shipper's duties in this realm is not indicative of abrogation. In sum, the MCSA did not repeal the common law, either explicitly or through occupation of the field.

B. CONTOURS OF THE DUTY OWED

Having decided that the shipper's common-law duty was not abrogated by the adoption of the MCSA, we address the contours of the shipper's common-law duty of care to the carrier and its drivers. We take this opportunity to formally adopt the "shipper's exception" as described in *Savage*, 209 F2d at 445:

> When the shipper assumes the responsibility of loading, the general rule is that [it] becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.

We find that the *Savage* rule properly delineates the duties of shippers and carriers and that this rule is consistent with our common law, with our comparative-fault regime, and with the MCSA.

In *Savage*, the defendant was a common carrier that had contracted with the federal government to transport a truck with a cargo of six airplane engines in cylindrical containers. *Id*. at 443. At some point during the transport, the cylinders shifted, and one fell off the truck, killing another motorist. *Id*. The way that the government's agents loaded the cylinders had caused the cargo to jostle while being transported. *Id*. at 443-444. On appeal, the government argued that despite the finding of negligence on its part in loading the truck, it was still entitled to recover damages to the engines from the defendant because of the liability owed by a common carrier to a shipper. *Id*. at 444.

The United States Court of Appeals for the Fourth Circuit recognized that the "common law liability of a common carrier is that of an insurer for loss or damage of goods in transit . . . ." *Id*. at 445. But the carrier's liability does not reach "losses arising from acts of God, acts of the public enemy, the inherent nature of the goods, and acts of the shipper." *Id*. The court noted that "the duty rests upon the carrier to see that the packing of goods received by it for transportation is such as to secure their safety," and that the duty of every common carrier is "to furnish adequate facilities for the transportation of property and to establish and enforce just and reasonable regulations and practices relating to the manner of packing and delivering goods for transportation[.]" *Id*. This duty was derived from federal regulations, which stated at the time that "the load on every motor vehicle transporting property shall be secured in order to prevent unsafe shifting of the load

and that no motor vehicle shall be driven unless the driver shall have satisfied himself that all means of fastening the load are securely in place." *Id*. The Fourth Circuit concluded that "[t]he primary duty as to the safe loading of property is therefore upon the carrier." *Id*. The court went on to explain:

> When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper. This rule is not only followed in cases arising under the federal statutes by decisions of the federal courts but also for the most part by the decisions of the state courts. [*Id*.]

The court observed that both parties were negligent: the government's agents failed to secure the engines properly when loading the cargo, and the carrier's agents failed to use reasonable care in accepting the load as loaded as well as failed to operate the vehicle with ordinary care in light of the known deficiencies in loading and securing the cargo. *Id*. at 446. The court reasoned, "Obviously it was [the driver's] duty, having this knowledge, to drive with particular attention to the speed of the vehicle but he conducted himself as if conditions were normal and the catastrophe ensued." *Id*. Thus, under the rule it set out, the carrier was not entitled to recover from the government for damages to his truck, but the government was entitled to recover from the carrier for the damage to its cargo. *Id*.

The default rule, then, is that a carrier and its drivers will generally shoulder responsibility for issues stemming from the loading of cargo. Only when the shipper assumes the responsibility of loading and there are hidden defects may the shipper be held responsible—even if the shipper negligently loads the

cargo. The "shipper's exception" initially pertained only to the damage of goods during shipment but has been extended to the personal-injury context in which employees or contractors of carriers are injured because of allegedly negligent loading. See *Decker v New England Pub Warehouse, Inc*, 749 A2d 762, 767; 2000 ME 76 (2000).

The Court of Appeals held, in the alternative to common-law abrogation, that the "shipper's exception" applied. *McMaster II*, unpub op at 5. The panel reached this conclusion in part because it presumed that the Legislature knew about the *Savage* case, which preceded Michigan's enactment of the MCSA. *Id*. While we agree that the *Savage* rule defines the scope of the duty question, we disagree that the mere existence of federal common law from the United States Court of Appeals for the Fourth Circuit bears on the question of legislative intent with regard to the continued vitality of Michigan common law. We do not impute knowledge of federal common law to the Michigan Legislature. Nevertheless, we hold that the *Savage* rule is consistent with preexisting Michigan law, including our comparative-fault system.

The *Savage* rule accords with our recognition of the liability of common carriers at common law. A common carrier is generally liable for damages to goods, with narrow exceptions including the "fault of the owner." *Black v Ashley*, 80 Mich 90, 96; 44 NW 1120 (1890). In other words, the common carrier is the default insurer. *Id*. The descriptions of the "fault of the owner" in *Black*, *id*., and the "acts of the shipper" in *Savage*, 209 F2d at 445, indicate a shared understanding that the default rule contained narrow exceptions reflecting who had control of the goods and was in a better position to control for risk. The shipper's exception—

limiting the scope of the shipper's fault to latent defects—is a natural extension of this shared understanding.

The exception is also consistent with considerations governing whether a legal duty exists, including "foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and . . . the burdens and consequences of imposing a duty and the resulting liability for breach." *Brown v Brown*, 478 Mich 545, 553; 739 NW2d 313 (2007) (cleaned up). Given the responsibilities outlined in the MCSA, the *Savage* rule properly recognizes that a carrier and its drivers are generally in the best position to foresee harm, with limited exceptions. One such limited exception is latent defects; the shipper is in the best position to know of latent defects caused while the goods were within its exclusive control. This refinement of when a duty will give rise to liability reflects the unique allocation of responsibility in this specialized setting. See *Decker*, 749 A2d at 766-767 ("The *Savage* rule simply extends the industry's reasonable understanding to negligence suits involving carriers and shippers.").

Further, the rule is consistent with the federal regulations codified by Michigan in the MCSA. In turn, these regulations reflect the balance of responsibilities in the trucking industry. For example, the onus is generally on the carrier's driver to ensure that the cargo is secured and distributed properly and to perform safety checks throughout the trip. 49 CFR 392.9. The driver may refuse to accept a load from a shipper if they believe that the cargo is dangerously loaded. 49 CFR 392.9(b)(1). In addition, the regulations excuse a driver from such responsibilities if the driver is unable

to inspect the cargo, such as if the container is sealed or if the manner of loading makes inspection impracticable. 49 CFR 392.9(b)(4). These exemptions are wholly consistent with shifting the responsibility for latent defects to shippers, because a driver would be unable to detect them.

McMaster argues that the *Savage* rule is inconsistent with our comparative-fault system.[3] To be sure, the *Savage* court applied its holding in the context of a contributory-negligence framework. But our adoption of the *Savage* rule is not a wholesale adoption of *Savage* and its discussion of the concepts of contributory negligence. The rule that we now adopt does not allow a shipper to wholly escape liability, as might be possible under a contributory-negligence framework. Instead, the shipper's exception defines when liability will attach to the shipper. A shipper may be liable for negligent loading only when there is a latent defect. Moreover, even in circumstances under which the carrier has some degree of fault, the shipper may still be held liable. In other words, the carrier's negligence does not extinguish liability for the shipper, but the jury could reduce the recovery amount when allocating comparative fault. Such a state of events is exactly what is contemplated by a comparative-fault system—multiple, potentially overlapping duties, with only

[3] We adopted the doctrine of comparative negligence in *Placek*, 405 Mich 638, and the Legislature later codified the state's modified comparative-negligence scheme, MCL 600.2957. After the jury has determined that a party is liable for damages in a tort action, the comparative-fault assessment kicks in for the jury to apportion liability on the basis of the relative fault of the parties. MCL 600.2957; see also M Civ JI 11.01. In contrast to our former contributory-negligence scheme, which we cast aside in *Placek*, an at-fault party generally may not escape liability by pointing to the plaintiff's own negligence unless the jury determines that the plaintiff's percentage of fault surpasses that of the at-fault party. MCL 600.2959; M Civ JI 11.01.

some breaches giving rise to liability. Notably, many other states with comparative-fault regimes have also adopted the "shipper's exception." See, e.g., *Decker*, 749 A2d 762; *Wilkes v Celadon Group, Inc*, 177 NE3d 786 (Ind, 2021); *Smart v American Welding & Tank Co, Inc*, 149 NH 536; 826 A2d 570 (2003). While not binding, these decisions from our sister jurisdictions have persuasive value.

In summary, we adopt the shipper's exception because it is consistent with our common law, the MCSA, and our system of comparative fault. A shipper owes a common-law duty to use reasonable care while loading cargo and will be liable for injury to persons or property for defects that are not readily discernible by the carrier. The carrier still owes a duty to inspect and correct any defects that it can perceive, even if the shipper was the one who initially caused the defect. When both the shipper and the carrier have acted negligently by breaching their respective duties and proximately causing damage, Michigan's comparative-fault scheme requires a jury to apportion fault between them.

IV. APPLICATION

Having outlined the nature and extent of DTE's duty to McMaster, we next determine whether McMaster has raised a genuine issue of material fact sufficient to survive a motion for summary disposition. We hold, on the basis of the record presented, that there exists no genuine issue of material fact that the accident was caused by a latent defect and, therefore, that DTE was properly granted summary disposition.

McMaster's theory of liability was that the blue pipe was improperly loaded parallel to the back of the container. But even assuming that it was negligent to

load the pipe in this manner, as we must when viewing the evidence in the light most favorable to McMaster, the placement of the pipe was not a latent defect. McMaster admitted in his deposition that during his safety inspections he saw that the large blue pipe was loaded such that it was parallel to and up against the rear door of the container. McMaster testified that he had climbed up a ladder to look inside the container while still at the DTE facility and could see that the pipe was "[i]n the very back up against the back door." He also testified that the position of the pipe did not cause him any concern at that time. Finally, McMaster testified that when he began the unloading process at the Ferrous facility, he cracked open the rear door of the container to see whether any material would fall out and again observed the blue pipe in the back of the container. Accordingly, because the placement of the pipe which caused the injury was readily observable to McMaster—and, in fact, was observed by McMaster—no reasonable jury could conclude that DTE breached its duty to him.

In addition, McMaster argues that the fact that the pipe was loaded on top of other concealed materials was a latent defect that made the pipe more susceptible to rolling out of the container. But this theory is too speculative to defeat summary disposition. When asked whether the material under the pipe played a role in the pipe rolling out of the container, McMaster's proposed expert, Larry Baareman, testified, "I can only say it could have." However, to defeat summary disposition, a plaintiff must do more than present evidence that the defendant's conduct possibly caused the injury. *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994) ("Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the

plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred."). Given this evidence, there is no genuine issue of material fact either that the allegedly defective loading of the blue pipe was latent or that DTE breached the duty it owed to McMaster.

V. CONCLUSION

We hold that the adoption of the federal motor carrier safety regulations at MCL 480.11a did not abrogate the common-law duty of care owed by shippers to carriers. Under Michigan common law, consistently with the "shipper's exception" discussed in *Savage*, a shipper is not liable in negligence for a defect in loading that is apparent to the carrier or its agents, but is instead only liable if the defect is hidden. *Savage*, 209 F2d at 445. This duty is consistent with our common law, with our comparative-fault system, and with the everyday experiences in the trucking industry as reflected in the MCSA. Applying this rule to the facts of this case, McMaster has failed to raise a genuine issue of material fact that there was a latent defect that caused his injuries. Therefore, we affirm the Court of Appeals' determination that the trial court's entry of summary disposition to DTE was proper.

MCCORMACK, C.J., and ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, and WELCH, JJ., concurred with CAVANAGH, J.

CHAMPINE v DEPARTMENT OF TRANSPORTATION

Docket No. 161683. Argued on application for leave to appeal December 8, 2021. Decided July 6, 2022.

Norman Champine brought an action against the Department of Transportation in the Court of Claims alleging that defendant had breached its duty to maintain I-696. Plaintiff was driving on I-696 in Macomb County when a large piece of concrete dislodged from the road and crashed through the windshield of his car, causing serious injuries. The police notified defendant of the incident on the day it occurred, and plaintiff also sent notice to defendant of the incident. Plaintiff later mailed an amended notice to defendant along with the police report from the incident. Plaintiff timely filed a complaint in the Court of Claims. Plaintiff served defendant with a copy of the complaint, but plaintiff did not file either the notice or the amended notice in the Court of Claims. Defendant moved for summary disposition, arguing that plaintiff had failed to meet the notice requirements of MCL 691.1404 before bringing suit. MCL 691.1404 states that, as a condition to any recovery for injuries sustained because of a defective highway, the injured person must serve notice on the responsible governmental agency of the occurrence of the defect and injury, specifying the exact location and nature of the defect, the injury sustained, and known witnesses, and when the state is the responsible governmental agency, the notice shall be filed in triplicate with the clerk of the Court of Claims. The Court of Claims, COLLEEN A. O'BRIEN, J., granted summary disposition for defendant on the basis that plaintiff had failed to provide proper notice under MCL 691.1404. The court reasoned that plaintiff's separate notice to defendant was inadequate because it was not filed in the Court of Claims, the complaint itself could not serve as notice, and the complaint had not identified the exact location of the highway defect. Plaintiff appealed, and the Court of Appeals, CAMERON, P.J., and LETICA, J. (SHAPIRO, J., dissenting), affirmed in an unpublished per curiam opinion, holding that the filing of a complaint could not satisfy the statutory notice requirements. The Court of Appeals declined to address whether plaintiff also failed to adequately describe the location of the incident, even assuming plaintiff's complaint could serve as proper notice.

Plaintiff sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant plaintiff's application for leave to appeal or take other action. 507 Mich 935 (2021).

In an opinion by Justice BERNSTEIN, joined by Chief Justice MCCORMACK and Justices VIVIANO, CLEMENT, CAVANAGH, and WELCH, the Supreme Court, in lieu of granting leave to appeal, *held*:

Under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., state agencies have immunity from tort liability when engaged in the exercise of a governmental function, with certain exceptions—including the highway exception. Plaintiffs filing claims under the highway exception must comply with the notice requirements of MCL 691.1404. "Notice" is not defined by MCL 691.1404, so courts are permitted to consider its plain meaning as well as its placement and purpose in the statutory scheme. The plain meaning of the word "notice" in the context of the statute indicates only that the governmental agency must be made aware of the injury and the defect. The statute does not require advance notice beyond the filing of the complaint, and the Court of Appeals erred by holding otherwise. Plaintiff properly gave notice by timely filing his complaint in the Court of Claims. Nonetheless, the case had to be remanded to the Court of Appeals for that Court to address whether the complaint adequately specified the exact location and nature of the defect as required by MCL 691.1404(1).

Reversed and remanded.

Justice ZAHRA, dissenting, would have affirmed because plaintiff failed to comply with the GTLA. The GTLA expressly provides that claims against the state shall be brought in the manner provided in the revised judicature act (RJA), MCL 600.101 *et seq*. This language means that a highway-defect claim against the state must be separately authorized under the GTLA and brought in the manner provided in the RJA. The GTLA provides that the filing of a timely notice is required to file a claim under the RJA, regardless of when a plaintiff files their statutory claim. Specifically, MCL 691.1404(1) requires a plaintiff to serve notice on the governmental agency within 120 days of the injury, and MCL 691.1404(2) provides that when the defendant is the state, notice shall be filed in triplicate with the clerk of the Court of Claims. In this case, statutory notice was never properly filed. Justice ZAHRA disagreed that notice was not defined by the statute, noting that MCL 691.1404(1) defines notice by setting forth the required content of the notice, i.e., the notice must specify the exact location and nature of the defect, the injury, and the names of any

known witnesses. Additionally, MCL 691.1404(2) defines notice in terms of the place and manner of filing. These statutory provisions show that in order to comply with the statute, the notice must contain particular content and be filed in a particular place in a particular manner. The state's awareness of the injury and the defect does not authorize a claim to be filed under the RJA. Because plaintiff did not file a single document under the GTLA to authorize the filing of a claim under the RJA, plaintiff's claim could not be brought under the RJA.

TORTS — GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — NOTICE.

Plaintiffs seeking to recover pursuant to the highway exception to governmental immunity under the governmental tort liability act, MCL 691.1401 *et seq*., must comply with the notice requirements of MCL 691.1404; MCL 691.1404 requires the plaintiff to serve notice on the governmental agency of the occurrence of the injury and the highway defect; when the state is the governmental agency at issue, the statute requires that the notice be filed with the clerk of the Court of Claims; a plaintiff's complaint may serve as notice to the state under the statute if filed in the Court of Claims within the statutory period for providing notice because the plain meaning of the word "notice" in the context of the statute indicates only that the state must be made aware of the injury and the defect, and a complaint that otherwise meets the notice requirements of MCL 691.1404 is sufficient for this purpose.

Johnson Law, PLC (by *Christopher Patrick Desmond* and *Ven R. Johnson*) for Norman Champine.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, and *Philip L. Bladen*, Assistant Attorney General, for the Michigan Department of Transportation.

BERNSTEIN, J. This case concerns a negligence claim, governed by the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., brought against defendant under the highway exception to governmental immunity, MCL 691.1402(1). The specific question before us is whether plaintiff provided proper notice in

accordance with MCL 691.1404(2). We hold that notice was proper but find that a question still remains regarding whether plaintiff met the statutory requirement to provide a description of the "exact location" of the highway defect under MCL 691.1404(1). Accordingly, we reverse the judgment of the Court of Appeals and remand to that Court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On December 17, 2017, plaintiff was driving the posted speed limit on I-696 in Macomb County when a 20-pound chunk of concrete became dislodged from the road and smashed through the windshield of his car. Plaintiff sustained serious injuries to his head and face. According to plaintiff, this was at least the fourth time in which a motorist sustained injuries caused by the poor condition of the freeway on the same stretch of road in a six-month period.

The Warren Police Department took photographs of plaintiff's car and the bloody chunk of concrete that had smashed through the windshield. The police notified defendant of the incident on the same day that it occurred, and plaintiff sent a separate notice to defendant on December 28, 2017. Defendant acknowledged receipt of the notice on December 30, 2017. The notice stated:

> Please allow this letter to serve as notification pursuant to MCL 691.1404 of a highway defect. The location of the defect is the Hoover Road bridge over I-696 West ("overpass"), approximately above the third travel lane or the travel lane itself. Our client, Norman Champine, was operating his vehicle west on I-696 at approximately 1:45 p.m. on December 17, 2017, when a piece of concrete either from the overpass or dislodged from the roadway surface, came through his windshield. Mr. Champine

> sustained severe injuries, including fractures to his face, jaw, and orbital bones, loss of teeth, severe contusions to his face and right eye, and lacerations. We are unaware of any eye witnesses, but believe the incident was investigated by the Warren Police Department.

Plaintiff filed a complaint in the Court of Claims on February 6, 2018. In the complaint, plaintiff alleged that he was injured on a section of I-696 between Gratiot Avenue and Mound Road and that defendant had breached its duty to maintain the highway in reasonable repair so that it was reasonably safe and convenient for public travel under MCL 691.1402(1). On February 7, 2018, plaintiff mailed an amended notice to defendant and attached a police report about the incident. This notice alleged that the chunk of concrete came "from the roadbed" and explained that the precise location of the defect could not be determined with any more specificity because of the extremely poor condition of this stretch of highway, which plaintiff stated contained more than "one thousand" potholes. Finally, on March 26, 2018, plaintiff served defendant with a copy of the complaint. Notably, plaintiff did not file either the notice or the amended notice with the clerk of the Court of Claims, as required by MCL 691.1404, which states that if a suit is filed against the state government, the requisite notice must be "filed in triplicate with the clerk of the court of claims." MCL 691.1404(2).

Defendant moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff had failed to comply with the statutory notice requirements of MCL 691.1404 before bringing suit under the highway exception to governmental immunity. Defendant argued that because no notice was filed with the clerk of the Court of Claims within 120 days of the accident, plaintiff had failed to meet the statutory notice re-

quirement. Defendant then argued that none of plaintiff's pleadings gave proper notice because plaintiff had failed to describe the location of the accident with sufficient specificity. The Court of Claims granted defendant's motion for summary disposition, holding that a complaint could not serve as notice under MCL 691.1404(2). It also held that the notice was deficient because it failed to identify the exact location of the highway defect as required by MCL 691.1404(1).

Plaintiff appealed by right to the Court of Appeals. The Court of Appeals affirmed, agreeing with the Court of Claims that a complaint could not serve as notice. *Champine v Dep't of Transp*, unpublished per curiam opinion of the Court of Appeals, issued April 16, 2020 (Docket No. 347398). The Court of Appeals declined to address whether the complaint adequately identified the location of the defect.

Plaintiff timely sought leave to appeal in this Court. On April 28, 2021, we directed the clerk to schedule oral argument on the application. *Champine v Dep't of Transp*, 507 Mich 935 (2021).

II. STANDARD OF REVIEW

"The applicability of governmental immunity is a question of law that is reviewed de novo." *Ray v Swager*, 501 Mich 52, 61; 903 NW2d 366 (2017). We also review de novo a trial court's ruling on a motion for summary disposition. *Id*. at 61-62.

III. ANALYSIS

The GTLA immunizes a state agency from tort liability when the agency is "engaged in the exercise or discharge of a governmental function," subject to certain exceptions. MCL 691.1407(1). One such exception

is the "highway exception," which allows for claims arising from defective highways—if those claims otherwise meet the narrow conditions provided by statute—to survive summary disposition. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). All plaintiffs seeking to recover under the highway exception to governmental immunity must comply with the notice requirements of MCL 691.1404, which states, in relevant part:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
>
> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency . . . . In case of the state, such notice shall be filed in triplicate with the clerk of the court of claims. Filing of such notice shall constitute compliance with [MCL 600.6431] . . . , requiring the filing of notice of intention to file a claim against the state.

Determining whether the highway exception applies is a matter of statutory interpretation. When interpreting a statute, courts must consider "the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Andrie Inc v Dep't of Treasury*, 496 Mich 161, 167; 853 NW2d 310 (2014) (quotation marks and citations omitted). If a word in a statute is undefined, it must be given its "plain and ordinary meaning[], and it is proper to consult a dictionary for definitions." *Halloran*

v Bhan, 470 Mich 572, 578; 683 NW2d 129 (2004). Here, the word "notice" is not defined in MCL 691.1404, so we may look to the dictionary for guidance. *Black's Law Dictionary* (11th ed) defines "notice" as "[l]egal notification required by law or agreement, or imparted by operation of law as a result of some fact (such as the recording of an instrument); definite legal cognizance, actual or constructive, of an existing right or title[.]" Similarly, *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "notice" as "warning or intimation of something," as through an announcement.[1]

Taking the plain meaning of "notice" into account, we find that nothing in the text of MCL 691.1404(2) suggests that notice cannot be provided through the filing of a plaintiff's complaint within the statutory notice period. A complaint filed within the statutory notice period, listing the factual circumstances and legal theories relevant to the cause of action, undoubtedly gives sufficient "warning" or "legal notification" of "the occurrence of the injury and the defect." See MCL 691.1404(1). We do not read "notice" in this context as requiring *advance* notice beyond the filing of the complaint. The text of the statute does not indicate that there must be some temporal gap between the filing of a notice and the initiation of a lawsuit; rather, the plain meaning of the word "notice" in this context only suggests that the state must be made aware of the injury and the defect in accordance with MCL 691.1404(2). Here, plaintiff gave timely notice by filing his complaint in the Court of Claims "within 120 days from the time the injury occurred," as required by MCL 691.1404(1).

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[1] Because the legal definition of notice is substantially similar to the lay definition of "notice," we refer to both definitions in parsing the plain meaning of "notice" as it is used in MCL 691.1404.

IV. CONCLUSION

We hold that plaintiff's complaint may serve as notice under MCL 691.1404(1) and (2). However, the Court of Appeals did not address whether the complaint adequately "specif[ied] the exact location and nature of the defect" as required by MCL 691.1404(1). Accordingly, we reverse and remand this case to the Court of Appeals to determine whether these requirements were met.

MCCORMACK, C.J., and VIVIANO, CLEMENT, CAVANAGH, and WELCH, JJ., concurred with BERNSTEIN, J.

ZAHRA, J. (*dissenting*). I do not dispute the alleged facts claiming that on December 17, 2017, plaintiff was driving his vehicle on I-696 westbound near Hoover Road when a large chunk of concrete apparently dislodged from the roadbed, projected through plaintiff's windshield, and struck him. Plaintiff lost consciousness for a short period of time and woke to find himself safely exiting the freeway, from which he drove to a local gas station. He suffered significant injuries to his head and torso that were readily explained by the bloodied chunk of concrete recovered from his vehicle.

Plaintiff asserts a statutory right to recovery under the highway exception to the governmental tort liability act (GTLA).[1] Given that " 'the Legislature is not even required to provide a defective highway exception

[1] The majority opinion asserts that "[t]his case concerns a negligence claim, governed by the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., brought against defendant under the highway exception to governmental immunity, MCL 691.1402(1)." I do not characterize plaintiff's claim as one grounded in common-law negligence. Rather, plaintiff's claim is purely statutory in nature; it is a claim brought under the highway exception to the GTLA.

to governmental immunity, it surely has the authority to allow such suits only upon compliance with rational notice limits.' "[2] Here, the GTLA expressly provides that "[c]laims against the state *authorized* under [the GTLA] *shall be brought* in the manner provided in"[3] the Revised Judicature Act of 1961 (RJA). I conclude that this language means that a prospective highway-defect claim against the state must be separately "authorized" under the GTLA and separately "brought in the manner provided" in the RJA. A timely notice filed under the GTLA is required to "authorize" the filing of a claim under the RJA irrespective of when a plaintiff files this statutory claim. Plaintiff did not duly file a single document under the GTLA to have "*authorized*" the filing of a claim under the RJA. Since plaintiff's claim was not authorized under the GTLA, it could not be brought under the RJA. There is no statutory basis that permits an unauthorized RJA claim to become authorized if the claim contains content that arguably would have satisfied a GTLA notice had that notice been properly and timely filed. Accordingly, I would affirm the result of our lower courts and deny plaintiff's application.

I. BASIC FACTS AND PROCEEDINGS

Shortly after the incident giving rise to plaintiff's injuries, his counsel sent correspondence to defendant, the Michigan Department of Transportation, via certified mail; the correspondence was intended to constitute statutory notice as required under the GTLA. On

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[2] *Estate of Pearce v Eaton Co Rd Comm*, 507 Mich 183, 207; 968 NW2d 323 (2021) (ZAHRA, J. *dissenting*), quoting *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 212; 731 NW2d 41 (2007).

[3] MCL 691.1410(1) (referring to "[MCL] 600.6401 to [MCL] 600.6475") (emphasis added).

February 6, 2018, plaintiff filed a claim against defendant. The next day, plaintiff's counsel again sent defendant correspondence claiming to be an amended statutory notice.

Defendant moved for summary disposition on governmental immunity grounds under MCR 2.116(C)(7), arguing that plaintiff had failed to comply with the GTLA's statutory notice requirement before filing a claim under the RJA. The Court of Claims granted defendant's motion, and the Court of Appeals affirmed that decision in a divided unpublished opinion.[4] We directed the clerk to schedule oral argument on the application.[5]

II. ANALYSIS

MCL 691.1404(1) of the GTLA generally requires that a person injured because of a highway defect, within 120 days, serve a notice "[a]s a condition to any recovery for injuries . . . on the governmental agency of the occurrence of the injury and the defect." The following subsection, MCL 691.1404(2), plainly differentiates the above-described statutory notice, generally served on any governmental agency, from a specific statutory notice that is to be served on a defined entity, which, in this case, is "the *state*." Notice provided to the state "shall be filed in triplicate with the clerk of the court of claims."[6] In this case, this statutory notice was never properly filed. Had this notice been filed, the Court of Claims would have forwarded a copy to "the attorney general and to each of the departments,

[4] *Champine v Dep't of Transp*, unpublished per curiam opinion of the Court of Appeals, issued April 16, 2020 (Docket No. 347398).

[5] *Champine v Dep't of Transp*, 507 Mich 935 (2021).

[6] MCL 691.1404(2).

commissions, boards, institutions, arms, or agencies of this state designated in the claim or notice."[7] "Provisions requiring notice to a particular entity, like the Court of Claims in this case, further ensure that notice will be provided to the *proper* governmental entity, thereby protecting plaintiffs and defendants alike from having the wrong component of government notified."[8]

The majority relies on the plain meaning of the term "notice," claiming that notice is not defined in MCL 691.1404. I disagree. First, MCL 691.1404(1) does define the notice in regard to its content, requiring that it "shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." Second, MCL 691.1404(2) further defines the notice in terms of the place and manner of filing, stating that "[i]n case of the state, such notice shall be filed in triplicate with the clerk of the court of claims." These provisions reflect that the "notice" at issue here is not a common and ordinary notice but a defined "notice" that must contain particular content and must be filed in a particular place and in a particular manner.

I therefore strongly disagree with the majority's purported reliance on "the plain meaning of the word 'notice' in this context [to] only suggest[] that the state must be made aware of the injury and the defect in accordance with MCL 691.1404(2)." Here, the GTLA expressly provides that "[c]laims against the state *authorized* under [the GTLA] *shall be brought* in the manner provided in" the RJA.[9] The state's awareness

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[7] MCL 600.6431(3).

[8] *McCahan v Brennan*, 492 Mich 730, 744; 822 NW2d 747 (2012).

[9] MCL 691.1410(1) (referring to "[MCL] 600.6401 to [MCL] 600.6475") (emphasis added).

of the injury and the defect alone does not authorize a claim to be filed under the RJA. Further, there is no legal or logical basis to conclude that an unauthorized claim filed under the RJA can authorize itself to be filed without having complied with the GTLA. A prospective highway-defect claim against the state must be "authorized" under the GTLA and "brought in the manner provided" in the RJA. Plaintiff did not duly file a single document under the GTLA to have "*authorized*" the filing of a claim under the RJA. Because plaintiff's claim was not authorized under the GTLA, it could not be brought under the RJA.[10]

Accordingly, I agree with the lower courts that plaintiff failed to comply with the GTLA and that plaintiff's claim should be dismissed.

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[10] I agree with the majority that "[t]he text of the statute does not indicate that there must be some temporal gap between the filing of a notice and the initiation of a lawsuit . . . ." None of the requirements of the notice discussed above expressly stipulates that the notice be filed in advance of the claim. Still, even in the very rare instance, such as in this case, when a plaintiff files a claim before filing a notice, the plaintiff must still afterwards file a proper and timely notice that would render the claim "authorized."

MEYERS v RIECK

Docket No. 162094. Argued on application for leave to appeal January 12, 2022. Decided July 7, 2022.

Lesley Meyers, personal representative of the estate of Samuel Corrado, filed an action against Karen Rieck; Radi Gerbi; Shelby Nursing Center Joint Venture, doing business as Shelby Nursing Center; and others in the Macomb Circuit Court, alleging that defendants were negligent and had committed medical malpractice in treating Corrado. Corrado, the decedent, was a patient at Shelby Nursing Center, a nursing home, in 2014. Corrado had been prescribed a feeding tube due to a medical condition that made it difficult for him to swallow. On June 2, 2014, Gerbi, a nurse employed by Shelby Nursing Center, went to Corrado's room to administer the feeding tube, but after noticing that Corrado had vomited, he did not administer the feeding tube. Later, Gerbi heard Corrado calling for help, and he entered Corrado's room and found that he had vomited again. The nursing home had a standing order for patients with nausea that directed staff to, among other things, administer an antinausea medication and to notify the patient's doctor immediately if the patient had more than one episode of vomiting in a 24-hour period. Pursuant to the standing order, Gerbi administered the antinausea medication to Corrado. Gerbi also attempted to call a physician, but when he was unable to reach the physician he went on break instead. Meyers, Corrado's daughter, who had been in contact with Corrado throughout the day, called the nursing home to have someone sent to Corrado's room. When she was unsuccessful, Meyers went to the nursing home herself, where she found Corrado having difficulty breathing. Corrado was taken to the hospital, where he died from hypoxia due to aspiration. In the action, plaintiff alleged both ordinary negligence and medical malpractice. During discovery, plaintiff learned of the standing order and moved to amend the complaint to add to its ordinary-negligence claim allegations that Gerbi had failed to comply with the standing order to contact a physician after Corrado's second vomiting episode. In response, Shelby Nursing Center moved to dismiss the new claim, arguing that the standing order was not evidence of ordinary negligence, could not be used to establish the

standard of care in a medical malpractice claim, and could not be admitted as evidence in support of a medical malpractice claim. The trial court, James M. Maceroni, J., granted plaintiff's motion to amend and denied Shelby Nursing Center's motion to dismiss. Shelby Nursing Center sought leave to appeal, and the Court of Appeals granted the application. The Court of Appeals, RIORDAN, P.J., and FORT HOOD and SWARTZLE, JJ., reversed in a published per curiam opinion. 333 Mich App 402 (2020). The Court of Appeals held that plaintiff's proposed amended claim sounded in medical malpractice, rather than ordinary negligence. The Court of Appeals also concluded that the standing order could not be used to establish the standard of care for a medical malpractice claim and could not be admitted as evidence at trial. Plaintiff sought leave to appeal in the Michigan Supreme Court, and the Court ordered and heard oral argument on whether to grant plaintiff's application for leave to appeal or take other action. 507 Mich 958 (2021).

In a unanimous opinion by Justice VIVIANO, the Supreme Court, in lieu of granting leave to appeal, *held*:

Plaintiff's proposed amendment sounded in medical malpractice, and the standard of care in a medical malpractice action may not be established by the internal rules and regulations of the defendant medical provider. Those rules and regulations, however, may be admissible as evidence in determining the standard of care, provided that the jury is instructed that they do not constitute the standard of care.

1. The threshold question in this case was whether plaintiff's proposed amendments to the complaint sounded in ordinary negligence or medical malpractice. In general, medical malpractice claims arise within the course of a professional relationship and raise questions involving medical judgment rather than issues that are within the common knowledge and experience of the fact-finder. Plaintiff argued that no medical judgment was required to follow the standing order because it was mandatory and did not afford Gerbi any discretion or opportunity to exercise medical judgment. A claim that concerns the failure to monitor and assess risks to a patient usually requires specialized medical knowledge and therefore sounds in medical malpractice. On the other hand, if a nurse fails to take any action to address a known problem or hazardous condition, then the claim might sound in ordinary negligence. But plaintiff's claim did not simply allege that Gerbi failed to take any action in light of a known risk; rather, plaintiff alleged that Gerbi was negligent because he failed to take a specific action in response to the circumstances. That specific action was set forth in the standing order. To assess

whether Gerbi should have notified the physician sooner, the fact-finder would need to know about the risk of acute aspiration in a patient with a feeding tube who had vomited twice and the specific steps that needed to be taken to address that risk. That assessment necessarily implicated medical judgment beyond common knowledge and experience. Therefore, the gravamen of the proposed amendments sounded in medical malpractice.

2. Generally, to prove medical malpractice, the plaintiff must establish that the defendant owed a duty to exercise that degree of skill, care, and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science. In this case, plaintiff contended that the standard of care applicable to Shelby Nursing Center's nursing staff was that they had to comply with the provisions of the standing order. Plaintiff's argument failed because longstanding caselaw holds that a private entity's internal rules do not fix the standard of care regarding its duty to others. This held true whether the argument was that the order established the standard of care or that the standard of care was to follow the order because in either case plaintiff sought to hold Shelby Nursing Center liable for the same underlying conduct: the breach of the actions prescribed by the order. A defendant's violation of its own rules does not constitute negligence per se, and the mere allegation that a defendant breached its own rule or regulation does not, by itself, make out a claim for negligence. Allowing a private organization's rules and regulations to establish the standard of care would permit that organization to choose the standards under which it would be liable to others. The law neither permits private entities to legislate away their responsibilities by establishing rules, nor does it impose discriminating liabilities upon them by reason of their efforts to lessen public danger. This rule was previously applied in the context of ordinary negligence and naturally extended to medical malpractice claims.

3. Although a private entity's own rules and regulations do not establish the standard of care in a medical malpractice case, it does not follow that those rules and regulations are categorically inadmissible. In this case, the fact that the standing order did not, by itself, represent the applicable standard of care did not mean that it was altogether irrelevant in determining the standard of care. The Supreme Court has recognized in ordinary-negligence cases that an entity's internal regulations might constitute some evidence of negligence. Because there is a potential difficulty in distinguishing between the use of an internal rule

or regulation as evidence of the standard of care and its use to establish the standard of care, a jury that receives this sort of evidence must be cautioned as to its proper use. Further, a medical provider's internal rules and regulations must meet general evidentiary standards, including the rules regarding relevancy, MRE 402, and probative value, MRE 403.

Judgment reversed in part and affirmed in part, and case remanded to the trial court for further proceedings.

Justice BERNSTEIN did not participate because he has a family member with an interest that could be affected by the proceeding.

NEGLIGENCE — MEDICAL MALPRACTICE — STANDARD OF CARE — EVIDENCE — INTERNAL REGULATIONS OF A MEDICAL PROVIDER.

A medical malpractice action requires a plaintiff to establish that a medical professional failed to exercise the degree of skill, care, and diligence exercised by other members of the profession in the same or similar localities; the defendant's internal rules and regulations cannot be used to establish the standard of care, but such rules and regulations may be admissible as evidence of the standard of care if the jury is instructed as to their proper use and they meet the rules governing the admission of evidence.

Mark Granzotto, PC (by *Mark Granzotto*) and *The Sam Bernstein Law Firm, PLLC* (by *Stanley J. Feldman*) for the Estate of Samuel Corrado.

Abbott Nicholson, PC (by *Alyssa C. Kennedy* and *Lori A. Barker*) for Shelby Nursing Center Joint Venture, doing business as Shelby Nursing Center.

Amici Curiae:

John M. Malone for the Michigan Association for Justice.

Miller, Canfield, Paddock & Stone, PLC (by *Paul D. Hudson* and *Michael C. Simoni*) for the Michigan Manufacturers Association.

Collins Einhorn Farrell PC (by *Michael J. Cook*) for Michigan Defense Trial Counsel, Inc.

VIVIANO, J. Lesley Meyers brings this action on behalf of the estate of Samuel Corrado, claiming that defendants were negligent and committed medical malpractice in their treatment of Corrado, who died while a resident at defendant Shelby Nursing Center. In the proceedings below, plaintiff moved to amend its complaint to add allegations concerning one of defendant's standing orders, which established a procedure for treatment of patients with Corrado's condition. Plaintiff's new allegations are that defendant's nurse violated the standing order and that this violation gives rise to an ordinary-negligence claim.

We hold that plaintiff's new allegations sound in medical malpractice. We further hold that the standing order cannot establish the standard of care for a medical malpractice action. Therefore, to the extent that the new allegations raise a claim based *solely* on the violation of the standing order, that claim must fail. However, to the extent that the new factual allegations concerning the standing order are relevant to any other claim in plaintiff's original complaint, the standing order may be used as evidence of the standard of care if it is otherwise admissible and the jury is instructed that the order does not itself constitute the standard of care.

I. FACTS

Corrado suffered from dysphagia, which is a medical condition that makes it difficult to swallow. Because this condition impeded his ability to eat, Corrado's doctor ordered a feeding tube. After placement of the tube, Corrado was admitted to defendant nursing home on March 20, 2014. His recovery was progressing, and he was scheduled for discharge on June 17, 2014.

The nursing home had a standing order on the treatment of patients with nausea.[1] The order stated that if the patient has "[n]ausea with or without vomiting," staff were to:

> Check for fecal impaction. If impacted remove impaction manually and give fleets enema. If nausea and/or vomiting persist, give Tigan 100 mg suppository or 100 mg i.m. one dose only . . . . Notify physician next office day for a single episode.
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> Report immediately to physician if: . . .> 1 episode within 24 hours.

On June 2, 2014, at about 5:00 p.m., defendant Radi Gerbi, a registered nurse working for Shelby Nursing Center, arrived in Corrado's room to administer medication and a feeding tube.[2] At that time, he noticed that Corrado had vomited, which Corrado confirmed. Consequently, he did not administer the medication or feeding tube but did check Corrado's vitals, monitor him for a period, and notify other nurses. About 90 minutes later, Gerbi heard Corrado calling for help. Gerbi entered Corrado's room and found him hunched over a small tub, in which Corrado had just vomited. At

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[1] A standing order is

> a written document containing rules, policies, procedures, regulations, and orders for the conduct of patient care in various stipulated clinical situations. The standing orders are usually formulated collectively by the professional members of a department in a hospital or other health care facility. Standing orders usually name the condition and prescribe the action to be taken in caring for the patient, including the dosage and route of administration for a drug or the schedule for the administration of a therapeutic procedure. Standing orders are commonly used in intensive care units, coronary care units, and emergency departments. [*Mosby's Medical Dictionary* (2021).]

[2] While Gerbi is a defendant in the underlying case, he is not an appellee in the present appeal.

this point, Gerbi administered Tigan (a medication used to treat nausea and vomiting) pursuant to the standing order and monitored Corrado. About 20 to 30 minutes after the second vomiting episode, Gerbi called a physician pursuant to the standing order. He could not reach the physician so he notified his supervisor and then took his 30-minute break.

In the meantime, Meyers (who is Corrado's daughter) had been in contact with Corrado throughout the day. After unsuccessfully attempting to have someone sent to Corrado's room, she went to the nursing facility herself, arriving at around 6:45 p.m., after the Tigan had been administered. Meyers found Corrado violently shaking and struggling to breathe. Emergency personnel arrived in Corrado's room about ten minutes later and rushed him to the hospital, where he died from hypoxia due to aspiration.

Plaintiff brought the present lawsuit against the nursing home, Gerbi, and other defendants on behalf of Corrado's estate. The complaint contains ordinary-negligence claims and medical malpractice claims encompassing all the events that occurred and various alleged breaches of the relevant standards of care. In particular, the complaint alleged that Gerbi and other defendants failed to adequately monitor Corrado and to provide emergency care, including notifying Corrado's physician concerning his status. During discovery, plaintiff learned about the standing order and moved to amend the complaint to include allegations concerning the standing order and "to add as part of its claim for ordinary negligence the fact that Nurse Gerbi failed to comply with [the] standing order to contact the physician on call."[3] In response, defendant moved to

[3] The amended complaint was never filed.

dismiss the new claim, arguing that the standing order was not evidence of ordinary negligence and could not be used to establish the standard of care in a medical malpractice claim. Because the standing order could not be used as the standard of care, defendant also argued that it could not be admitted as evidence in support of the claim. The trial court rejected these contentions, denying defendant's motion for summary disposition and granting plaintiff's motion to amend. It held that the standing order, by its terms, did not require or involve any medical judgment—the order simply required the nurse to notify a physician. Therefore, "whether defendant failed to follow the Standing Order is a question of reasonableness and sounds in negligence, and not medical malpractice."

On appeal, the Court of Appeals reversed in a published opinion. It first held that the proposed claim sounds in medical malpractice rather than ordinary negligence because plaintiff's core contention was that Gerbi failed to take specific actions in response to Corrado's second episode of vomiting. The Court wrote, "A lay fact-finder would not know that a physician should be immediately informed when a patient vomits twice in a matter of hours and could not rely solely on common knowledge and experience to determine whether it was reasonable for Gerbi to wait at least 20 minutes before attempting to consult a doctor about Corrado's status." *Estate of Corrado v Rieck*, 333 Mich App 402, 412; 960 NW2d 218 (2020). Thus, according to the Court, because this claim involved questions outside the jury's common knowledge, it sounded in medical malpractice. Further, the Court concluded that the standing order could not be used to establish the standard of care for a medical malpractice claim and could not be used as evidence at trial. The Court

therefore reversed the trial court's denial of defendant's motion for summary disposition and remanded for further proceedings.

Plaintiff sought leave to appeal in our Court, and we ordered argument on the application, requiring briefing on "(1) whether the proposed claim based on a violation of the standing order sounds in medical malpractice or ordinary negligence; and (2) whether evidence of the standing order is admissible at trial." *Meyers v Rieck*, 507 Mich 958 (2021).

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019).

III. ANALYSIS

In this case, we review the trial court's denial of summary disposition to defendant on the basis that plaintiff's amended allegations sufficiently raise a claim of ordinary negligence regarding the violation of the standing order. Two issues have arisen below: (1) whether plaintiff's new claim sounds in ordinary negligence or medical malpractice and can succeed when it alleges a bare violation of the standing order; and (2) whether a private entity's internal rules or regulations, like the standing order here, may be admissible evidence.

A. NATURE OF THE CLAIM AND THE STANDARD OF CARE

The threshold question addressed by the Court of Appeals and in the parties' briefing here is whether plaintiff's amendments sound in ordinary negligence

or medical malpractice. In general, a medical malpractice claim is one "brought against someone who, or an entity that, is capable of malpractice," involving actions that occurred "within the course of a professional relationship," and which "raise[s] questions involving medical judgment" rather than "issues that are within the common knowledge and experience of the [fact-finder]." *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 420, 422; 684 NW2d 864 (2004) (quotation marks and citations omitted). In the present case, the parties dispute whether the new allegations involve medical judgment. Plaintiff contends that no medical judgment was required to follow the standing order—the order, according to plaintiff, was mandatory and left Gerbi no discretion or opportunity to exercise medical judgment.

To determine the nature of the claim, we seek its "gravamen," and therefore "we disregard the labels given to the claim[] and instead read the complaint as a whole . . . ." *Trowell v Providence Hosp & Med Ctrs, Inc*, 502 Mich 509, 519; 918 NW2d 645 (2018). The question here, then, is whether the substance of the new claim relates to matters involving medical judgment outside "the common knowledge and experience of the [fact-finder]." *Bryant*, 471 Mich at 424 (quotations marks and citation omitted). We agree with the Court of Appeals that the new claim involves medical judgment and therefore sounds in medical malpractice. As the Court of Appeals explained, our decision in *Bryant* indicates that if a nurse fails to take any action to address a known problem or hazardous condition, then the claim might sound in ordinary negligence. *Id*. at 431 ("If a party alleges in a lawsuit that the nursing home was negligent in allowing the decedent to take a bath under conditions known to be hazardous, . . . the claim sounds in ordinary negligence. No expert testi-

mony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem."). But a claim that concerns the failure to monitor and assess risks to a patient—such as, in *Bryant*, "the risk of positional asphyxiation posed by bed railings"—usually requires specialized medical knowledge and therefore sounds in medical malpractice. *Id*. at 426-427.

The present claim, that Gerbi violated the standing order, does not simply allege that Gerbi failed to take any action in light of a known risk. "Rather," as the Court of Appeals explained, "plaintiff alleges that Gerbi was negligent because he failed to take a specific action in response to the circumstances." *Estate of Corrado*, 333 Mich App at 412. That specific action was spelled out in the standing order. In this Court, plaintiff expressly "concedes that the *formulation* of Shelby [Nursing] Center's standing orders involves just the kind of medical judgment that gives rise to a claim of medical malpractice . . . ." No doubt this is because, as the Court of Appeals stated, "[a] lay fact-finder would not know that a physician should be immediately informed when a patient vomits twice in a matter of hours and could not rely solely on common knowledge and experience to determine whether it was reasonable for Gerbi to wait at least 20 minutes before attempting to consult a doctor about Corrado's status." *Estate of Corrado*, 333 Mich App at 412. In other words, to assess whether the physician should have been notified sooner, the fact-finder would need to know about the risk of acute aspiration in a patient with a feeding tube who has vomited twice and the specific steps that must be taken to address that risk. That assessment necessarily implicates medical judg-

ment beyond common knowledge and experience. Therefore, the gravamen of the claim sounds in medical malpractice.

Plaintiff attempts to avoid this conclusion by focusing narrowly on the violation of the standing order and not the conduct prescribed by the order. But by attempting to premise liability on the bare violation of a private defendant's internal rules or regulations, plaintiff undercuts its claim completely. This is because, as explained below, such rules and regulations cannot by themselves establish the standard of care. We have applied this rule in the context of ordinary negligence, and today we find that those holdings naturally extend to medical malpractice actions like the present claim.

The standard of care is a concept applicable to both ordinary negligence and medical malpractice claims. To prove ordinary negligence, a plaintiff must demonstrate, among other things, that the defendant owed the plaintiff a duty. *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). Once the duty is established, the "factfinder [then] determine[s] whether, in light of the particular facts of the case, there was a breach of the duty." *Id*. In that analysis, the fact-finder "determines what constitutes reasonable care under the circumstances." *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988). Under a medical malpractice theory of liability, the defendant owes a "duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science." *Bryant*, 471 Mich at 424 (quotation marks and citation omitted). For nurses like Gerbi, then, the standard of care is "the degree of skill and care ordinarily possessed and exercised by

practitioners of the profession in similar localities." *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 20-21; 651 NW2d 356 (2002).

Sometimes, however, the applicable standard of care is supplied by a statute or legal regulation. See, e.g., *Holmes v Merson*, 285 Mich 136, 139; 280 NW 139 (1938) ("The generally accepted view is that violation of a statutory duty constitutes negligence *per se*."); Restatement Torts, 2d, § 285, p 20 ("The standard of conduct of a reasonable man may be . . . established by a legislative enactment or administrative regulation which so provides[.]"). In such cases, the statute "establishes the standard of care" and "its breach establishes the first two elements of negligence: duty and breach of duty." 1 Modern Tort Law: Liability and Litigation (May 2022 update), § 3:79. The violation of such a statute thus establishes negligence per se, i.e., that the defendant acted negligently. See *Westover v Grand Rapids R Co*, 180 Mich 373, 378; 147 NW 630 (1914) (noting that "a violation of a statute imposed under the police power of the State is negligence *per se*.").[4]

In the present case, plaintiff protests that she is *not* asking the Court to treat defendant's standing order as a statute establishing the standard of care, the violation of which constitutes negligence per se. Rather, she contends that "the standard of care applicable to the defendant's nursing staff is that the provisions of the standing order (whatever they might be) must be complied with." (Emphasis omitted.) But we see no meaningful distinction between the contention that

[4] We have held, however, that "violation of a safety or penal statute creates a rebuttable presumption of negligence" rather than establishing negligence per se. *Klinke v Mitsubishi Motors Corp*, 458 Mich 582, 592; 581 NW2d 272 (1998).

the standing order establishes the standard of care and the argument that the standard of care is to follow the standing order. In both cases, the underlying conduct for which plaintiff seeks to hold defendant liable is the same: the breach of the actions prescribed by the order itself.

Under our longstanding caselaw, plaintiff's argument must fail. We long ago held that a private entity's internal rules do not "fix the standard of [its] duty to others." *McKernan v Detroit Citizens' Street-R Co*, 138 Mich 519, 530; 101 NW 812 (1904). That standard "is fixed by law, either statutory or common." *Id*. In other words, a defendant's violation of its own internal rule, even if the rule is designed to protect the public, does not constitute negligence per se. *Id*. at 528. As such, the mere allegation that a defendant breached its own internal rule or regulation does not, without more, make out a claim for negligence. *Id*. at 530. We have followed this rule in multiple cases. See, e.g., *Baker v Mich Central R Co*, 169 Mich 609, 637; 135 NW 937 (1912) (stating that private rules "do not fix the obligations and liabilities of the master to its servants, nor to third persons and the public, those obligations, being fixed by law, cannot be diminished by such rules, nor, ordinarily, increased thereby"); *Dixon v Grand Trunk Western R Co*, 155 Mich 169, 173-174; 118 NW 946 (1908) (applying *McKernan* and holding that negligence could not be predicated on the failure to enforce a private rule).[5]

[5] Other courts have held likewise. See *Wal-Mart Stores, Inc v Wright*, 774 NE2d 891, 894 (Ind, 2002) (collecting sources and noting that "[t]he law has long recognized that failure to follow a party's precautionary steps or procedures is not necessarily failure to exercise ordinary care"); *Cooper v Eagle River Mem Hosp, Inc*, 270 F3d 456, 462 (CA 7, 2001) ("As a general rule in Wisconsin, the internal procedures of a private organization do not set the standard of care applicable in negligence

There are good reasons for this rule. Allowing a private organization's rules and regulations to establish the standard of care would permit that organization to choose the standards under which it would be liable to others. Choosing this course would "send a signal to [medical providers] that they have a safe harbor from lawsuits if they comply with [standing medical orders] to the letter, whatever the consequences for the patient." *Fagocki v Algonquin/Lake-in-the-Hills Fire Protection Dist*, 496 F3d 623, 630 (CA 7, 2007). If the order here, for example, had instructed the nurses to wait a day after the second episode of vomiting before contacting the physician, we would be reluctant to hold that a nurse followed the requisite standard of care simply by complying with such a slack order.

Plaintiff's view might also discourage entities from adopting internal rules that require a "higher degree of care than the law imposes. . . . [I]f the adoption of such a course is to be used against him as an admission, he would naturally find it to his interest not to adopt any rules at all." *McKernan*, 138 Mich at 531; see also *Buczkowski v McKay*, 441 Mich 96, 99 n 1; 490 NW2d 330 (1992) ("Imposition of a legal duty on a retailer on the basis of its internal policies is actually contrary to public policy. Such a rule would encourage retailers to abandon all policies enacted for the protection of others in an effort to avoid future liability."). In short, the law "neither permits corporations to legislate away their responsibilities by rules, nor imposes discriminating

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cases."); 57A Am Jur 2d, Negligence (2004), § 174, p 248 ("The failure to comply with a company rule does not constitute negligence per se; the jury may consider the rule, but the policy does not set forth a standard of conduct that establishes what the law requires of a reasonable person under the circumstances.").

liabilities upon them by reason of their efforts to lessen public danger." *McKernan*, 138 Mich at 532.

Although we have never addressed whether a private entity's standing orders can fix the standard of care in a medical malpractice action, the Court of Appeals has. Following our caselaw discussed above, the Court of Appeals has held that a hospital's internal rules and regulations do not establish the standard of care in malpractice actions. See *Jilek v Stockson*, 289 Mich App 291, 306-309; 796 NW2d 267 (2010) (*Jilek I*), rev'd on other grounds by 490 Mich 961 (2011) (*Jilek II*); *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761, 764-768; 431 NW2d 90 (1988); *Wilson v WA Foote Mem Hosp*, 91 Mich App 90, 95; 284 NW2d 126 (1979). As the Court of Appeals has stated, "the ultimate question is what responsibility has the hospital assumed regarding the care of the patient. In Michigan, we look to the standard practiced in the community [or similar communities] rather than internal rules and regulations to determine that responsibility in a malpractice action." *Gallagher*, 171 Mich App at 768.

The Court of Appeals' conclusion appears to reflect the nearly uniform treatment of this issue across jurisdictions.[6] The Illinois Supreme Court, in one of the

[6] See, e.g., *Quijano v United States*, 325 F3d 564, 568 (CA 5, 2003) ("In Texas, . . . hospital rules alone do not determine the governing standard of care."); *Damgaard v Avera Health*, 108 F Supp 3d 689, 698-699 (D Minn, 2015) ("[I]t is not enough for a plaintiff simply to point to a healthcare provider's policies and claim they were breached. This conclusion, of course, flows from the fact a plaintiff asserting medical negligence must establish a physician breached the standard of care *in the relevant medical community*—not just at her hospital."); *Hodge v UMC of Puerto Rico, Inc*, 933 F Supp 145, 148 (D Puerto Rico, 1996) ("Courts in the United States have almost universally held that hospital rules, regulations, and policies alone do not establish the standard of medical care in the medical community . . . ."); *Reed v Granbury Hosp*

leading cases on the issue, wrote that an internal hospital rule or regulation cannot be "conclusive" of the standard of care because " 'a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages.' " *Darling v Charleston Community Mem Hosp*, 33 Ill 2d 326, 331-332; 211 NE2d 253 (1965), quoting *The TJ Hooper*, 60 F2d 737, 740 (CA 2, 1932). Similarly, as with our cases above in the context of ordinary negligence, other courts have observed that a contrary rule would discourage hospitals from establishing higher standards of care than the community. See *Wuest v McKennan Hosp*, 619 NW2d 682, 689; 2000 SD 151 (2000) ("Public policy encouraging standards higher than generally employed in the community dictates that individual hospital policies are not determinative of the standard of care."); see also 3 Modern Tort Law: Liability and Litigation (May 2022 update), § 24:155 ("Frequently such bylaws, in attempting to

Corp, 117 SW3d 404, 414 (Tex App, 2003) ("[A] hospital's internal policies and procedures do not, alone, determine the standard of care . . . ."); *Moyer v Reynolds*, 780 So 2d 205, 208 (Fla App, 2001) (noting that evidence of breach of an internal rule "does not conclusively establish the standard of care"); *Van Steensburg v Lawrence & Mem Hosps*, 194 Conn 500, 506; 481 A2d 750 (1984) ("In this regard, we point out that hospital rules, regulations and policies do not themselves establish the standard of care."); *Foley v Bishop Clarkson Mem Hosp*, 185 Neb 89, 93; 173 NW2d 881 (1970) (recognizing the general rule that internal regulations "do[] not establish community standards which may be either more liberal or stricter than the standards set up by defendant" and that such regulations, "[a]lthough pertinent, . . . standing alone [are] insufficient"); 41 CJS, Hospitals (2014), § 36, pp 368-369 ("Hospital rules, regulations, and policies do not themselves establish the standard of care owed a patient or reflect the community standard of medical care.") (footnotes omitted); cf. *Fisk v McDonald*, 167 Idaho 870, 881-882; 477 P3d 924 (2020) (holding that a hospital's internal policies were insufficient, alone, to provide a foundation for an out-of-area expert's testimony on the community standard of care).

administer an efficient operation, will require higher standards than the community will customarily require.").[7]

Accordingly, a claim that defendant committed malpractice merely by violating its own internal rule or regulation, without more, must fail because that rule or regulation does not establish the applicable standard of care. In the present case, the medical malpractice claim that plaintiff seeks to add to the complaint is premised solely on Gerbi's violation of the standing order.[8] Therefore, the Court of Appeals properly re-

[7] Some cases appear to go the other way, but they are distinguishable. For example, in *Estate of French v Stratford House*, 333 SW3d 546, 559 (Tenn, 2011), abrogated by statute as recognized in *Ellithorpe v Weismark*, 479 SW3d 818, 820 (Tenn, 2015), the Tennessee Supreme Court held that "allegations that the [certified nursing assistants] failed to comply with the care plan's instructions due to a lack of training, understaffing, or other causes, constitute claims of ordinary, common law negligence." *French*, 333 SW3d at 559. The rationale was not, however, that the bare violation of the plan was a matter of negligence. Rather, the court rested its decision largely on the distinct proposition that the violation of the care plan involved conduct that would not fall within the normal scope of medical malpractice because the services provided were "routine and nonmedical in nature . . . ." *Id*. at 560. Regardless, it does not appear that the parties argued—and the court did not directly analyze—whether internal rules and regulations could, without more, give rise to liability. Similarly, in *Lucy Webb Hayes Nat'l Training Sch for Deaconesses and Missionaries v Perotti*, 136 US App DC 122; 419 F2d 704 (1969), the court generally focused on a violation of a municipal regulation. While it did say that the jury could find negligence on the basis of, among other things, the internal hospital directives, those directives were only one piece of evidence from which the jury could find for plaintiff. *Id*. at 128. The court did not suggest that the bare violation of the directive was enough.

[8] As mentioned above, plaintiff never filed the actual amended complaint. But, as noted, plaintiff has explained at length that the new claim is premised only on the breach of the standing order. Indeed, the limited nature of the claim is at the center of plaintiff's argument that the claim sounds in ordinary negligence because the standing order was

versed the trial court's denial of defendant's motion for summary disposition of the proposed new claim.

B. ADMISSIBILITY OF INTERNAL RULES AND REGULATIONS

The Court of Appeals went further, however, holding that because the standing order does not establish the standard of care, it was irrelevant to the case and therefore inadmissible for any purpose.[9] This conclusion was ultimately based on this Court's order in *Jilek II*, 490 Mich 961. We take this opportunity to correct the misapprehension that a private entity's internal rules and regulations are categorically inadmissible.

In *Gallagher*, the Court of Appeals noted that while hospital rules and regulations could not establish the standard of care, they "could be admissible as reflecting the community's standard where they were adopted by the relevant medical staff and where there is a causal relationship between the violation of the rule and the injury." *Gallagher*, 171 Mich App at 767. But the hospital rules were not indicative of the standard of care in *Gallagher* because they "were more in the nature of . . . administrative guidelines" and, therefore, were inadmissible. *Id*. at 768.

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mandatory. For the reasons already discussed, the mandatory nature of the order is irrelevant because the order cannot itself establish the standard of care.

[9] The admissibility question arises even if the new claim is dismissed because the new factual allegations plaintiff has sought to add concerning the standing order might also be relevant to plaintiff's existing claims. For instance, the original complaint alleges that Gerbi and various defendants failed to adequately monitor Corrado and provide appropriate emergency care, including notifying Corrado's physician and calling for assistance. Thus, regardless of whether the new claim is dismissed, the factual allegations concerning the standing order may be relevant to the existing claims.

In *Jilek I*, the Court of Appeals relied on *Gallagher*'s discussion of admissibility. *Jilek I*, 289 Mich App at 306-307, 314. The Court also cited numerous out-of-state decisions, stating that "[n]early all of the states that have published law on the subject appear to follow the rule that internal policies may be introduced as relevant to the standard of care but, standing alone, do not fix or establish that standard." *Id*. at 309-310. The dissent in *Jilek I* criticized the majority for its reliance on *Gallagher*, characterizing the earlier decision's comments on admissibility as dicta. *Id*. at 316 (BANDSTRA, J., dissenting). The thrust of the dissent, however, was that the majority had ignored the standard of review applicable to the trial court's evidentiary rulings excluding the internal hospital rules. *Id*. at 317. We reversed the Court of Appeals majority in an order mostly addressing other matters. *Jilek II*, 490 Mich at 961. In relevant part, we stated, "We also conclude that the trial court did not abuse its discretion in excluding plaintiff's proposed document exhibits at issue for the reasons stated in the analysis of the Court of Appeals dissenting opinion." *Id*.

The resolution in *Jilek II* thus left this issue in an unsettled state. Reading our order in *Jilek II* broadly, the Court of Appeals below held that internal rules and regulations are simply inadmissible. But the Court's reasoning displays the flaws in such an approach. In holding that the amended claim sounds in medical malpractice, the Court of Appeals concluded that the standing order involves medical judgment about the treatment necessary for a patient in Corrado's condition. But in declaring the standing order to be inadmissible, the Court of Appeals indicates that the standing order is irrelevant to determining the medical standard of care regarding the medical treatment necessary for an individual in Corrado's condition. It

makes little sense to say that the standing order (or the actions it prescribes) involves medical judgment about the proper treatment but also has no bearing on what constitutes the proper treatment.

The fact that the standing order cannot itself represent the applicable standard of care does not mean that it is altogether irrelevant to determining the standard of care or whether it was breached. We indicated as much in *McKernan* when we recognized that the railroad's internal "regulation might constitute some evidence" concerning negligence. *McKernan*, 138 Mich at 528; see also *Van Steensburg*, 194 Conn at 506 ("The failure to follow such rules and regulations is . . . evidence of negligence."). The same rule is supported by the overwhelming weight of authority in the context of medical malpractice: a medical provider's rules and regulations can be used as evidence to help determine the standard of care, but they cannot be used as the standard itself without additional evidence. See, e.g., *Quijano*, 325 F3d at 568 ("In Texas, a hospital's internal policies and bylaws may be evidence of the standard of care, but hospital rules alone do not determine the governing standard of care."); see also *Darling*, 33 Ill 2d at 332 (allowing internal hospital regulations to be admitted into evidence); *Jilek I*, 289 Mich App at 309-310 (collecting cases). This is true even in states, like ours, that generally require expert testimony to establish the standard of care. See, e.g., *Dine v Williams*, 830 SW2d 453, 456-457 (Mo App, 1992) (explaining that, "[i]f plaintiffs' expert had testified to the standard of care of an attending physician and that the defendants' conduct fell below that standard, then the rules and regulations may have been admissible to support the negligent conduct" in the medical malpractice action despite the fact that expert testimony is necessary to establish the standard of care); see also

Woodard v Custer, 473 Mich 1, 6; 702 NW2d 522 (2005) ("Generally, expert testimony is required in medical malpractice cases.").

But courts must be cautious in admitting this evidence. One court explained the need for caution in the context of ordinary-negligence claims:

> Indeed, this court has held that a party's internal policies and procedure are admissible as some evidence of the appropriate standard of care. . . . However, as Professor Wigmore has noted, a difficulty
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> > "arises from the necessity of distinguishing between the use of such facts *evidentially* and their use as involving a *standard of conduct* in substantive law . . . . To take [the defendant's] conduct as furnishing a sufficient legal standard of negligence would be to abandon the standard set by the substantive law, and would be improper . . . . The proper method is to receive it, with an express caution that it is merely evidential and is not to serve as a legal standard."
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> > 2 J Wigmore, *Evidence* § 461, at 593 (footnote omitted, emphasis in original).
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> Consistent with the Wigmore analysis, this court has held that the jury receiving such evidence must be cautioned that the existence of an internal rule does not itself fix the standard of care. [*Steinberg v Lomenick*, 531 So 2d 199, 200 (Fla App, 1988) (alteration in *Steinberg*).]

We agree with these concerns and believe that any jury receiving such evidence must be instructed as to its proper use. In addition, we emphasize that a medical provider's internal rules and regulations, like the standing order, must meet general evidentiary standards, including that the evidence be relevant, MRE 402, and its probative value must not be outweighed by the concerns listed in MRE 403. A particular rule or

regulation, of course, might be irrelevant to the question at hand in a given case. But we hold today that internal rules and regulations are not categorically inadmissible as irrelevant.

Given this analysis, the Court of Appeals erred to the extent it held that the standing order was inadmissible in this case because all such orders are irrelevant to the standard of care.[10]

IV. CONCLUSION

For the reasons above, we hold that plaintiff's amended claim concerning the violation of the standing order sounds in medical malpractice. The claim is premised on the bare violation of the standing order. But because the standing order does not establish the standard of care applicable to the case, the new claim must fail. However, this conclusion does not mean the standing order is irrelevant in determining the standard of care with regard to any other claims in the original complaint. A private entity's internal rules or regulations, like the standing order, are not inadmissible simply because they do not alone establish the standard of care. If they meet the rules governing the admission of evidence and if the jury is instructed as to their proper use—i.e., that they are evidence of the standard of care and do not fix the standard itself—then they might be admitted. In light of these holdings, we reverse the Court of Appeals in part but affirm its judgment reversing the trial court's denial of defendant's motion for summary disposition with regard to

[10] We do not decide here whether the particular standing order at issue meets the applicable criteria for admission.

the new allegations concerning the standing order. We remand to the trial court for proceedings not inconsistent with this opinion.

MCCORMACK, C.J., and ZAHRA, CLEMENT, CAVANAGH, and WELCH, JJ., concurred with VIVIANO, J.

BERNSTEIN, J. did not participate because he has a family member with an interest that could be affected by the proceeding.

GRIFFIN v TRUMBULL INSURANCE COMPANY

Docket No. 162419. Argued on application for leave to appeal January 12, 2022. Decided July 15, 2022.

Willie Griffin brought an action in the Wayne Circuit Court against Trumbull Insurance Company, the Michigan Assigned Claims Plan (the MACP), Allstate Insurance Company, Esurance Property and Casualty Insurance Company, and an unnamed John Doe insurance company, seeking personal protection insurance (PIP) benefits for injuries plaintiff sustained while riding a motorcycle. In May 2016, Griffin was driving a motorcycle when a large truck merged into his lane. Griffin swerved to avoid the truck. While there was no physical collision, Griffin's motorcycle went down, it was damaged, and he was badly injured. The responding police officer recorded the truck driver's name, personal telephone number, and residential address in the crash report; however, the officer did not record the license plate number or VIN of the truck, the insurer of the truck, the owner of the truck, or any other identifying information regarding the truck. Five days after the accident, Griffin's attorney sent a letter to the truck driver using the address in the crash report. The letter informed the driver that Griffin intended to take legal action; the truck driver never responded to the letter. Trumbull was Griffin's personal automobile insurer at the time of the accident, and Griffin filed a PIP benefits claim with Trumbull in June 2016. Trumbull made numerous unsuccessful attempts to contact the truck driver before closing its investigation in late December 2016; it was unclear whether Trumbull ever shared the details of its investigation with Griffin. In December 2016, Griffin submitted a separate PIP benefits claim to the MACP through the Michigan Automobile Insurance Placement Facility (the MAIPF). The MAIPF refused to assign the claim and requested more information. Griffin also submitted claims to Esurance and Allstate, which were both lower-priority insurers. In April 2017, approximately 11 months after the accident, Griffin filed this lawsuit seeking payment of his PIP benefits. During discovery, the parties learned that the truck had been owned by Pavex Corporation and insured by Harleysville Insurance. The parties also learned that Pavex never reported the accident or submitted

a claim to Harleysville. Trumbull moved for summary disposition, arguing that it was not liable to pay PIP benefits because Harleysville was the highest-priority insurer. The MACP also moved for summary disposition. Allstate, Esurance, and the John Doe insurance company were previously dismissed by stipulation, and those orders were not appealed. The trial court, Susan L. Hubbard, J., granted summary disposition in favor of Trumbull and the MACP, holding that Harleysville was the highest-priority insurer and that Griffin had not exercised reasonable diligence in attempting to timely locate Harleysville. The Court of Appeals, K. F. KELLY and TUKEL, JJ. (RONAYNE KRAUSE, P.J., concurring in part and dissenting in part), affirmed but for different reasons than those relied on by the trial court. 334 Mich App 1 (2020). The Court of Appeals majority relied on *Frierson v West American Ins Co*, 261 Mich App 732 (2004), holding that *Frierson* called for a binary analysis that asks only whether a higher-priority insurer is identifiable. The majority rejected the reasonable-diligence standard that the trial court had used and held that that because Harleysville could have been, and in fact eventually was, identified, Trumbull was entitled to summary disposition. The Court of Appeals unanimously affirmed the grant of summary disposition to the MACP. Griffin sought leave to appeal the Court of Appeals judgment to the extent it affirmed the grant of summary disposition for Trumbull, and the Supreme Court ordered and heard oral argument on the application. 507 Mich 941 (2021).

In an opinion by Justice WELCH, joined by Chief Justice MCCORMACK and Justices BERNSTEIN and CAVANAGH, the Supreme Court, in lieu of granting leave to appeal, *held*:

MCL 500.3114(5) of the no-fault act, MCL 500.3101 *et seq*., provides, in pertinent part, that a person who suffers accidental bodily injury arising from a motor vehicle accident that shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim PIP benefits from insurers in a certain order of priority. MCL 500.3114 puts the onus on a claimant to "claim" PIP benefits from the specified list of potential insurers; to "claim" PIP benefits in this context means that one must put potential insurers on notice and submit insurance claims stating an entitlement to benefits and requesting payment. Accordingly, a claimant must be diligent in the pursuit of their claim for PIP benefits. Whether a claimant exercised due diligence is a fact-specific determination that must be made on a case-by-case basis. Furthermore, insurers who receive a claim for PIP benefits before expiration of the limitations period must act diligently when investigating, responding

to, and resolving the claim. The statutory scheme adopted by the Legislature strongly incentivizes insurers to pay first and seek reimbursement later when it is clear that a claimant will be entitled to PIP benefits from someone, and it penalizes unreasonable payment delays. Nonetheless, an insurer that is confident that it is not liable to pay PIP benefits can and should promptly deny the claim so that the claimant can seek assignment by the MAIPF or take other actions that might be necessary to preserve their right to PIP benefits. Importantly, claiming benefits from the highest-priority insurer that is identifiable through the filing of an insurance claim is not the same as filing an "action for recovery of" PIP benefits under MCL 500.3145(1). *Frierson* provided no clear guidance about what it means for a higher-priority insurer to be unidentifiable because that case involved a hit-and-run collision and the parties in *Frierson* stipulated that no higher-priority insurer was identifiable; accordingly, *Frierson* did not create a binary inquiry that only asks whether an insurer was potentially identifiable in the abstract. In this case, it was undisputed that the limitations period in MCL 500.3145(1) had run before Harleysville was identified and that Harleysville was the highest-priority insurer under MCL 500.3114(5). Griffin exercised due diligence under the circumstances by hiring an attorney, investigating the claim, and submitting a claim for PIP benefits to Trumbull, the highest-priority insurer known to and identifiable by any relevant party based on the available information. Because Harleysville was unidentifiable during the prelitigation phase, Trumbull was the default insurer. Trumbull, however, did not make payment or timely respond to inquiries from Griffin's attorney. Additionally, Trumbull did not formally deny Griffin's claim until after this lawsuit had been filed and after the limitations period to put an additional insurer on notice or to file a lawsuit against another insurer had passed. With Trumbull refusing to pay or deny the pending claim for PIP benefits, and being unable to identify any higher-priority insurer, Griffin was left waiting in limbo for Trumbull to make a decision on his pending PIP benefits claim. Due diligence did not require Griffin to file a lawsuit to obtain subpoena power *before Trumbull had taken any formal action to deny or dispute liability for Griffin's pending PIP benefits claim*; accepting such an argument would incentivize insurers to engage in undesirable gamesmanship and would be antithetical to the core purposes of the no-fault act concerning the prompt resolution of claims and the avoidance of needless litigation. Under the circumstances of this case, there was no reason for Griffin to file a lawsuit against Trumbull sooner than he did, which was still within the limitations period. In the

absence of an express requirement in the no-fault act, someone who is injured in an accident should not be required to file a lawsuit against a known insurance company merely to ensure that he or she can force cooperation of potentially knowledgeable individuals through the power of subpoena. Accordingly, Trumbull could be held liable to pay Griffin's PIP benefits claim under MCL 500.3114(5). The trial court erred by granting Trumbull's summary-disposition motion, and the Court of Appeals erred by affirming on the basis that a previously *unidentifiable* higher-priority insurer *became identifiable* during litigation well after the one-year notice and limitations period in MCL 500.3145 had expired.

Court of Appeals judgment reversed to the extent that summary disposition was granted in favor of Trumbull; case remanded to the Wayne Circuit Court for further proceedings.

Justice ZAHRA, joined by Justice VIVIANO, dissenting, would have affirmed the decision of the Court of Appeals because under the unambiguous text of the no-fault act, a lower-priority insurer cannot be held liable for PIP benefits when the highest-priority insurer is identifiable and not given timely notice under MCL 500.3145(1). The general purpose of an act cannot defeat the clear and unambiguous language within the act that places limitations on the scope of that act. In this case, plaintiff failed to timely claim PIP benefits from the insurer of the owner or registrant of the truck involved in his accident—Harleysville. It was undisputed that Harleysville was the highest-priority insurer, and therefore plaintiff was required to claim benefits from Harleysville within the one-year statutory period. Because plaintiff failed to do so, plaintiff was barred from collecting PIP benefits from Harleysville. Nothing in the no-fault act provides a basis to conclude that plaintiff was nevertheless entitled to recover based on notice it gave to Trumbull, the wrong insurer. The no-fault act does not provide exceptions for difficulties in discovering necessary facts or evidence that would either toll the statute of limitations or allow the plaintiff to sue an otherwise incorrect defendant. Similarly, nothing in the broader statutory context suggests that the Legislature intended to place lower-priority insurers on the hook when a plaintiff fails to identify the highest-priority insurer within the limitations period. *Frierson* did not hold that an injured party can jump down the order of priority if the highest-priority insurer *could* have been identified but was not; *Frierson* explained that the offending vehicle's insurer would be liable under MCL 500.3114(5) if identified. Accordingly, the Court of Appeals correctly explained that *Frier-*

son calls for a binary analysis: a higher-priority insurer is either identifiable or not. Furthermore, there was no textual basis for the reasonable-diligence standard; under a proper reading of the statute, whether a higher-priority insurer is identifiable does not depend on whether a plaintiff exercised reasonable diligence to identify that insurer. Even if there were a reasonable-diligence standard, plaintiff did not exercise reasonable diligence in this case. Had plaintiff timely initiated legal action, as threatened in the correspondence to the driver of the truck, plaintiff would have discovered the existence of Harleysville before the expiration of the limitations period. Plaintiff also never investigated whether the driver of the truck had been operating his employer's vehicle at the time of the accident, despite seeing that the truck was a stake-bed truck with logos on it.

Justice CLEMENT, dissenting, would have held that the trial court properly identified the reasons for granting summary disposition to defendants-appellees and that the trial court properly held that plaintiff failed to exercise reasonable diligence in identifying the highest-priority insurer. Justice CLEMENT did not agree that the proper analysis was as simple as the binary analysis that asks only whether a higher-priority insurer is identifiable. Rather, the structure of the no-fault system makes it clear that it is intended to be comprehensive, and it is notable that all the instances of individuals who are excluded from benefits in MCL 500.3113 involve people who had control, in one way or another, over being excluded from benefits. In light of the textual indications of the system's intended comprehensiveness, Justice CLEMENT would interpret the statute as requiring a claimant to show at least, but also no more than, reasonable diligence when it requires an injured person to "claim." The trial court did not clearly err by concluding that plaintiff had not demonstrated reasonable diligence in trying to identify the insurer of the truck. Plaintiff knew that he had been in an accident that involved a motor vehicle and thus that the insurer of that vehicle would be at the top of the order of priority. Plaintiff further knew the identity of the operator of the motor vehicle. Yet plaintiff waited until roughly two weeks remained in the limitations period before filing suit against several potentially implicated insurers known to him. It was not reasonable to conclude that two weeks was enough time to realistically expect to use legal process to obtain the necessary information to identify the motor vehicle's insurer from the operator of the vehicle that caused plaintiff to swerve and crash. Furthermore, Trumbull's conduct was irrelevant; plaintiff had the burden to file a proper claim under MCL 500.3114(5).

1. INSURANCE — NO-FAULT ACT — PERSONAL PROTECTION INSURANCE BENEFITS — DUE DILIGENCE BY THE CLAIMANT.

MCL 500.3114 of the no-fault act, MCL 500.3101 *et seq*., puts the onus on a claimant to "claim" personal protection insurance (PIP) benefits from a specified list of potential insurers based on the statutory priority scheme; to "claim" PIP benefits in this context means that one must put potential insurers on notice and submit insurance claims stating an entitlement to benefits and requesting payment; when it would be practically impossible for a party to learn the identity of the presumed highest-priority insurer, then the injured party may look to another insurer in the order of priority, such as their default PIP insurer or, if that is not an option, the Michigan Assigned Claims Plan; a claimant must be diligent in the pursuit of their claim for PIP benefits, and due diligence requires a good-faith effort to fulfill a legal obligation or requirement that could ordinarily be expected of a person under the factual circumstances; while due diligence must be more than a mere gesture, it does not mean that one must exhaust everything that is theoretically or abstractly possible; due diligence does not require an individual to do the impossible, nor does it require one to commit illegal, unethical, or otherwise impermissible acts; whether a claimant exercised due diligence is a fact-specific determination that must be made on a case-by-case basis.

2. INSURANCE — NO-FAULT ACT — PERSONAL PROTECTION INSURANCE BENEFITS — DUE DILIGENCE BY THE INSURER.

Insurers who receive a claim for personal protection insurance (PIP) benefits prior to expiration of the limitations period must act diligently when investigating, responding to, and resolving the claim; a dispute regarding which of multiple insurers is legally obligated to pay a valid PIP benefits claim generally does not excuse delaying payment; an insurer that is confident that it is not liable to pay PIP benefits can and should promptly deny the claim so that the claimant can seek assignment by the Michigan Automobile Insurance Placement Facility or take other actions that might be necessary to preserve their right to PIP benefits; assuming the claimant has been diligent, an insurer within the order of priority who has received a timely PIP benefits claim but neither pays nor denies the claim prior to expiration of the limitations period risks being held liable due to its lack of timely action.

Law Offices of Jason P. Kief (by *Jason P. Kief*) and *Steven A. Hicks* for Willie Griffin.

Secrest Wardle (by *Drew W. Broaddus* and *Ryan D. Ewles*) for Trumbull Insurance Company.

Dykema Gossett PLLC (by *Lori McAllister*) for the Michigan Assigned Claims Plan.

Anselmi Mierzejewski Ruth & Sowle (by *Mark L. Nawrocki*) for the Michigan Automobile Insurance Placement Facility.

WELCH, J. This case involves a claim for personal protection insurance (PIP) benefits filed by plaintiff, Willie Griffin, that was left pending without payment or denial for nearly a year after Griffin was seriously injured while riding a motorcycle. Griffin filed a claim with defendant Trumbull Insurance Company (Trumbull), his primary automobile insurance company, within eight weeks of the accident when he was unable to identify the insurance company for the truck that caused his accident or for its driver. Trumbull neither paid the claim nor denied the claim. One month shy of the 12-month limitations period, Griffin filed a lawsuit against Trumbull, demanding payment pursuant to the insurance policy. Trumbull used its subpoena power obtained in that lawsuit and determined the identity of the truck driver's former employer and the former employer's insurer. Trumbull then, after the one-year notice and limitations period had expired, moved for summary disposition, claiming it had no liability because it was not the highest-priority insurer. The trial court granted Trumbull's motion for summary disposition, effectively eliminating Griffin's ability to obtain PIP benefits from any insurance company, and the Court of Appeals affirmed.

We reverse, in part, and hold that Griffin properly filed a claim under the no-fault act, MCL 500.3101 *et seq*., against all insurers who were identifiable prior to the expiration of the limitations period and that Trumbull's delaying a decision on payment or denial of Griffin's claim until after the limitations period expired did not excuse it from liability to pay PIP benefits. The trial court erred by granting Trumbull's summary-disposition motion, and the Court of Appeals erred by affirming on the basis that a previously *unidentifiable* higher-priority insurer *became identifiable* during litigation well after the one-year notice and limitations period in MCL 500.3145 had expired.

I. FACTUAL BACKGROUND

On May 6, 2016, Griffin was driving a motorcycle when a large truck merged into his lane. Griffin swerved to avoid the truck. While there was no physical collision, Griffin's motorcycle went down, it was damaged, and he was badly injured. Griffin was transported by ambulance from the scene to a hospital to receive medical treatment.

The truck driver stopped and talked to the responding police officer. The officer recorded the driver's name, personal telephone number, and residential address in the crash report as well as the name and contact information of a second witness. Griffin's insurance and vehicle information were also included in the crash report. However, the responding officer did not record the license plate number or VIN of the truck, the insurer of the truck, the owner of the truck, or any other identifying information regarding the truck.

Griffin hired an attorney to assist with his insurance claim a few days later. Five days after the accident,

Griffin's attorney sent a letter to the truck driver using the address in the crash report. The letter stated that Griffin had retained an attorney, provided contact information, and stated that Griffin intended to take legal action. The letter further "suggested that you [the driver] turn this letter over to either the insurance agent or the insurance company handling your liability insurance coverage. We are confident that they will communicate with us relative to this case." The truck driver never responded to the letter.

Trumbull was Griffin's personal automobile insurer at the time of the accident, and the policy included PIP coverage. An Allstate Insurance Company (Allstate) policy held by Griffin's girlfriend covered the motorcycle that Griffin was driving, but that policy did not include PIP coverage. Griffin filed a PIP claim with Trumbull through his attorney on June 30, 2016. Trumbull's initial response was that it needed to investigate, and in late October 2016, its investigator interviewed Griffin at his attorney's office. Beginning on November 1, 2016, Trumbull made numerous unsuccessful attempts to contact the truck driver, which included several phone calls, sending someone to his home, mailing letters, and checking to see if the driver owned any vehicles or businesses. Trumbull also unsuccessfully attempted to contact the other witness listed in the crash report. None of this revealed who owned or insured the truck.

On December 26, 2016, Griffin's attorney wrote to Trumbull again, inquiring whether it intended to pay Griffin's PIP benefits claim, asking for an update as to the results of Trumbull's investigation, and requesting an immediate response. Griffin represented that Trumbull did not respond. The record indicates that Trumbull gave up and closed its investigation in late

December 2016. It is unclear when, if ever, Trumbull shared the details of its investigation with Griffin prior to litigation.

Then, on December 30, 2016, after Trumbull still had not paid or denied the PIP benefits claim, Griffin submitted a separate PIP benefits claim to the Michigan Assigned Claims Plan (the MACP) through the Michigan Automobile Insurance Placement Facility (the MAIPF). The MAIPF refused to assign the claim and requested more information. Griffin also submitted claims to Esurance Property and Casualty Insurance Company (Esurance) and Allstate, which were both lower-priority insurers. Then, in April 2017, Griffin's attorney hired MEA Research Services in a final attempt to locate any additional insurance coverage that might be applicable; MEA found no insurance policies for the truck driver, and without any identifying information about the truck, it was unable to provide any further assistance. On April 21, 2017, approximately 11 months after the accident, Griffin timely filed this lawsuit seeking payment of his PIP benefits and naming Trumbull, the MACP, Allstate, Esurance, and an unnamed John Doe insurance company as defendants.[1] It was not until May 10, 2017—more than a year after both the accident and the filing of the PIP claim with Trumbull—that Trumbull finally informed Griffin that it was "unable to consider benefits at this time due to a lack of information regarding this matter."

During discovery in this case, Trumbull hired an investigator to find the truck driver and serve him with a deposition subpoena. The parties learned from the

[1] Allstate, Esurance, and the John Doe insurance company were previously dismissed by stipulation, and those orders have not been appealed.

truck driver's deposition that he had never contacted his insurer and did not own the truck he had been driving. Rather, the truck was owned by Pavex Corporation (Pavex), the driver's former employer, and the truck had been insured by Harleysville Insurance (Harleysville). It was also discovered that the truck driver had submitted an accident report to Pavex but that Pavex never reported the accident or submitted a claim to Harleysville, and the driver never forwarded Griffin's letter to Pavex. Trumbull eventually obtained a copy of the vehicle registration for the truck and a copy of the Harleysville insurance policy from Pavex.

Armed with new information, Trumbull moved for summary disposition under MCR 2.116(C)(10), arguing that it was not liable to pay PIP benefits because Harleysville was the highest-priority insurer. Trumbull argued that it did not matter that Griffin would not recover any PIP benefits because the limitations period had run before Harleysville was discovered. The MACP likewise moved for summary disposition, making similar arguments. The trial court agreed with the moving parties, holding that Harleysville was the highest-priority insurer and that Griffin had not exercised reasonable diligence in attempting to timely locate Harleysville. The court therefore granted summary disposition in favor of Trumbull and the MACP.

The Court of Appeals affirmed the trial court in a split, published decision. *Griffin v Trumbull Ins Co*, 334 Mich App 1; 964 NW2d 63 (2020). The majority relied on *Frierson v West American Ins Co*, 261 Mich App 732; 683 NW2d 695 (2004),[2] a case that involved a hit-and-run collision in which the offending vehicle and driver were never located. In *Frierson*, the Court of

[2] No party sought leave to appeal the Court of Appeals' decision in *Frierson*.

Appeals held that the plaintiff was entitled to PIP benefits from the passenger's motor vehicle insurer because the offending vehicle was never located. *Id*. at 737-738. In this matter, the Court of Appeals construed *Frierson* narrowly and found that its holding only applies if a higher-priority insurer under MCL 500.3114 *cannot be identified* and that the higher-priority insurer in *Frierson* could not be identified because of the hit-and-run nature of the crash. *Griffin*, 334 Mich App at 11. The majority concluded that *Frierson* "calls for a binary analysis that asks only whether a higher-priority insurer is identifiable." *Id*. at 11-12. The majority rejected the reasonable-diligence standard used by the trial court and held that it was dispositive "that Harleysville could have been, and in fact actually was, identified," *id*. at 12, regardless of the efforts or difficulties associated with attempting to locate insurers because of incomplete information. Accordingly, the Court of Appeals affirmed for different reasons than those relied on by the trial court.[3]

Judge RONAYNE KRAUSE concurred as to disposition of the claims against the MACP but dissented as to Trumbull. The dissent agreed that *Frierson* established a "conditional test: *if* a higher-priority insurer 'cannot be identified,' *then* the 'general rule' regarding insurer priority applies." *Griffin*, 334 Mich App at 18 (RONAYNE KRAUSE, J., concurring in part and dissenting in part). However, the dissent found no guidance in *Frierson* for what it means for an insurer to be "identifiable" because the parties in that case had simply agreed—and the Court accepted—that no higher-priority insurer could have been identified. *Id*. The

[3] The Court of Appeals unanimously affirmed the grant of summary disposition to the MACP, and that holding was not appealed to this Court.

dissent rejected the "absolute impossibility" standard that the majority had seemingly crafted "out of whole cloth." *Id*. at 20. While recognizing that neither the Legislature nor this Court had yet crafted a "standard for determining when or how a higher-priority insurer 'cannot be identified,' " the dissenting judge expressed support for something resembling a due-diligence standard. *Id*. at 20-21. Under such a standard, the dissenting judge would have held that Griffin was sufficiently diligent under the circumstances and that Griffin should therefore be entitled to the PIP benefits. *Id*. at 22-23.

Griffin sought leave to appeal to this Court. We scheduled oral argument on the application and directed the parties to address the following issues:

> (1) whether a lower-priority insurer, who was provided timely notice under MCL 500.3145(1), can be held liable for personal protection insurance benefits under the no-fault act if the higher-priority insurer was not identified until after the one-year statutory notice period under MCL 500.3145(1) expired; if so, (2) whether the insured must prove that he or she exercised reasonable, due, or some other degree of, diligence in searching for the higher-priority insurer; and, if so, (3) whether the appellant exercised the requisite degree of diligence in searching for the higher-priority insurer. [*Griffin v Trumbull Ins Co*, 507 Mich 941, 941-942 (2021).]

II. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019).

III. ANALYSIS

As a comprehensive and "innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or 'fault') liability system[,] [t]he goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978). When reaffirming an insurer's right to equitable subrogation last term, we observed that

> [t]he no-fault act is "a comprehensive scheme of compensation designed to provide sure and speedy recovery of certain economic losses resulting from motor vehicle accidents." For that reason, "whenever a priority question arises between two insurers, the preferred method of resolution is for one of the insurers to pay the claim and sue the other in an action of [equitable] subrogation." [*Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan*, 507 Mich 498, 517; 968 NW2d 482 (2021) (alterations in original; citations omitted).]

Moreover, while we have long recognized that when a statute is "clear and unambiguous, the courts must apply the statute as written," we have also acknowledged that "[t]he no-fault act is remedial in nature and is to be liberally construed in favor of the persons who are intended to benefit from it." *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997). See also *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 61; 404 NW2d 199 (1987); *Walega v Walega*, 312 Mich App 259, 266; 877 NW2d 910 (2015); *Churchman v Rickerson*, 240 Mich App 223, 228; 611 NW2d 333 (2000).

Following a motor vehicle accident, MCL 500.3114[4] instructs a person to pursue his or her "claim" for PIP benefits from insurers according to the listed order of priority. In this context, a claim for benefits is simply a demand to an insurer by its insured or a third party for payments that are believed to be due after a motor vehicle accident.[5] "[T]he general rule is that one looks to a person's own insurer for no-fault benefits unless one of the statutory exceptions, [MCL 500.3114(2), (3), and (5)], applies." *Parks v Detroit Auto Inter-Ins Exch*, 426 Mich 191, 202-203; 393 NW2d 833 (1986). For a claim involving a motorcycle, the order of priority for potential insurers is set forth in MCL 500.3114(1) and (5):

> (1) *Except as provided in subsections* (2), (3), *and (5)*, a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person

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[4] After the accident giving rise to Griffin's claim occurred, MCL 500.3114 and other parts of the no-fault act were amended by 2016 PA 347 and 2019 PA 21. The amended provisions are not before the Court. Unless otherwise stated, this opinion will refer to the no-fault act as it existed on May 6, 2016, the date of the accident.

[5] The point is that making a claim for insurance benefits is not the same as filing a lawsuit. This commonsense, contextual understanding is also consistent with how an insurance claim is understood within the insurance industry. See, e.g., National Association of Insurance Commissioners, *Glossary of Insurance Terms* <https://content.naic.org/consumer_glossary#C> (accessed June 8, 2022) [https://perma.cc/CU8Y-Z8GQ] (defining "claim" as "a request made by the insured for insurer remittance of payment due to loss incurred and covered under the policy agreement"); GEICO, *Glossary of Insurance Terms and Definitions* <https://www.geico.com/information/insurance-terms/> (accessed June 8, 2022) [https://perma.cc/WF8L-JKP9] (defining "claim" as "[a]ny request or demand for payment under the terms of the insurance policy"); International Risk Management Institute, Inc., *Glossary* <https://www.irmi.com/term/insurance-definitions/claim> (accessed June 8, 2022) [https://perma.cc/H8N5-ZTAZ] ("Claim — used in reference to insurance, a claim may be a demand by an individual or corporation to recover, under a policy of insurance, for loss that may come within that policy.").

named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. *A personal injury insurance policy described in section 3103(2) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motorcycle accident*. . . .

* * *

(5) Subject to subsections (6) and (7), a person who suffers accidental bodily injury arising from a motor vehicle accident that shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle *shall claim personal protection insurance benefits from insurers in the following order of priority*:

(a) The insurer of the owner or registrant of the motor vehicle involved in the accident.

(b) The insurer of the operator of the motor vehicle involved in the accident.

(c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.

(d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident. [Emphasis added.]

At the time of the accident, the limitations period for providing notice and filing an action for recovery of PIP benefits was contained in MCL 500.3145(1):

An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be

> commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

It is clear that MCL 500.3114 puts the onus on a claimant to "claim" PIP benefits from a specified list of potential insurers based on the statutory priority scheme. As previously noted, to "claim" PIP benefits in this context can be reasonably understood to mean that one must put potential insurers on notice and submit insurance claims stating an entitlement to benefits and requesting payment.[6] Taken together, this implies that a claimant must be diligent in the pursuit of his or her claim for PIP benefits. Due diligence requires a good-faith effort to fulfill a legal obligation or requirement that could ordinarily be expected of a person under the factual circumstances. See *People v Bean*, 457 Mich 677, 682-683; 580 NW2d 390 (1998); *People v Dye*, 431 Mich 58, 66-67; 427 NW2d 501 (1988). See also *In re Gorcyca*, 500 Mich 588, 627; 902 NW2d 828 (2017) (holding that due diligence is " '[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation' "), quoting

[6] The obligation to "claim personal protection insurance benefits from insurers" in a stated order of priority under MCL 500.3114(5) is separate and distinct from the requirement that an "action for recovery of" PIP benefits (i.e., a lawsuit) be filed within a specified time frame under MCL 500.3145(1).

Black's Law Dictionary (10th ed). While due diligence must be more than a mere gesture, it does not mean that one must exhaust everything that is theoretically or abstractly possible. See *Ickes v Korte*, 331 Mich App 436, 443; 951 NW2d 699 (2020) ("[D]ue diligence means undertaking reasonable, good-faith measures under the circumstances, not necessarily undertaking everything possible."). Due diligence does not require an individual to do the impossible, nor does it require one to commit illegal, unethical, or otherwise impermissible acts. See *id*. at 443 n 3. Requiring a claimant to identify potential insurers and pursue a PIP benefits claim with due diligence is consistent with the purpose of the no-fault act and its limitations period. We emphasize, however, that this will be a fact-specific determination that must be made on a case-by-case basis.

The Legislature also provided strong incentives for prompt resolution of claims and avoidance of needless litigation when it provided that an attorney's "fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." MCL 500.3148(1). PIP benefits "are payable as loss accrues," MCL 500.3142(1), and they are "overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained," MCL 500.3142(2). Overdue payments are subject to a 12% interest penalty. MCL 500.3142(3). MCL 500.3142(2) also provides that "[i]f reasonable proof is not supplied as to the entire claim," then those parts of the claim that are not sufficiently supported at first but are "later supported by reasonable proof [are] overdue if not paid within 30 days after the proof is received by the insurer." The law further requires an insurer to

pay all benefits to or for the benefit of the injured person or, in death, to his or her dependents. MCL 500.3112. If the insurer has doubt about the party who should receive the payment, it may ask the circuit court for an order apportioning the benefits equitably between the proper parties. *Id*. When read together, these provisions establish that the insurers who receive a claim for PIP benefits prior to expiration of the limitations period must act diligently when investigating, responding to, and resolving the claim, and the provisions provide a strong financial incentive to do so.

For decades, the Court of Appeals has recognized that a dispute regarding which of multiple insurers is legally obligated to pay a valid PIP benefits claim generally does not excuse delaying payment. See *Bloemsma v Auto Club Ins Co*, 174 Mich App 692, 697; 436 NW2d 442 (1989) ("A dispute of priority among insurers will not excuse the delay in making timely payment."); *Bach v State Farm Mut Auto Ins Co*, 137 Mich App 128, 132; 357 NW2d 325 (1984) (holding that to delay paying a claim to resolve which of two insurers was legally responsible would defeat the purpose of the statutes imposing penalty interest and attorney fees). We affirm this general rule as being consistent with the overall statutory scheme adopted by the Legislature. When the wrong insurer pays, the Legislature has provided statutory rights for recoupment of payments, see, e.g., MCL 500.3114(6), and we have recognized an insurer's right to sue for equitable subrogation, see *Esurance*, 507 Mich at 517-520. In other circumstances, a priority dispute may result in a claim submitted to the MACP being assigned by the MAIPF. See MCL 500.3172. The statutory scheme adopted by the Legislature thus strongly incentivizes insurers to pay first and seek reimbursement later when it is clear that a claimant will be entitled to PIP benefits from

someone, and it penalizes unreasonable payment delays. See *Bazzi v Sentinel Ins Co*, 502 Mich 390, 419, 423; 919 NW2d 20 (2018) (MCCORMACK, J., dissenting). Alternatively, an insurer that is confident that it is not liable to pay PIP benefits can and should promptly deny the claim so that the claimant can seek assignment by the MAIPF or take other actions that might be necessary to preserve the right to PIP benefits.[7]

IV. APPLICATION

It is undisputed that the limitations period in MCL 500.3145(1) had run before Harleysville was identified. The parties also agree that Harleysville is the highest-priority insurer under MCL 500.3114(5). The question before the Court is whether the trial court erred by granting summary disposition to Trumbull on the basis that Trumbull could not be liable for Griffin's PIP benefits claim because of Griffin's alleged lack of diligence in trying to identify Harleysville before the one-year limitations period elapsed. We conclude that summary disposition was granted in error.

Griffin acted diligently under the circumstances. The crash report contained contact information for the truck driver but omitted insurance and identifying

[7] We do not mean to suggest that a lower-priority insurer is statutorily obligated to pay PIP benefits merely because it received a timely claim for such benefits. Rather, such insurers have an obligation to act diligently in deciding how to resolve the claim and to inform the claimant of that decision in a timely manner. Assuming the claimant has been diligent, an insurer within the order of priority who has received a timely PIP benefits claim but neither pays nor denies the claim prior to expiration of the limitations period risks being held liable due to its lack of timely action. Conversely, an insured or claimant who waits until the twilight of the limitations period to put an insurer on notice of a possible PIP benefits claim for the first time by filing a lawsuit is unlikely to have been diligent. Diligent and timely action by all parties is required; gamesmanship should not be rewarded.

information for the truck at issue. Griffin hired an attorney to assist him who promptly sent a letter of intent to the truck driver, but the truck driver neither responded to the letter nor forwarded it.[8]

Griffin's attorney then submitted a claim for PIP benefits to Trumbull, who was Griffin's general PIP provider. Trumbull initially responded by saying that further investigation was needed, but Trumbull *did not make payment or deny Griffin's claim*, and it did not timely respond to inquiries from Griffin's attorney. The record demonstrates that Trumbull's prelitigation attempts to contact the truck driver were unsuccessful. Trumbull was also unable to locate a higher-priority insurer. In December 2016, a full four months before the expiration of the one-year limitations period, Trumbull closed the investigation. But Trumbull did not formally deny Griffin's claim until after this lawsuit had been filed and after the limitations period to put an additional insurer on notice or to file a lawsuit against another insurer had passed.

Beyond knowing that Trumbull was investigating the claim generally, it is not clear if Trumbull shared

[8] Justice ZAHRA suggests that Griffin could have been more diligent in tracking down the employer of the truck driver given that there was some evidence that the truck was carrying industrial equipment and might have had commercial logos on the vehicle. But Griffin was seriously injured, required emergency medical transportation, and was hospitalized for an extended time. Ultimately, the police report here was deficient because it lacked identifying information about the truck, and that deficiency is a large reason for the quandary that Griffin faced. What if Griffin, or someone involved in a similar accident, was unconscious? The dissent seems to suggest that seriously injured individuals in such circumstances would not be able to receive PIP benefits from any insurer unless someone else discovered the owner or registrant of the offending vehicle because the highest-priority insurer would theoretically be identifiable regardless of whether anyone is successful in actually identifying the insurer.

any details of its investigation with Griffin prior to litigation. What is clear is that Griffin was left waiting in limbo for Trumbull to make a decision on his pending PIP benefits claim. During this time, Griffin also submitted notices and claims to the MACP, Esurance, and Allstate as lower-priority insurers. The MAIPF refused to assign Griffin's claim to a carrier because Trumbull was a known insurer within the order of priority and was not explicitly disputing liability. About 11 months after the accident, Griffin hired a third-party company to try to identify the truck driver's insurance provider, but the company was unsuccessful. With Trumbull *refusing to pay or deny the pending claim* for PIP benefits, and being unable to identify any higher-priority insurer, Griffin filed this lawsuit slightly less than 12 months after the accident. It was only through deposition testimony in this case that the parties learned that the truck was a work vehicle insured by Harleysville, which was not notified of the accident by either the driver or the insured business.

The Court of Appeals has previously held that "when an insurer that would be liable under one of the exceptions in MCL 500.3114(1) cannot be identified, the general rule applies and the injured party must look to her own insurer for personal protection insurance benefits." *Frierson*, 261 Mich App at 738, citing *Parks*, 426 Mich at 202-203. *Frierson* involved a hit-and-run in which the police were unable to locate the offending driver or vehicle, and thus *the parties agreed* that no higher-priority insurer was identifiable. We do not know what efforts the parties might have made to track down the fleeing driver, such as checking traffic cameras or asking for cooperation from law enforcement. Because of the parties' stipulation and the court's acceptance of that agreement, *Frierson* pro-

vides no clear guidance about what it means for a higher-priority insurer to be unidentifiable. Nevertheless, the facts and circumstances of a situation must be considered because the law cannot be reasonably applied in a manner that requires someone to do what is impossible. We thus disagree with the Court of Appeals majority and Justice ZAHRA that *Frierson* created a binary inquiry that only asks whether an insurer was potentially identifiable in the abstract. However, we agree with *Frierson*'s implication that when it would be practically impossible for a party to learn the identity of the presumed highest-priority insurer, then an injured party should be able to look to another insurer in the order of priority, such as their default PIP insurer or, if that is not an option, the MACP.[9]

While this case does not involve a hit-and-run, many of the factual circumstances are similar. No insurance or identifying information for the truck was included in the crash report, and the truck driver refused to cooperate until served with a subpoena. Griffin thus had little more information relevant to claiming PIP benefits after the accident than someone who had been involved in a hit-and-run. Before filing a lawsuit, Griffin had no legal authority to compel cooperation from the truck driver, and there was nothing in the text of the no-fault act in 2016 that required a claimant to file a lawsuit or send out subpoenas before a pending PIP benefits claim had been denied. Importantly, MCL 500.3114(5) provides that a person "*shall claim* personal protection insurance benefits from insurers" in a

[9] Indeed, it would be absurd for our state's comprehensive no-fault insurance system to leave an injured motorcyclist in a better position, from an insurance perspective, when the offending vehicle and driver flee the scene and are never identified than when the driver of the offending vehicle talks with the police but the police fail to record identifying information about the offending vehicle itself.

specified order. (Emphasis added.) Claiming benefits from the highest-priority insurer that is identifiable through the filing of an insurance claim is not the same as filing an "action for recovery of" PIP benefits under MCL 500.3145(1). As previously explained, Griffin hired an attorney; investigated the claim; tried to "claim" PIP benefits from Trumbull, the highest-priority insurer known to and identifiable by any relevant party based on available information; and cooperated with Trumbull's investigation. Griffin further provided notice of his potential PIP benefits claim to every lower-priority insurer he could identify as well as to the MACP and the MAIPF. Under these facts, Griffin exercised due diligence, and Harleysville was unidentifiable during the prelitigation phase of this dispute, making Trumbull the default insurer under *Parks*, 426 Mich at 202-203, and *Frierson*, 261 Mich App at 738.

We reject Trumbull's and Justice CLEMENT's arguments that due diligence required Griffin to file a lawsuit to obtain the subpoena power *before Trumbull had taken any formal action to deny or dispute liability for Griffin's pending PIP benefits claim*. Accepting such an argument would incentivize insurers to engage in undesirable gamesmanship and would be antithetical to the core purposes of the no-fault act concerning the prompt resolution of claims and the avoidance of needless litigation. See *Parks*, 426 Mich at 207; *Shavers*, 402 Mich at 578-579. Such gamesmanship would also be contrary to MCL 500.3142(1) and (2), which provide that "benefits are payable as loss accrues" and that benefits would be "overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained."

It is true that MCL 500.3114(5) places a burden on the claimant to "claim personal protection insurance benefits from insurers in" the stated order of priority, and we agree with Justice CLEMENT that this burden implies the claimant's need to exercise due diligence. We also agree with Justice CLEMENT that "[i]t is obviously impossible for claimants to see the future, and if that is the only way a claimant could identify a higher-priority insurer within the limitations period," then MCL 500.3114(5) should not be read as requiring a claimant to do something that is impossible. But it is equally true that a claimant cannot feasibly do more than ascertain all identifiable insurers that are potentially in the order of priority using legal means and available information.

That is precisely what Griffin did in this case. As previously noted, Griffin promptly hired an attorney, tried to contact the truck driver, hired a third-party company to look for applicable insurance policies, put every identifiable insurer on notice, and cooperated with Trumbull's investigation. Griffin had no legal right or ability, at that time, to force the cooperation of the truck driver who was identified in the crash report. Moreover, after Trumbull was unable to identify a higher-priority insurer, it apparently closed its investigation and went silent rather than putting its insured on notice that it was disputing priority, disputing liability to pay, or denying the claim. Under these circumstances, *there was no reason for Griffin to file a lawsuit against Trumbull sooner than he did*, which was, after all, still within the limitations period. In the absence of an express requirement in the no-fault act, someone who is injured in an accident should not be required to file a lawsuit against a known insurance company merely to ensure that he or she can force

cooperation of potentially knowledgeable individuals through the power of subpoena.

When one cuts through the fog of legal posturing, it becomes clear that the basis for Trumbull's nearly year-long silence and inaction on Griffin's claim was a phantom priority dispute. Trumbull did not believe that it was the highest-priority insurer, but it was unable to point to a higher-priority insurer until after Griffin filed this lawsuit. Even if Trumbull's belief was reasonable, it had several lawful options for protecting its rights. For example, Trumbull could have simply denied Griffin's claim, in which case the MAIPF likely would have assigned Griffin's claim, or Trumbull could have expressly stated that it was not the highest-priority insurer. If Trumbull was concerned about MCL 500.3142(2) but did not want to deny the claim, it could have notified Griffin that "reasonable proof" had not been "supplied as to the entire claim" and requested additional information or instructed Griffin to take additional action to provide whatever missing information was needed. Trumbull also could have paid Griffin's claim and filed its own lawsuit to seek statutory recoupment or equitable subrogation from a higher-priority insurer. Under any of these scenarios, Griffin would have been put on notice that his default insurer, to which he had been paying monthly premiums, was contesting its liability to pay PIP benefits, and Griffin could have responded accordingly. What Trumbull could not do was leave its insured in limbo for nearly a year under the guise of "investigation" *while refusing to pay or deny the pending PIP benefits claim* and then pull the rug out after a lawsuit was filed and the limitations period in MCL 500.3145(1) had run.

V. CONCLUSION AND RELIEF

We hold that under the facts of this case, Trumbull can be held liable to pay Griffin's claim for PIP benefits under MCL 500.3114(5). Griffin exercised due diligence by doing everything the law required of him, and we refuse to reward Trumbull for its gamesmanship. We reverse the judgments of the Court of Appeals and the Wayne Circuit Court to the extent that summary disposition was granted in favor of Trumbull. We remand this case to the Wayne Circuit Court for further proceedings that are consistent with this opinion.

MCCORMACK, C.J., and BERNSTEIN and CAVANAGH, JJ., concurred with WELCH, J.

ZAHRA, J. (*dissenting*). I would affirm the decision of the Court of Appeals. A lower-priority insurer cannot be held liable for personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., when the highest-priority insurer is identifiable and not given timely notice under MCL 500.3145(1). This conclusion is required by the unambiguous text of the no-fault act. The majority, however, eschews the unambiguous text of the act in favor of a result that is consistent with the act's general purpose. But the general purpose of an act cannot defeat the clear and unambiguous language within the act that places limitations on the scope of that act. To do so begs the question and assumes the answer. Here, the Legislature made clear that a motorcycle operator who is injured in an accident that involves a motor vehicle "*shall* claim personal protection insurance benefits from . . . [t]he insurer of the owner or registrant of the

motor vehicle involved in the accident."[1] Because plaintiff failed to timely claim PIP benefits from the insurer of the owner or registrant of the truck involved in his accident, I dissent.

MCL 500.3114(5) states that "a person who suffers accidental bodily injury arising from a motor vehicle accident that shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle *shall* claim personal protection insurance benefits from insurers *in the following order of priority*[.]"[2] The first in the list of priority is "[t]he insurer of the owner or registrant of the motor vehicle involved in the accident."[3] The Legislature's use of the word "shall" indicates that the priority list is mandatory.[4] And it is undisputed here that Harleysville Insurance Company is the highest-priority insurer under MCL 500.3114(5). Trumbull Insurance Company is no more than second in priority. Therefore, plaintiff was required to follow the order of priority and claim benefits from Harleysville. Plaintiff failed to do so within the one-year statutory period.[5] Plaintiff is therefore barred from collecting PIP benefits from Harleysville. Nothing in the no-fault act provides a basis to conclude that plaintiff is nevertheless entitled to recover based on notice it gave to Trumbull, the wrong insurer. The no-fault act does not provide exceptions for difficulties in discovering necessary facts or evidence that would

[1] MCL 500.3114(5)(a) (emphasis added).

[2] Emphasis added.

[3] *Id*.

[4] See, e.g., *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 114; 845 NW2d 81 (2014) (explaining that the Legislature's use of the word "shall" in the relevant statutes "indicates a mandatory and imperative directive").

[5] See MCL 500.3145(1).

either toll the statute of limitations or allow the plaintiff to sue an otherwise incorrect defendant.

Similarly, nothing in the broader statutory context suggests that the Legislature intended to place lower-priority insurers on the hook when a plaintiff fails to identify the highest-priority insurer within the limitations period. One might think that if the Legislature intended for a lower-priority insurer to pay even when a higher-priority insurer can be identified, the Legislature would have provided a recoupment mechanism whereby the lower-priority insurer could seek reimbursement from the higher-priority insurer. The no-fault act contains various recoupment devices for insurers, but none covers these circumstances.[6] The need for a recoupment mechanism would be readily apparent if lower-priority insurers were required to pay in these circumstances. For example, an insurer might sue a lower-priority insurer on the very last day of the limitations period, leaving that insurer no time in which to identify a higher-priority insurer before the limitations period expired. This provides support for the conclusion that the lower-priority insurer is not obligated to pay when there is a higher-priority insurer.

I have no dispute with the majority about the general purpose of the no-fault act, which is "designed to provide sure and speedy recovery of certain economic losses resulting from motor vehicle accidents."[7] I also agree that "the *preferred* method of resolution [of priority disputes] is for one of the insurers to pay the claim and sue the other in an action of equitable

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[6] See *Bronner v Detroit*, 507 Mich 158, 173-175; 968 NW2d 310 (2021) (discussing the reimbursement mechanisms in the statute).

[7] *Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan*, 507 Mich 498, 517; 968 NW2d 482 (2021) (quotation marks and citation omitted).

subrogation."[8] But it cannot be that the general purpose of an act trumps express language within the act. Limitations on recovery placed in the no-fault act are more a part of the no-fault act's purpose than the broad, general purpose of the act itself. I am aware of no legislation, state or federal, that pursues a general purpose at all costs. There are always legislative limitations that set boundaries on recovery—boundaries that must be honored by the courts.[9]

Ultimately, the issue in this case is not whether the purposes of the no-fault act would be furthered by making Trumbull pay. Rather, at issue is whether an insurer must pay PIP benefits when it is not the highest-priority insurer. Was it plaintiff's obligation to determine whether the truck involved in his accident was insured, or was plaintiff permitted to make his claim for PIP benefits with Trumbull, his motor vehicle insurer, and thus place the onus on Trumbull to pay the claim even if a higher-priority insurer could be identified? As discussed earlier, I conclude that the obligation fell on plaintiff, not Trumbull. The no-fault act sets forth a clear order of priority. The act further requires the "person who suffers accidental bodily injury [to] . . . claim personal protection insurance benefits from insurers in the [statutorily defined] order of priority[.]"[10] Nothing in the statutory language suggests that a claim may be asserted against a lower-

[8] *Id*. (emphasis added; quotation marks, citation, and brackets omitted).

[9] As more fully explained in this dissent, the general purpose of ensuring prompt payment of no-fault benefits would have been satisfied had plaintiff's counsel more diligently pursued an investigation into this claim.

[10] MCL 500.3114(5).

priority insurer, thus forcing that insurer to pay benefits even if a higher-priority insurer can be identified.

The Court of Appeals opinion in *Frierson v West American Ins Co* demonstrates how the statute operates.[11] There, the Court held that when an insurer cannot be identified, the injured party must look to their own insurer for PIP benefits. *Frierson* did not hold that an injured party can jump down the order of priority if the highest-priority insurer *could* have been identified but was not. As the majority explains, *Frierson* involved a hit-and-run in which neither the police nor the parties were able to identify the driver or offending vehicle. Because it was impossible to identify a higher-priority insurer, the injured party's own insurer was the highest-priority insurer under the no-fault act. But the *Frierson* panel explained that the offending vehicle's insurer would be liable under MCL 500.3114(5) "if identified."[12]

In the present case, the highest-priority insurer was identifiable and, in fact, has been identified. There is no dispute that Harleysville is a higher-priority insurer than Trumbull. The Court of Appeals correctly explained that *Frierson* calls for a binary analysis: a higher-priority insurer is either identifiable or not. Here, because the higher-priority insurer was identifiable, the statutory order of priority must be followed.[13]

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[11] *Frierson v West American Ins Co*, 261 Mich App 732, 738; 683 NW2d 695 (2004).

[12] *Id*.

[13] The majority relies, in part, on *Parks v Detroit Auto Inter-Ins Exch*, 426 Mich 191, 202-203; 393 NW2d 833 (1986). There, we addressed MCL 500.3114(1), which states, in pertinent part, "Except as provided in subsections (2), (3), and (5), . . . [a] personal injury insurance policy described in section 3103(2) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either

There is simply no textual basis for the "reasonable diligence" standard pressed by the majority and Justice CLEMENT. The majority emphasizes the unique facts and circumstances of this case, but the facts of this case are not all that unique and, in any event, do not change the meaning of a statute.[14] As discussed, MCL 500.3114(5) sets forth a mandatory order of priority. And there is not a statutory provision that creates an exception for claimants who failed to identify the proper insurer after giving it a good try. The majority and Justice CLEMENT import an exception into the statute based on policy and fairness concerns and, in doing so, rewrite the Legislature's priority scheme. As noted, under a proper reading of the statute, whether a higher-priority insurer is identifiable does not depend on whether a plaintiff exercised reasonable diligence to identify that insurer. But under the majority's opinion, a claimant may now provide notice to and recover from any of the listed insurers, regardless of how low on the priority list they may be; if he or she is deemed to have reasonably attempted to identify the higher-priority insurer, a lower-priority insurer will be forced to pay the claim and, in turn, bring its own claim for recovery against the highest-priority insurer.

Even if there were a reasonable-diligence requirement, I would conclude, as does Justice CLEMENT, that plaintiff did not exercise reasonable diligence in this

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domiciled in the same household, if the injury arises from a motorcycle accident." In concluding that Subsection (3) did not apply and thus Subsection (1) governed, we stated that "the general rule is that one looks to a person's own insurer for no-fault benefits unless one of the statutory exceptions, subsections 2, 3, and 5 applies." *Parks*, 426 Mich at 202-203. Here, by contrast, the terms of Subsection (5) clearly apply—MCL 500.3114(5) provides the rule for the circumstance at issue, i.e., a motorcycle accident.

[14] See *Clark v Martinez*, 543 US 371, 386; 125 S Ct 716; 160 L Ed 2d 734 (2005).

case. Plaintiff knew that a truck was involved in the accident giving rise to his injuries. Under the clear and unambiguous language of the no-fault act, plaintiff was to first pursue his PIP benefits from the insurer of the truck's owner or registrant. Plaintiff enlisted the aid of counsel to assert his claim. As noted in the majority's opinion, plaintiff's counsel sent a letter to the truck driver stating that plaintiff intended to take legal action and requesting that the driver forward the letter to his insurer. Apparently, the truck driver did not respond to this correspondence, and plaintiff's counsel did not take legal action, as threatened in the correspondence to the driver, or take any further action to determine the higher-priority insurer. Had plaintiff's counsel timely done so, plaintiff would have discovered the existence of Harleysville before the expiration of the limitations period. It does not appear, for example, that plaintiff or his counsel ever thought to investigate whether the driver had been operating his employer's vehicle at the time of the accident. The driver testified that the vehicle was a stake-bed truck with a tandem axle; there was also evidence that it was carrying a steamroller. Plaintiff indicated that he recalled seeing logos on the truck. It should have been apparent, therefore, that the truck could have been owned by the driver's employer. But plaintiff did not search for that employer, and it was not reasonable for plaintiff and his counsel to rely on Trumbull's own investigation.

It is not entirely clear what plaintiff or his attorney knew about Trumbull's investigation—they received a letter simply informing them that the claim was under investigation—yet they waited nearly five months before asking for an update from Trumbull. In May 2017, after the lawsuit had been filed, Trumbull responded that "[w]e are unable to consider benefits at this time

due to a lack of information regarding this matter." Thus, it does not appear that plaintiff was receiving updates or had any reason to believe that Trumbull had successfully found the higher-priority insurer—nor does it appear that plaintiff or his counsel sought any further updates. For these reasons, I cannot agree with the majority that plaintiff exercised reasonable diligence before commencing this lawsuit.

In sum, a goal of the no-fault act is indeed prompt payment, meaning that the act tends to prefer that insurers pay first and seek reimbursement later. But a general goal of the no-fault act cannot defeat clear statutory language. The majority's ruling improperly elevates this general principle from a mere policy objective to the prime directive of the no-fault act. For these reasons, I would affirm the decision of the Court of Appeals.

VIVIANO, J., concurred with ZAHRA, J.

CLEMENT, J. (*dissenting*). I believe that the trial court properly identified the reasons for granting summary disposition to defendants-appellees in this matter. This means, on the one hand, that I dissent from the Court's decision to reverse the trial court. It also means that I decline to join Justice ZAHRA's dissent, because I am not persuaded by the Court of Appeals' rationale for granting summary disposition to defendant-appellee Trumbull Insurance Company, which he would adopt. Rather, I believe—as the trial court held—that plaintiff failed to exercise reasonable diligence in identifying the correct insurer to file a claim against, and I would affirm the Court of Appeals on that alternative basis.

It is well established that the goal of our no-fault system "was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers v Attorney General*, 402 Mich 554, 579; 267 NW2d 72 (1978). The intended comprehensiveness of the program is demonstrated by the existence of the assigned-claims system, which creates what is "essentially an insurer of last priority," *Cason v Auto Owners Ins Co*, 181 Mich App 600, 610; 450 NW2d 6 (1989), from which an injured person can recover benefits if no other applicable insurance is available, MCL 500.3172(1). On the other hand, the no-fault act textually imposes the burden of filing a proper claim on a claimant. Thus, "*a person* who suffers accidental bodily injury arising from a motor vehicle accident that shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle *shall claim* personal protection insurance benefits from insurers in" a stated order of priority. MCL 500.3114(5) (emphasis added). "[T]he presumption is that 'shall' is mandatory." *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982). The law therefore does not contemplate a claimant simply filing a claim with *an* insurer that is *somewhere* in the order of priority, leaving it up to that insurer to ascertain whether a higher-priority insurer exists—the statutory text imposes the obligation on claimants to claim in the stated order of priority.

In light of this obligation to claim in the stated order of priority, the Court of Appeals concluded—and Justice ZAHRA agrees—that whether an insurer is liable "calls for a binary analysis that asks only whether a higher-priority insurer is identifiable." *Griffin v Trumbull Ins Co*, 334 Mich App 1, 11-12; 964 NW2d 63 (2020). If a higher-priority insurer is identified, at any point and for any reason, then a lower-priority insurer

is necessarily relieved of liability under this rule. I do not agree that the analysis is this simple. As noted, the structure of the no-fault system makes it clear that it is intended to be comprehensive. It is notable in this regard that all the instances of individuals who are excluded from benefits in MCL 500.3113 involve people who had control, in one way or another, over being excluded from benefits. When a claimant has demonstrated reasonable diligence in identifying the highest-priority insurer with which to file a claim, I do not believe that the insurer should then have a defense to paying benefits (at least, not after the limitations period of MCL 500.3145(1) has expired) because, by a stroke of chance, a higher-priority insurer is subsequently discovered.

The facts of *Frierson v West American Ins Co*, 261 Mich App 732; 683 NW2d 695 (2004), are illustrative of this principle. There, the plaintiff was a passenger on a motorcycle that had to swerve when an oncoming automobile crossed the center line of the road, causing the plaintiff to hit the ground. *Id*. at 733. Under MCL 500.3114(5)(a) and (b), the insurer of the owner of that automobile was the highest-priority insurer and the insurer of the operator of the automobile was the next highest, but because of the hit-and-run nature of the accident no information was known, or knowable, about those insurers, *id*. at 736-737, and the Court held that the priority analysis would proceed to insurers further down the list of priority, *id*. at 738. If, serendipitously, the owner of the automobile involved in the *Frierson* accident had come to light after the limitations period had expired—imagine if the automobile owner had business in the same courtroom in which *Frierson* was being litigated and remarked to one of the *Frierson* lawyers that he had been driving the automobile in that accident—I do not think the

injured person could be denied benefits from the highest-priority insurer who *was* identified even while being time-barred from recovering benefits from the belatedly identified highest-priority insurer.

To this extent, then, I agree with the majority that the Court of Appeals' analysis was erroneous. The statute directs an injured person to "claim" in a stated order of priority, but by definition an injured person can give no more than their best effort at making such a claim. In light of the textual indications of the system's intended comprehensiveness, I would interpret the statute as requiring a claimant to show at least, but also no more than, reasonable diligence when it requires an injured person to "claim." It is obviously impossible for claimants to see the future, and if that is the only way a claimant could identify a higher-priority insurer within the limitations period, then I would not construe MCL 500.3114(5) as requiring a claimant to do something that is impossible in order to enjoy the benefits the system clearly contemplates should be made available.

On the other hand, I do not believe that the trial court clearly erred by concluding that plaintiff had not demonstrated reasonable diligence in trying to identify the insurer of the motor vehicle he swerved to avoid while riding a motorcycle. Plaintiff waited until roughly two weeks remained in the limitations period before filing suit against several potentially implicated insurers known to him (including Trumbull), the Michigan Assigned Claims Plan, and a fictitious "John Doe Insurance Company," a stand-in for the insurer ultimately identified as Harleysville. Plaintiff did so knowing that he was in an accident that involved a motor vehicle and thus that the insurer of that vehicle—if there was one—would be at the top of the

order of priority. See MCL 500.3114(5)(a). He further knew the identity of the operator of the vehicle. He reached out via letter to the operator of the vehicle to get more information but received no answer. He knew that he could file suit against the unknown insurer of the accident vehicle under MCR 2.201(D) to subpoena the known operator of the vehicle and try to use legal process to compel the operator to disclose the information plaintiff knew he might need to file a claim with the highest-priority insurer. Subpoenaing the driver, after all, is exactly how Trumbull discovered the name of the higher-priority insurer that has prompted this appeal. Not taking these steps, in my view, exposed plaintiff to the risk of a higher-priority insurer being discovered after the limitations period had expired with plaintiff lacking an adequate excuse for not discovering that insurer within the limitations period.

Of course, we have no way of knowing whether the operator would have cooperated with plaintiff. It is possible that the operator would not have disclosed the information in a timely manner, and therefore plaintiff would have been left with no recourse but to sue a lower-priority insurer anyway. In light of the no-fault system's intended comprehensiveness, plaintiff's reasonable efforts to identify a higher-priority insurer should shield him from summary disposition if such an insurer is discovered after the limitations period expires when we construe whether he has made a proper "claim" under MCL 500.3114(5). But I do not believe that it is reasonable to conclude that two weeks was enough time to realistically expect to use legal process to obtain the necessary information from the operator of the vehicle that caused plaintiff to swerve and crash, and as a result I do not believe that the trial court clearly erred by holding that plaintiff had not demonstrated reasonable diligence in pursuing his claim.

The majority, in coming to the opposite conclusion, focuses on Trumbull's conduct during the run-up to plaintiff's filing suit. But Trumbull's conduct is irrelevant; as noted, the burden was on *plaintiff* to file a proper claim under MCL 500.3114(5). As a result, whether "the basis for Trumbull's nearly year-long silence and inaction on Griffin's claim was a phantom priority dispute" is immaterial—to place the onus on Trumbull "to point to a higher-priority insurer" is to invert the burden that the text of MCL 500.3114(5) places on the claimant and instead impose it on the insurer to identify higher-priority insurers if it wants to "protect[] its rights." An insurer is undoubtedly going to act in its own interest, and at times that interest will be aligned with the interest of its insured —for example, before the limitations period expires, the insurer's desire to avoid liability for benefits is aligned with the insured's desire to identify higher-priority insurers so as to make a proper claim. But no statute gives an insured a right to rely on that temporary alignment of interests; in the end, it is the insured who must claim against the proper insurer, which is likely why the majority cites no authority for its assertion that "an insurer that is confident that it is not liable to pay PIP benefits . . . should promptly deny the claim so that the claimant can . . . take other actions that might be necessary to preserve the right to PIP benefits." Absent some form of relief like estoppel —which neither plaintiff nor the majority argues is applicable here—the conduct of the insurer simply is not a relevant consideration in determining whether the plaintiff has made a claim with the proper insurer under MCL 500.3114(5).

The majority asserts that "[w]hat Trumbull could not do was leave its insured in limbo for nearly a year under the guise of 'investigation,' " but the majority

identifies no legal authority that Trumbull violated. Given that Trumbull's arguments are characterized as a "fog of legal posturing" and its handling of its investigation as "pull[ing] the rug out after a lawsuit was filed and the limitations period . . . had run," I take it that Trumbull's conduct offends the majority's moral sensibilities. Statutes like MCL 500.3142(1) to (3) and MCL 500.3148(1) certainly provide, as the majority states, "strong incentives for prompt resolution of claims and avoidance of needless litigation," but they are no more than that—incentives. They do not "establish that the insurers . . . must act diligently when investigating, responding to, and resolving [PIP benefits] claim[s]"—or, at least, they owe no such *duty to their insureds*. They certainly do not relieve the insured of the obligation to identify the correct insurer and make a claim with that insurer.

For my part, in looking at a system whose structure communicates a legislative policy of comprehensively available benefits but which places the onus on claimants to identify the correct insurer with which to make claims, I believe that the trial court identified the correct rule: claimants must demonstrate reasonable diligence in identifying the highest-priority insurer. I do not believe that the trial court clearly erred by concluding that plaintiff had not demonstrated such diligence, so I would affirm the Court of Appeals on that basis. I dissent from the Court's decision to reverse.

JOHNSON v VANDERKOOI
HARRISON v VANDERKOOI

Docket Nos. 160958 and 160959. Argued November 9, 2021 (Calendar No. 3). Decided July 22, 2022.

In Docket No. 160958, Denishio Johnson filed an action in the Kent Circuit Court against the city of Grand Rapids (the City) and Captain Curtis VanderKooi and Officer Elliott Bargas of the Grand Rapids Police Department (the GRPD). Johnson asserted claims under 42 USC 1981 and 42 USC 1983, alleging violations of his constitutional rights. The matter originated in 2011 when the GRPD investigated a complaint that a person, eventually identified as Johnson, was looking into vehicles in a parking lot. After GRPD officers stopped Johnson in the parking lot and were unable to confirm his identity or age, Bargas photographed and fingerprinted Johnson in accordance with the City's photograph and print (P&P) procedure. VanderKooi, who arrived at the scene at some point during this process, approved of Bargas's actions. The GRPD regularly used the P&P procedure for gathering identifying information about individuals during the course of a field interrogation or a stop if an officer deemed it appropriate based on the facts and circumstances of that incident. Johnson was ultimately released and was not charged with a crime. VanderKooi, Bargas, and the City moved separately for summary disposition. The court, George J. Quist, J., granted VanderKooi's and Bargas's motions for summary disposition of Johnson's § 1981 and § 1983 claims and also granted the City's motion for summary disposition, holding, in relevant part, that Johnson had failed to establish that the P&P procedure was unconstitutional on its face or as applied. Johnson appealed, and the Court of Appeals, BOONSTRA and O'BRIEN, JJ. (WILDER, P.J., not participating), affirmed. 319 Mich App 589 (2017).

In Docket No. 160959, Keyon Harrison brought a separate action in the Kent Circuit Court against VanderKooi and the City. Harrison asserted claims under 42 USC 1981, 42 USC 1983, and 42 USC 1988, alleging violations of his constitutional rights. The matter originated in 2012 after VanderKooi saw Harrison give someone a large model train engine. VanderKooi became suspi-

cious and confronted Harrison after following him to a nearby park. Still suspicious after speaking with Harrison, VanderKooi asked another officer to come to the scene and photograph Harrison. An officer arrived and performed a P&P on Harrison. When told that his fingerprints would be taken, Harrison had asked, "[W]hy[?]" In response, VanderKooi stated it was "just to clarify again to make sure you are who you say you are." Harrison then responded, "[O]kay." After the P&P, Harrison was released and was not charged with a crime. VanderKooi and the City moved for summary disposition, which the court, George J. Quist, J., granted, holding, in relevant part, that Harrison had not shown that the P&P procedure was unconstitutional. Harrison appealed, and the Court of Appeals, BOONSTRA and O'BRIEN, JJ. (WILDER, P.J., not participating), affirmed in an unpublished per curiam opinion issued May 23, 2017 (Docket No. 330537).

The reasoning of the Court of Appeals was the same in both cases with regard to municipal liability: the City could not be held liable because neither Johnson nor Harrison had demonstrated that any alleged constitutional violation resulted from a municipal policy or a custom that was so persistent and widespread as to practically have the force of law. The Court of Appeals did not decide whether the P&Ps in these cases violated Johnson's or Harrison's Fourth Amendment right to be free from unreasonable searches and seizures. Johnson and Harrison filed a joint application for leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 954 (2018). In lieu of granting leave to appeal, the Supreme Court held that the Court of Appeals erred by affirming the trial court's orders granting summary disposition in favor of the City based on the Court's conclusion that the alleged constitutional violations were not the result of a policy or custom of the City; accordingly, the Supreme Court reversed Part III of the Court of Appeals' judgments and remanded the cases to the Court of Appeals to determine whether the P&Ps at issue violated plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures. 502 Mich 751 (2018). On remand, the Court of Appeals, BOONSTRA, P.J., and O'BRIEN and LETICA, JJ., concluded that taking neither a person's fingerprints nor their photograph was a search under the Fourth Amendment and that the P&Ps did not infringe on plaintiffs' Fourth Amendment rights. 330 Mich App 506 (2019). Plaintiffs again filed a joint application for leave to appeal in the Supreme Court, and the Supreme Court granted leave to appeal. 507 Mich 880 (2021).

In a unanimous opinion by Justice BERNSTEIN, the Supreme Court *held*:

The Court of Appeals erred by finding that no constitutionally protected interest was violated by the P&P policy; fingerprinting constitutes a search under the trespass doctrine, and the P&P policy was facially unconstitutional because it authorized the GRPD to engage in unreasonable searches contrary to the Fourth Amendment.

1. The Fourth Amendment of the United States Constitution protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Under the common-law trespass doctrine, a search occurs when the government physically intrudes on a constitutionally protected area to obtain information. The trespass doctrine exists alongside the test in *Katz v United States*, 389 US 347 (1967), which provides that a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. Because the trespass doctrine exists alongside the *Katz* test, the *Katz* test is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas, as was the case here. The fingerprinting of each of the plaintiffs in these cases constituted a physical trespass onto a person's body, a constitutionally protected area, and the act of fingerprinting was done to obtain information to confirm plaintiffs' identities. Accordingly, fingerprinting pursuant to the P&P policy constituted a search under the Fourth Amendment. The Court of Appeals erred by finding that no constitutionally protected interest was violated by the P&P policy.

2. Generally, warrantless searches are per se unreasonable under the Fourth Amendment, subject to several exceptions, including the stop-and-frisk exception and the consent exception. In these cases, defendants only argued that fingerprinting was appropriate under *Terry v Ohio*, 392 US 1 (1968), and that Harrison consented to fingerprinting. Under *Terry*, a brief, on-the-scene detention of an individual is not a violation of the Fourth Amendment as long as the officer can articulate a reasonable suspicion for the detention. In these cases, fingerprinting pursuant to the P&P policy exceeded the permissible scope of a *Terry* stop because it was not reasonably related in scope to the circumstances that justified either stop; fingerprinting is not related to an officer's immediate safety, and *Terry* caselaw does not justify stops merely for the general purpose of crime-solving. The fingerprinting in these cases also exceeded the permissible

duration of a *Terry* stop. In Docket No. 160959, VanderKooi called an officer in for backup to execute the P&P policy, but Harrison had already answered questions regarding his identity; therefore, calling another officer for backup after having already determined that no criminal activity was taking place was beyond the permissible duration of the *Terry* stop. Similarly, in Docket No. 160958, as soon as the officers concluded that no crime had taken place in the parking lot where Johnson was detained, the reasons justifying the initial stop were dispelled, and execution of the P&P policy was an impermissible extension of the duration of the *Terry* stop. Because the P&P policy impermissibly exceeded both the scope and duration of a *Terry* stop, neither of the searches fell within the stop-and-frisk exception to the warrant requirement. The Court of Appeals, having found that fingerprinting was not a search, did not address the application of the consent exception to the warrant requirement in Docket No. 160959. Accordingly, Harrison's case had to be remanded to the Court of Appeals to determine whether the prosecution can establish that Harrison's consent was freely and voluntarily given.

3. To sustain a facial challenge, the party challenging the statute must establish that no set of circumstances exists under which the statute would be valid. When addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes. In these cases, the P&P policy authorized the GRPD to conduct unreasonable searches in violation of the Fourth Amendment; accordingly, the P&P policy was facially unconstitutional. The Court of Appeals holding on this issue was reversed.

Reversed; Johnson's case remanded to the Kent Circuit Court for further proceedings and Harrison's case remanded to the Court of Appeals to determine whether the prosecution established that Harrison voluntarily consented to fingerprinting.

Justice WELCH, joined by Chief Justice MCCORMACK and Justice CAVANAGH, concurring, agreed in full with the majority opinion but wrote separately to explain why the P&P policy also infringed upon an individual's reasonable expectation of privacy and thus constituted a Fourth Amendment search under *Katz v United States*, 389 US 347 (1967), and its progeny. While the taking of fingerprints directly from one's body is a search under *United States v Jones*, 565 US 400 (2012), the collection and use of biometric information might not always require a physical trespass sufficient to trigger *Jones*, and Justice WELCH would conclude that a search occurred in the absence of the *Jones* line of

precedent. Without specialized training or advanced analytical software, the details of one's fingerprint structure are neither readily observable nor even very useful. Additionally, a copy of a person's fingerprints is biometric data that can be used for many things beyond individual identification; people regularly use fingerprints and other biometric markers as security measures for accessing electronic devices, secured digital spaces, or restricted places. These considerations and the lived experiences of average people strongly suggest that the individualized privacy expectations surrounding one's fingerprints have not only become more robust over time, but also that society widely views such expectations as reasonable. Accordingly, the collection of biometric information from a person's body, such as the lifting of one's fingerprints, is a search for Fourth Amendment purposes, and the focus of judicial review should include an analysis of the reasonableness of the search under the circumstances.

CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — COMMON-LAW TRESPASS DOCTRINE — FINGERPRINTING.

The Fourth Amendment of the United States Constitution protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures; under the common-law trespass doctrine, a search occurs when the government physically intrudes on a constitutionally protected area to obtain information; fingerprinting constitutes a search under the trespass doctrine because it is a physical trespass onto a person's body, a constitutionally protected area, and it is done to obtain information.

The American Civil Liberties Union Fund of Michigan (by *Daniel S. Korobkin*, *Edward R. Becker*, *Margaret Curtiss Hannon*, *David A. Moran*, and *Miriam J. Aukerman*) for Denishio Johnson and Keyon Harrison.

Elizabeth J. Fossel, *Sarah J. Hartman*, and *Andrew J. Lukas* for Curtis VanderKooi, Elliott Bargas, and the city of Grand Rapids.

Amici Curiae:

Jones Day (by *Amanda K. Rice*, *Kurt A. Johnson*, *Eric A. Nicholson*, and *Shelbie M. Rose*) for the Cato Institute and the Mackinac Center for Public Policy.

Eli Savit, *Victoria Burton-Harris*, *Christina Hines*, and *Anthony Hernandez* for the Prosecuting Attorneys of Washtenaw County.

Kim Thomas and *Eve Hastings* for Washtenaw County My Brother's Keeper and the University of Michigan Juvenile Justice Clinic.

Dykema Gossett PLLC (by *Harold D. Pope*, *Lauren E. Fitzsimons*, and *Madison Laskowski*) for the Innocence Network.

Mahogane D. Reed and *The Lamar Law Firm, PLLC* (by *Janey J. Lamar*) for the NAACP Legal Defense & Educational Fund, Inc.

BERNSTEIN, J. This is the second time these consolidated cases have come before us. Previously, we considered whether a decades-long procedure used by the Grand Rapids Police Department (the GRPD) was a policy or a custom attributable to the city of Grand Rapids (the City). We held that it was.

We now consider the constitutionality of the GRPD's policy of photographing and fingerprinting individuals stopped without probable cause, referred to as the "photograph and print" (P&P) procedure. In considering the fingerprint component of the P&P procedure, we hold that the P&P procedure is unconstitutional.[1] Fingerprinting an individual without probable cause, a

[1] Because plaintiffs have effectively abandoned their challenge to the constitutionality of the photograph component of the P&P procedure, we do not address that aspect of the P&P procedure.

warrant, or an applicable warrant exception violates an individual's Fourth Amendment rights. Accordingly, we reverse the judgment of the Court of Appeals and remand these cases for further proceedings that are consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The underlying facts of these consolidated cases have not changed since they were last before us. We previously summarized the relevant facts as follows:

> The P&Ps giving rise to these lawsuits took place during two separate incidents. At the time of the incidents, each GRPD patrol officer was assigned as a part of their standard equipment a camera, a fingerprinting kit, and GRPD "print cards" for storing an individual's copied fingerprints. Generally speaking, a P&P involved an officer's use of this equipment to take a person's photograph and fingerprints whenever an officer deemed the P&P necessary given the facts and circumstances. After a P&P was completed, the photographs were uploaded to a digital log. Completed print cards were collected and submitted to the Latent Print Unit. Latent print examiners then checked all the submitted fingerprints against the Kent County Correctional Facility database and the Automated Fingerprint Identification System. After being processed, the cards were filed and stored in a box according to their respective year.
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> The first incident giving rise to these lawsuits involved the field interrogation of plaintiff Denishio Johnson. On August 15, 2011, the GRPD received a tip that a young black male, later identified as Johnson, had been observed walking through an athletic club's parking lot and peering into vehicles. Officer Elliott Bargas responded to the tip and initiated contact with Johnson. Johnson, who had no identification, told Bargas that he was 15 years old, that he lived nearby, and that he used the parking lot as a shortcut. Bargas was skeptical of Johnson's story, and being aware of several prior thefts in and near the parking

lot, he decided to perform a P&P to see if any witnesses or evidence would tie Johnson to those crimes. After Johnson's mother arrived and verified his name and age, Johnson was released. At some point during this process, Captain Curtis VanderKooi arrived and approved Bargas's actions. Johnson was never charged with a crime.

The second event occurred on May 31, 2012, after VanderKooi observed Keyon Harrison, a young black male, walk up to another boy and hand him what VanderKooi believed was a large model train engine. Suspicious of the hand-off, VanderKooi followed Harrison to a park. After initiating contact, VanderKooi identified himself and questioned Harrison. Harrison, who had no identification, told VanderKooi that he had been returning the train engine, which he had used for a school project. VanderKooi, still suspicious, radioed in a request for another officer to come take Harrison's photograph. Sergeant Stephen LaBrecque arrived a short time later and performed a P&P on Harrison, despite being asked to take only a photograph. Harrison was released after his story was confirmed, and he was never charged with a crime.

Johnson and Harrison subsequently filed separate lawsuits in the Kent Circuit Court, and the cases were assigned to the same judge. Plaintiffs argued, in part, that the officers and the City were liable pursuant to 42 USC 1983 for violating plaintiffs' Fourth and Fifth Amendment rights when the officers performed P&Ps without probable cause, lawful authority, or lawful consent. Both plaintiffs also initially claimed that race was a factor in the officers' decisions to perform P&Ps, though Johnson later dropped that claim.

In two separate opinions, the trial court granted summary disposition in favor of the City pursuant to MCR 2.116(C)(10) and in favor of the officers pursuant to MCR 2.116(C)(7), (C)(10), and (I)(2). Plaintiffs individually appealed by right in the Court of Appeals. In two separate opinions relying on the same legal analysis, the Court of Appeals affirmed the trial court's judgments regarding plaintiffs' municipal-liability claims. Specifically, the Court of Appeals held that the City could not be held liable

because plaintiffs did not demonstrate that any of the alleged constitutional violations resulted from a municipal policy or a custom so persistent and widespread as to practically have the force of law. [*Johnson v VanderKooi*, 319 Mich App 589, 626-628; 903 NW2d 843 (2017).] The Court of Appeals did not decide whether the P&Ps actually violated either plaintiff's Fourth Amendment rights.

Plaintiffs filed a joint application for leave to appeal in this Court, challenging the Court of Appeals' ruling on the City's liability under 42 USC 1983. They argued that the record demonstrated that the City had a policy or custom of performing P&Ps without probable cause during investigatory stops pursuant to *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968), which may be based on reasonable suspicion of criminal conduct, and that execution of that policy or custom violated their Fourth Amendment rights. We scheduled oral argument on the application and instructed the parties to address "whether any alleged violation of the plaintiffs' constitutional rights [was] the result of a policy or custom instituted or executed by the defendant City of Grand Rapids." *Johnson v VanderKooi*, 501 Mich 954, 954-955 (2018). [*Johnson v VanderKooi*, 502 Mich 751, 757-761; 918 NW2d 785 (2018).]

Following oral argument, we reversed the judgment of the Court of Appeals in part, holding that a policy or custom that authorizes police officers to engage in specific conduct may form the basis for municipal liability. We held that genuine issues of material fact existed as to both whether the custom had become an official policy and whether this custom had caused the alleged constitutional violations.

Therefore, the Court of Appeals erred by affirming the trial court's order granting summary disposition based on the Court's conclusion that the alleged constitutional violations were not the result of a policy or custom of the City. We express no opinion with regard to whether plaintiffs' Fourth Amendment rights were violated. There-

> fore, we reverse Part III of the Court of Appeals' opinion in both cases. We remand these cases to the Court of Appeals to determine whether the P&Ps at issue here violated plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures. [*Johnson*, 502 Mich at 781.]

On remand, the Court of Appeals considered "whether the specific conduct authorized by the City's policy or custom, i.e., the conducting of P&Ps on the basis of reasonable suspicion (rather than probable cause), resulted in a constitutional violation." *Johnson v VanderKooi (On Remand)*, 330 Mich App 506, 517; 948 NW2d 650 (2019). The Court of Appeals held that the P&Ps did not infringe on plaintiffs' Fourth Amendment rights, having concluded that taking neither a person's fingerprints nor their photograph was a search under the Fourth Amendment. The Court of Appeals therefore concluded that plaintiffs failed to demonstrate that the City's P&P policy was unconstitutional.

Plaintiffs again filed a joint application for leave to appeal in this Court, continuing to argue that the P&P policy violated their Fourth Amendment rights. We granted leave to appeal, directing the parties to address:

> (1) whether fingerprinting constitutes a search for Fourth Amendment purposes; (2) if it does, whether fingerprinting based on no more than a reasonable suspicion of criminal activity, as authorized by the Grand Rapids Police Department's "photograph and print" procedures, is unreasonable under the Fourth Amendment; and (3) whether fingerprinting exceeds the scope of a permissible seizure pursuant to *Terry v Ohio*, 392 US 1 (1968). [*Johnson v VanderKooi*, 507 Mich 880, 880 (2021).]

II. STANDARD OF REVIEW

"This Court reviews de novo both questions of constitutional law and a trial court's decision on a motion for summary disposition." *Associated Builders & Contractors v Lansing*, 499 Mich 177, 183; 880 NW2d 765 (2016).

III. FOURTH AMENDMENT SEARCH

A. SEARCH

The United States Constitution provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." US Const, Am IV.

Fourth Amendment jurisprudence was originally tied to common-law trespass and largely concerned physical intrusions onto property. See *United States v Jones*, 565 US 400, 404-405; 132 S Ct 945; 181 L Ed 2d 911 (2012). In noting that the Fourth Amendment protects people and not places, such that a physical intrusion is not necessary in order to find a constitutional violation, prior caselaw suggested that the trespass doctrine had been eroded by subsequent decisions and was no longer viable. *Katz v United States*, 389 US 347, 352-353; 88 S Ct 507; 19 L Ed 2d 576 (1967). The *Katz* test states that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v United States*, 533 US 27, 33; 121 S Ct 2038; 150 L Ed 2d 94 (2011), citing *Katz*, 389 US at 361.

However, the United States Supreme Court recently clarified that an individual's "Fourth Amendment

rights do not rise or fall with the *Katz* formulation." *Jones*, 565 US at 406. Specifically, the Supreme Court noted:

> At bottom, we must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, [533 US at 34]. As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates. *Katz* did not repudiate that understanding. [*Jones*, 565 US at 406-407.]

In other words, "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id*. at 409.

In *Jones*, the Supreme Court held that the installation of a GPS tracking device on a vehicle to monitor the vehicle's movement constituted a search under the Fourth Amendment: "Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred." *Id*. at 406 n 3. The Supreme Court held that "[t]respass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information." *Id*. at 408 n 5. Stated differently, a search occurs when the government "occupie[s] private property for the purpose of obtaining information." *Id*. at 404.

The Supreme Court has continued to apply the trespass doctrine, clarifying that it exists alongside the *Katz* test. See *Florida v Jardines*, 569 US 1, 11; 133 S Ct 1409; 185 L Ed 2d 495 (2013) ("That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred."). This Court has also

applied the trespass doctrine. See *People v Frederick*, 500 Mich 228, 234-237, 240; 895 NW2d 541 (2017). Although these cases involved physical intrusions onto *property*, the United States Supreme Court has made it clear that physical intrusions onto an individual's *body* are also covered under the trespass doctrine.[2] In *Grady v North Carolina*, 575 US 306, 307; 135 S Ct 1368; 191 L Ed 2d 459 (2015), the petitioner argued that a satellite-based monitoring program, which was imposed on him because of his multiple prior convictions as a sex offender, violated the Fourth Amendment. Because the monitoring program required the petitioner to wear a tracking device, the petitioner argued that this constituted a search under *Jones*. *Id*. The Supreme Court agreed: "The State's program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search." *Id*. at 310.[3]

Because the trespass doctrine exists alongside the *Katz* test, the *Katz* test "is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas." *Jardines*, 569 US at 11. As the Supreme Court has stated,

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[2] This caselaw only confirms the plain meaning of the text of the Fourth Amendment, which makes clear that an individual's body is constitutionally protected under the trespass doctrine: "The right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." US Const, Am IV (emphasis added).

[3] See also *Skinner v R Labor Executives' Ass'n*, 489 US 602, 613-614; 109 S Ct 1402; 103 L Ed 2d 639 (1989) (stating that the Fourth Amendment "guarantees the . . . security of *persons* against certain arbitrary and invasive acts by officers of the Government") (emphasis added).

"One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *Id*. Such is the case here.[4]

As directed by *Jones* and *Grady*, we consider whether there was a physical trespass on a constitutionally protected area and whether there was an attempt to obtain information.[5] Again, the Fourth Amendment protects both the right of people to be secure in their own persons as well as in their houses and effects. The fingerprinting of each of the plaintiffs in these cases constituted a physical trespass onto a person's body, a constitutionally protected area.[6] That the act of fingerprinting is done for the very *purpose* of obtaining information is clear; defendants' entire argu-

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[4] For this reason, we decline to address plaintiffs' argument that the P&P policy is unconstitutional because they have a reasonable expectation of privacy in their fingerprints.

[5] Defendants argue that plaintiffs cannot proceed with a trespass argument because it was not properly raised before the lower courts and is therefore unpreserved. But plaintiffs have consistently raised and presented a Fourth Amendment challenge to the P&P policy. That the United States Supreme Court recognizes two separate tests for determining whether a search has occurred under the Fourth Amendment does not change the fact that the underlying constitutional argument has been preserved. See *Yee v Escondido, California*, 503 US 519, 534-535; 112 S Ct 1522; 118 L Ed 2d 153 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. . . . Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim—that the ordinance effects an unconstitutional taking.").

[6] Although defendants argue that the physical intrusion here cannot constitute common-law trespass, both because common-law trespass against a person is an antiquated concept and because United States Supreme Court caselaw largely deals with property-based trespass, these arguments stand in stark contrast to the holding in *Grady*, which recognized that a physical intrusion on a body sufficed under the

ment justifying the P&P policy was that fingerprinting was necessary under these circumstances to confirm an individual's identity. Accordingly, we hold that fingerprinting pursuant to the P&P policy constitutes a search under the Fourth Amendment.

B. REASONABLENESS OF THE SEARCH

The determination that fingerprinting pursuant to the P&P policy constitutes a search does not end our inquiry. "The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures." *United States v Sharpe*, 470 US 675, 682; 105 S Ct 1568; 84 L Ed 2d 605 (1985). Thus, we now turn to the question of whether these searches were reasonable. The general rule is that warrantless searches are per se unreasonable under the Fourth Amendment, subject to a few specific exceptions. *Arizona v Gant*, 556 US 332, 338; 129 S Ct 1710; 173 L Ed 2d 485 (2009). These exceptions include, but are not limited to, the following: "(1) searches incident to a lawful arrest, (2) automobile searches, (3) plain view seizure, (4) consent, (5) stop and frisk, and (6) exigent circumstances." *In re Forfeiture of $176,598*, 443 Mich 261, 266; 505 NW2d 201 (1993).

To the extent that defendants argue that any of the established exceptions to the warrant requirement apply here, they argue only that fingerprinting was

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trespass approach. Accordingly, we apply *Grady* in holding that a physical intrusion on a person's body constitutes a trespass under the Fourth Amendment.

appropriate under *Terry*[7] and that Harrison consented to fingerprinting.[8] We address those exceptions in turn.

1. *TERRY* STOP

A *Terry* stop is " '[a] brief, on-the-scene detention of an individual [that] is not a violation of the Fourth Amendment as long as the officer can articulate a reasonable suspicion for the detention.' " *People v Pagano*, 507 Mich 26, 32; 967 NW2d 590 (2021), quoting *People v Custer*, 465 Mich 319, 327; 630 NW2d 870 (2001). Although it is undisputed that reasonable suspicion existed to justify a brief seizure of each plaintiff, *Terry* stops are limited in both scope and duration. The question presented here is whether execution of the P&P policy exceeded either the permissible scope or duration of a *Terry* stop.

Regarding the permissible scope of a *Terry* stop, the Supreme Court noted that "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. The scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry*, 392 US at 18-19 (quotation marks and citations omitted). "The scope of the detention must be carefully tailored to its underlying justification." *Florida v Royer*, 460 US 491, 500; 103 S Ct 1319; 75 L Ed 2d 229 (1983). The Supreme Court noted that a search for weapons is reasonable during a *Terry* stop when there is reason to believe that an individual

[7] This Court has recognized that the stop-and-frisk exception is governed by *Terry*. See *People v Shabaz*, 424 Mich 42, 51-52; 378 NW2d 451 (1985).

[8] Defendants do not argue that any special needs rendered the warrant and probable-cause requirement here impracticable. See *Griffin v Wisconsin*, 483 US 868, 873; 107 S Ct 3164; 97 L Ed 2d 709 (1987).

is armed and dangerous. *Terry*, 392 US at 27. However, "[n]othing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons." *Ybarra v Illinois*, 444 US 85, 93-94; 100 S Ct 338; 62 L Ed 2d 238 (1979).

Regarding the permissible duration of a *Terry* stop, in *Rodriguez v United States*, 575 US 348, 354; 135 S Ct 1609; 191 L Ed 2d 492 (2015), the Supreme Court made clear that a brief detention such as a *Terry* stop may last no longer than necessary to address the reasons justifying the stop. "The seizure remains lawful only 'so long as [unrelated] inquiries do not measurably extend the duration of the stop.' " *Id*. at 355, quoting *Arizona v Johnson*, 555 US 323, 333; 129 S Ct 781; 172 L Ed 2d 694 (2009) (alteration by the *Rodriguez* Court). *Rodriguez* concerned a dog sniff that was conducted after a traffic stop was completed. Despite having previously concluded that a dog sniff conducted *during* a traffic stop did not violate the Fourth Amendment, see *Illinois v Caballes*, 543 US 405, 409; 125 S Ct 834; 160 L Ed 2d 842 (2005), the Supreme Court held that a stop prolonged beyond the time reasonably required to complete the stop's mission is unlawful, *Rodriguez*, 575 US at 357. "The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff 'prolongs'—*i.e.*, adds time to—'the stop.' " *Id*. (citations omitted).

Fingerprinting pursuant to the P&P policy exceeded the permissible scope of a *Terry* stop because it was not reasonably related in scope to the circumstances that justified the stop. Having held that fingerprinting constitutes a search, it is clear that fingerprinting does not fall within the limited weapons search that is

justified under certain circumstances during a *Terry* stop; fingerprinting is simply not related to an officer's immediate safety concerns.

Defendants argue that fingerprinting nevertheless falls within the scope of a *Terry* stop because determining an individual's identity is an important government interest. The United States Supreme Court has recognized that "questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops." *Hiibel v Sixth Judicial Dist Court of Nevada, Humboldt Co*, 542 US 177, 186; 124 S Ct 2451; 159 L Ed 2d 292 (2004). But the Supreme Court also held in *Hiibel* that the Fourth Amendment does not require an individual to answer such questions, *id*. at 187, and to the extent that a state statute can require an individual to disclose their name in the course of a *Terry* stop, a request for identification must still be reasonably related in scope to the circumstances that justified the stop, *id*. at 188-189.[9]

The fingerprinting in these cases was not reasonably related in scope to the circumstances that justified

[9] *Hiibel* notes that past caselaw suggests that "*Terry* may permit an officer to determine a suspect's identity by compelling the suspect to submit to fingerprinting only if there is 'a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime.' " *Hiibel*, 542 US at 188, quoting *Hayes v Florida*, 470 US 811, 817; 105 S Ct 1643; 84 L Ed 2d 705 (1985). This language is arguably dicta. See *Hayes*, 470 US at 819 (Brennan, J., joined by Marshall, J., concurring in the judgment) ("The validity of on-site fingerprinting is no more implicated by the facts of this case than it was by *Davis*. . . . I disagree with the Court's strained effort to reach the question today."). In any event, the P&P policy contains no such limitations on its parameters, given that an officer may photograph and fingerprint any individual at their discretion, regardless of whether there is a reasonable basis for believing that fingerprinting could establish any connection with the suspected crime that justified the stop.

either stop. Absent some sort of indication that the GRPD has access to a database that includes the fingerprints of all residents of and visitors to the City, fingerprinting individuals who fail to carry government-issued identification does not seem to be a useful or productive exercise in *confirming* any individual's identity because there is no guarantee that a match exists that would provide more information. Instead, fingerprinting under the P&P policy appears to be aimed at solving past or future crimes. There is no indication in the record that the GRPD officers believed that fingerprinting would tie either plaintiff to the circumstances that justified each *Terry* stop. Notably, VanderKooi was informed over the radio that other officers were unable to retrieve the model train engine, and the record only suggests the existence of latent prints for prior break-ins in the parking lot. To the extent that defendants argue that fingerprinting could help the officers determine whether either plaintiff could be linked to *other* crimes, such as the prior break-ins, those crimes were necessarily unconnected to the reasons justifying the actual stops. It goes unsaid that *Terry* caselaw does not justify stops merely for the general purpose of crime-solving, especially for those crimes that have yet to occur.

The fingerprinting of each plaintiff also exceeded the permissible duration of a *Terry* stop. Recall that, before releasing Harrison, VanderKooi called an officer in for backup in order to execute the P&P policy; again, the purported reason for doing so was simply to clarify Harrison's identity. Harrison had already answered questions regarding his identity, and calling another officer for backup after having already determined that no criminal activity was taking place was beyond the permissible duration of the *Terry* stop. Even if fingerprinting, like a dog sniff, did not constitute a search

under the Fourth Amendment, fingerprinting Harrison after concluding that no crime had occurred impermissibly extended the duration of the *Terry* stop. See *Rodriguez*, 575 US at 357. Similarly, as soon as the officers concluded that no crime had taken place in the parking lot where Johnson was detained, the reasons justifying the initial stop were dispelled, and execution of the P&P policy was an impermissible extension of the duration of the *Terry* stop.

Because the P&P policy impermissibly exceeds both the scope and duration of a *Terry* stop, neither of the searches conducted here falls within the stop-and-frisk exception to the warrant requirement. Accordingly, fingerprinting Johnson violated the Fourth Amendment prohibition against unreasonable searches, as defendants do not argue that any other exception applied to Johnson.

2. CONSENT

Defendants also argue that Harrison, who was a minor at the time, consented to fingerprinting. Specifically, when told that VanderKooi needed to take his fingerprints, Harrison asked, "[W]hy[?]" In response, VanderKooi stated it was "just to clarify again to make sure you are who you say you are." Harrison then responded, "[O]kay."

" 'When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.' " *People v Farrow*, 461 Mich 202, 208; 600 NW2d 634 (1999), quoting *Bumper v North Carolina*, 391 US 543, 548-549; 88 S Ct 1788; 20 L Ed 2d 797 (1968). See also *People v Kaigler*, 368 Mich 281, 294;

118 NW2d 406 (1962) ("It is elementary that the obtaining of a search warrant may be waived by an individual and he may give his consent to search and seizure; but such waiver or consent must be proved by clear and positive testimony *and there must be no duress or coercion, actual or implied, and the prosecutor must show a consent that is unequivocal and specific, freely and intelligently given*."). Whether consent was voluntarily given concerns "whether a reasonable person would, under the totality of the circumstances, feel able to choose whether to consent." *Frederick*, 500 Mich at 242, citing *Schneckloth v Bustamonte*, 412 US 218, 227; 93 S Ct 2041; 36 L Ed 2d 854 (1973).

Defendants rely on the trial court's holding that Harrison consented to fingerprinting. Although the trial court considered Harrison's background, its analysis entirely failed to identify how the mere utterance of "okay" was enough to discharge the prosecutor's burden. Having found that fingerprinting is not a search, the Court of Appeals did not address the application of the consent exception to the warrant requirement. Accordingly, we remand the case to the Court of Appeals to determine whether the prosecution can establish that Harrison's consent was freely and voluntarily given.

IV. FACIAL CHALLENGE

Although we find that the fingerprinting of each plaintiff violated the Fourth Amendment prohibition against unreasonable searches, defendants allege, and the Court of Appeals held, that plaintiffs' Fourth Amendment challenge was a facial challenge. To sustain a facial challenge, the party challenging the statute must establish that no set of circumstances exists

under which the statute would be valid. *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). Despite the high bar presented by this language, the Supreme Court has clarified that "facial challenges under the Fourth Amendment are not categorically barred or especially disfavored." *Los Angeles v Patel*, 576 US 409, 415; 135 S Ct 2443; 192 L Ed 2d 435 (2015).

In *Patel*, the petitioner argued that "facial challenges to statutes authorizing warrantless searches must fail because such searches will never be unconstitutional in all applications." *Id*. at 417. The Supreme Court rejected this argument because "its logic would preclude facial relief in every Fourth Amendment challenge to a statute authorizing warrantless searches. For this reason alone, the City's argument must fail: The Court's precedents demonstrate not only that facial challenges to statutes authorizing warrantless searches can be brought, but also that they can succeed." *Id*. at 418. The Supreme Court explained that, in applying the exacting standard for facial challenges, which requires a challenger to establish that a law is unconstitutional in all its applications, "the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct." *Id*.

> Similarly, when addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant. If exigency or a warrant justifies an officer's search, the subject of the search must permit it to proceed irrespective of whether it is authorized by statute. Statutes authorizing warrantless searches also do no work where the subject of a search has consented. Accordingly, the constitutional "applications" that petitioner claims prevent fa-

> cial relief here are irrelevant to our analysis because they do not involve actual applications of the statute. [*Id*. at 418-419.]

The Supreme Court then concluded that the statute at issue, which authorized nonconsensual inspection of hotel records without a warrant or precompliance review, was facially unconstitutional. *Id*. at 419.

As stated in *Patel*, the facial-challenge standard does not require us to hypothesize about circumstances that are not governed by the P&P policy. We have held that fingerprinting constitutes a search under the Fourth Amendment and that the P&P policy authorizes such searches to be conducted without probable cause or a warrant. That specific exceptions to the warrant requirement might apply in any *particular* case is of no constitutional import, as this says nothing about the general operation of the policy itself.[10] The P&P policy still authorizes the GRPD to conduct unreasonable searches in violation of the Fourth Amendment; indeed, such was the case for each of the plaintiffs before us. Accordingly, we hold that the P&P policy is facially unconstitutional.[11] We therefore reverse the Court of Appeals holding on this issue and remand these cases for further proceedings.

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[10] Accordingly, it is irrelevant to our inquiry here whether the Court of Appeals determines that Harrison consented to fingerprinting. As stated by the Supreme Court, a policy that authorizes warrantless searches "do[es] no work where the subject of a search has consented." *Patel*, 576 US at 419. Where there is consent, the application of the policy itself is not at issue, and thus consent is irrelevant to the question of whether the policy is facially unconstitutional.

[11] Because we hold that the P&P policy is facially unconstitutional, it is unnecessary to decide whether plaintiffs adequately pleaded as-applied claims. To the extent that our Fourth Amendment analysis is largely grounded in the specific facts of the cases before us, it is only because these facts help illustrate how the P&P policy interacts with constitutional principles.

V. CONCLUSION

We conclude that the Court of Appeals erred by finding that no constitutionally protected interest was violated by the P&P policy. Specifically, we hold that fingerprinting constitutes a search under the trespass doctrine and that the P&P policy is facially unconstitutional because it authorizes the GRPD to engage in unreasonable searches contrary to the Fourth Amendment. Accordingly, we reverse the judgment of the Court of Appeals. We remand Johnson's case to the Kent Circuit Court for further proceedings not inconsistent with this opinion, and we remand Harrison's case to the Court of Appeals for that Court to determine whether the prosecution established that Harrison voluntarily consented to fingerprinting. We do not retain jurisdiction.

MCCORMACK, C.J., and ZAHRA, VIVIANO, CLEMENT, CAVANAGH, and WELCH, JJ., concurred with BERNSTEIN, J.

WELCH, J. (*concurring*). I am in full agreement with the majority opinion. I write separately to explain why the fingerprinting policy at issue also infringes upon an individual's reasonable expectation of privacy and thus constitutes a Fourth Amendment search under *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967), and its progeny. While such analysis may not be necessary when the alleged conduct amounts to a physical trespass, "[w]hen new technologies change what is exposed and what is hidden, the scope of Fourth Amendment protections can shift depending on the details of how the technologies work." Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich L Rev 801, 828 (2004). The collection and use of

biometric information, such as fingerprints, may not always require a physical trespass sufficient to trigger *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012), and thus courts should carefully examine the technologies at issue and how biometric data will be collected and used.

I. EVOLUTION OF THE REASONABLE EXPECTATION OF PRIVACY STANDARD

The United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." US Const, Am IV. Scholars and jurists generally agree that the Fourth Amendment was at least partially motivated by widespread distrust of abusive search and seizure procedures colonial officials had used prior to our nation's founding. See, e.g., Weaver, *The Fourth Amendment and Technologically Based Surveillance*, 48 Tex Tech L Rev 231, 233 (2015); *United States v Verdugo-Urquidez*, 494 US 259, 266; 110 S Ct 1056; 108 L Ed 2d 222 (1990) ("The driving force behind the adoption of the [Fourth] Amendment . . . was widespread hostility among the former colonists to the issuance of writs of assistance empowering revenue officers to search suspected places for smuggled goods, and general search warrants permitting the search of private houses, often to uncover papers that might be used to convict persons of libel."). This is not surprising when one considers the incredible breadth of the writs of assistance that were commonplace in that era. Since then, courts have spilled a large amount of ink trying to define the contours of the Fourth Amendment. While our nation's Fourth Amendment law has, at times, been described as unruly or worse, see *The Fourth Amendment and New Technologies*, 102 Mich L Rev at

809 & n 25, it is now relatively clear that situations involving a physical trespass can proceed under *Jones* while all other alleged searches are still subject to the "reasonable expectation of privacy" standard first articulated in *Katz*.

The "reasonable expectation of privacy" standard was developed in the context of assessing whether use of a listening device to eavesdrop on a telephone call in a phone booth was a search under the Fourth Amendment. *Katz*, 389 US at 349-350. Justice Harlan's concurrence is generally considered the controlling test, and it set forth two requirements for the constitutionality of Fourth Amendment searches: (1) whether the person had an "actual (subjective) expectation of privacy" in the thing to be searched, and (2) whether "the expectation be one that society is prepared to recognize as 'reasonable.' " *Id*. at 360-361 (Harlan, J., concurring). In Justice Harlan's view, it was critical that a person who closed the door of a phone booth behind them had a subjective expectation of privacy in the conversation and, at least at that time in history, society would have recognized this expectation as reasonable. *Id*. at 361-362.

The evolution of Fourth Amendment law since *Katz* was decided in 1967 has been anything but simple. For example, the United States Supreme Court has held that a privacy interest that a person knowingly exposes to the public is not entitled to Fourth Amendment protection under *Katz*. See, e.g., *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989) (holding that aerial surveillance of a backyard from a helicopter was not a search); *United States v Place*, 462 US 696; 103 S Ct 2637; 77 L Ed 2d 110 (1983) (holding that a dog sniff of a suitcase in an airport was not a search but that the evidence was inadmissible due to

an unreasonably lengthy detention of the luggage); *United States v Knotts*, 460 US 276; 103 S Ct 1081; 75 L Ed 2d 55 (1983) (holding that placing a "beeper" tracking device in an item purchased by a suspect was not a search or seizure);[1] *United States v Dionisio*, 410 US 1; 93 S Ct 764; 35 L Ed 2d 67 (1973) (holding that compelling the production of voice exemplars for use in a grand jury proceeding would not be a search). In fact, in *Dionisio*, the Supreme Court opined that

> [t]he physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world. [*Dionisio*, 410 US at 14.]

But the explosion of sense-enhancing technology that can reveal what would ordinarily be invisible or useless to the naked eye has created unique challenges for Fourth Amendment jurisprudence. See *Kyllo v United States*, 533 US 27, 34; 121 S Ct 2038; 150 L Ed 2d 94 (2001) (holding that the use of an infrared device to detect heat signatures radiating from a building was a search, at least where the technology was "not in general public use"). It is precisely because new technologies and analytic methods can make previously mundane information highly valuable that courts must take a critical look at new forms of information-gathering when considering whether a search has occurred. See Breyer, *Our Democratic Constitution*, 77 NYU L Rev 245, 261, 262 (2002) (describing the " 'pri-

[1] One might speculate that *Knotts* would be decided differently in a post-*Jones* world.

vacy' problem" as "unusually complex" and that "the law protects privacy only because of the way in which technology interacts with different laws"). Moreover, given the pace of judicial review, appellate decisions considering the constitutionality of new investigative technologies often lag many years behind the development and implementation of such technologies. See *The Fourth Amendment and New Technologies*, 102 Mich L Rev at 869 (noting that as of 2004 "no Article III court at any level ha[d] decided whether an Internet user has a reasonable expectation of privacy in their e-mails stored with an Internet service provider . . . [or] whether encryption creates a reasonable expectation of privacy") (citations omitted). Similarly, smart phones had been in widespread use for years before the United States Supreme Court held in *Riley v California*, 573 US 373, 386; 134 S Ct 2473; 189 L Ed 2d 430 (2014), that police officers generally cannot search digital information on a cell phone as a search incident to arrest and instead a warrant will usually be required.

II. THE CONFLICTING FINGERPRINTING PRECEDENT

This Court holds today that the old-fashioned process of fingerprinting with ink and paper is a search under *Jones* because it requires a physical trespass onto a constitutionally protected space, namely, a person's body. Moreover, it is generally accepted that fingerprinting as a part of booking following a valid arrest supported by probable cause, like a DNA cheek swab taken under similar circumstances, does not offend the Fourth Amendment. See *Maryland v King*, 569 US 435; 133 S Ct 1958; 186 L Ed 2d 1 (2013); *Schmerber v California*, 384 US 757; 86 S Ct 1826; 16 L Ed 2d 908 (1966); *United States v Iacullo*, 226 F2d 788 (CA 7, 1955), cert denied 350 US 966 (1956). But

this general acceptance is premised primarily on the idea that the existence of probable cause or a valid arrest will generally make any such search that occurs reasonable under the circumstances. See *King*, 569 US at 463-466. It is notable that Justices Scalia, Ginsburg, Sotomayor, and Kagan all strongly dissented from the majority opinion in *King* and emphasized that the DNA sampling that occurred in that case was done for purposes of solving crimes unrelated to why Mr. King had been arrested. *Id*. at 477-480 (Scalia, J., dissenting).

It might come as a surprise that the United States Supreme Court has never definitively answered whether fingerprinting is a search in and of itself or whether such procedures may be executed in the absence of probable cause of criminal wrongdoing. Over the years, there have been musings in dictum suggesting that perhaps one does not have a reasonable expectation of privacy in their fingerprints. For example, in *Davis v Mississippi*, 394 US 721, 727; 89 S Ct 1394; 22 L Ed 2d 676 (1969), the Supreme Court held that "[d]etentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment," but the Court went on to suggest the following in dicta:

> It is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense. See *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or

> search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context. [*Davis*, 394 US at 727-728.]

Justice Harlan specifically did not join that part of the opinion.

Then, in *Hayes v Florida*, 470 US 811, 817; 105 S Ct 1643; 84 L Ed 2d 705 (1985), the Supreme Court stated:

> There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch. Cf. *United States v Place*, [462 US 696]. Of course, neither reasonable suspicion nor probable cause would suffice to permit the officers to make a warrantless entry into a person's house for the purpose of obtaining fingerprint identification.

Justices Brennan and Marshall specifically called out such unnecessary fingerprinting commentary as questionable dicta and refused to join that part of the opinion. *Hayes*, 470 US at 819 (Brennan, J., concurring in the judgment) ("If the police wanted to detain an individual for on-site fingerprinting, the intrusion would have to be measured by the standards of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968),

and our other Fourth Amendment cases. . . . It would seem that on-site fingerprinting (apparently undertaken in full view of any passerby) would involve a singular intrusion on the suspect's privacy, an intrusion that would not be justifiable (as was the patdown in *Terry*) as necessary for the officer's protection.").

The most recent example was *Hiibel v Sixth Judicial Dist Court*, 542 US 177, 181-182; 124 S Ct 2451; 159 L Ed 2d 292 (2004), a case concerning an arrest for violation of a state's "stop and identify" statute, which authorized detention of a person to learn their identity and effectively required such persons to identify themselves or be arrested. The majority upheld this statute to the extent that it required vocal identification and held that this was consistent with *Terry*. Despite not being a fingerprinting case, the majority cited and quoted the dicta relating to fingerprints from *Hayes*. The four dissenting justices argued that the Court's decision impermissibly eroded *Terry* and other decisions.

Courts are now split on whether the taking of a fingerprint is a search. Some courts have looked to the Supreme Court's dicta and held or suggested that the taking of fingerprints is not a search. See, e.g., *Palmer v State*, 679 NE2d 887, 891 (Ind, 1997); *United States v Farias-Gonzalez*, 556 F3d 1181, 1188 (CA 11, 2009); *In re Grand Jury Proceedings*, 686 F2d 135, 139 (CA 3, 1982); *United States v Sechrist*, 640 F2d 81, 86 (CA 7, 1981); *United States v Fagan*, 28 MJ 64, 66 (1989). Other courts have either held that fingerprinting is a search or strongly suggested that it is. See *In re Search Warrant No 5165*, 470 F Supp 3d 715, 721 (ED Ky, 2020) (citing *Hayes* to hold that fingerprinting is a search); *In re Search of [Redacted] Washington, DC*, 317 F Supp 3d 523, 531 (D DC, 2018) (citing *Hayes* to

hold that "the taking of a fingerprint is undeniably a search"); *In re Search Warrant Application for Cellular Telephone in* United States v Barrera, 415 F Supp 3d 832, 834 (ND Ill, 2019) (holding that fingerprinting is still subject to Fourth Amendment protections); *Paulson v Florida*, 360 F Supp 156, 161 (SD Fla, 1973) (holding that fingerprinting constitutes a search); *United States v Laub Baking Co*, 283 F Supp 217, 222-224 (ND Ohio, 1968) (holding that cases concluding that fingerprinting subsequent to a valid arrest does not offend the Fourth Amendment imply that "fingerprinting does constitute a search" and "fingerprinting subsequent to an unlawful arrest or prior to arrest would constitute an illegal search and seizure"). See also *United States v Askew*, 381 US App DC 415, 454 n 6; 529 F3d 1119 (2008) (Kavanaugh, J., dissenting) ("The Court's . . . decision in *Hayes* plainly considered fingerprinting a search[.]"). In the latter group, the judicial inquiry has generally focused on the reasonableness of the search under the circumstances. Needless to say, the national landscape of Fourth Amendment law in this area is murky at best.

III. AN INDIVIDUAL'S REASONABLE EXPECTATION OF PRIVACY IN THEIR BIOMETRIC FEATURES MAKES THE TAKING OR COPYING OF FINGERPRINTS FROM THE BODY FOR LATER INVESTIGATION A SEARCH

While I agree with the majority that the taking of fingerprints directly from one's body is a search under *Jones* given the physical trespass that is required under the policy before us, I would also conclude that a search occurred in the absence of the *Jones* line of precedent. More than a century ago, the Supreme Court of Nevada provided an extensive account of the historical development of the science behind using fingerprints to identify individuals in *State v Kuhl*, 42

Nev 185; 175 P 190 (1918). While fingerprint analysis, as a scientific or investigative technique, did not exist at the time the Fourth Amendment was drafted or ratified, it has become a commonplace tool for law enforcement around the world, as both the majority and dissent acknowledged in *King*. The "[c]orrespondence of fingerprints is widely recognized as an accurate means to establish the identity of a person. The same is true with respect to palmprints and footprints. Courts generally will take judicial notice of the general use and accuracy of fingerprint identification." 36 Am Jur Proof of Facts 2d 285, § 1 (April 2022 update) (citations omitted). In fact, many law enforcement agencies maintain databases of fingerprints as a way to help with investigation and the identification of suspected criminals.

Without specialized training or advanced analytical software, the details of one's fingerprint structure are neither readily observable nor even very useful. Plaintiffs' brief and the amicus brief filed by the Innocence Network describe in great detail the training and technology that is necessary to make use of a copied fingerprint. In modern times, it is also beyond dispute that a copy of a person's fingerprints is biometric data that can be used for many things beyond individual identification. People regularly use such biometric markers as a security measure for accessing electronic devices (phones and laptops), secured digital spaces (bank accounts, work accounts, and investment accounts), or restricted places (athletic clubs, homes, and vehicles). Without the right biometric marker, one may not be able to gain access. These considerations and the lived experiences of average people strongly suggest that the individualized privacy expectations surrounding one's fingerprints have not only become more

robust over time, but also that society widely views such expectations as reasonable.

A copy of one's fingerprints, handprint, or even iris could, quite literally, be used as a key to gain access to that which would otherwise be hidden. It is highly likely that the average person on the street would consider it obtrusive or unreasonable for anyone, much less a government agent, to demand the opportunity to look at one's palms or fingertips with a magnifying glass or to make a copy of the same using ink or a scanner. Such a nonconsensual intrusion into one's personal space or upon their body is offensive to the very notion of individual autonomy and bodily integrity. Moreover, courts should not ignore or minimize the importance of how biometric information can and will be used by government agencies once the information has been harvested and uploaded to a database. Such considerations are relevant to both whether a search occurs and whether it is reasonable under the circumstances.

I view the lifting of fingerprints as being very similar to obtaining a small DNA sample from saliva using a buccal swab, such as what was at issue in *King*, 569 US at 445-446. A DNA sample can also be used to identify an individual as a culprit (although the purpose for the sample in *King* was to link Mr. King to crimes unrelated to why he had been arrested), and such analysis requires technical expertise and the assistance of advanced software. Both the majority and the dissent in *King* agreed that a search had occurred, but they passionately disagreed about whether it was reasonable under the circumstances. And while nothing more than oils and dirt are being physically removed from a person's body when fingerprints are copied, the procedure itself is no less intrusive than a

"light touch on the inside of the cheek," the "scraping [of] an arrestee's fingernails to obtain trace evidence," or the production of "alveolar or 'deep lung' breath for chemical analysis." *Id*. at 446 (quotation marks and citation omitted). The Supreme Court's decision in *Kyllo*, 533 US at 34, further suggests that when advanced technology is necessary to observe or analyze the "data" that is being collected, then it is more likely that a Fourth Amendment search has occurred.

Accordingly, I believe that the Supreme Court's decisions in *King* and *Kyllo*, which were premised on the "reasonable expectation of privacy" line of precedent, compel the conclusion that the lifting of one's fingerprints from a person's body is a search for Fourth Amendment purposes. Even *Hayes* suggests that the lifting of fingerprints is a search while simultaneously suggesting that its minimally invasive nature may make the search reasonable in more circumstances than not. At least one court's actions support the idea that seeking biometric information to access digital devices is a search under the Fourth Amendment, thus requiring a search warrant. See *In re Search of [Redacted] Washington, DC*, 317 F Supp 3d at 532-533 (establishing a multipart standard that law enforcement must meet for a search warrant to preauthorize law enforcement to compel someone to use an "individual's biometric features" to unlock an electronic device). See also *Riley*, 573 US at 386.

There is also an important distinction between taking copies of someone's biometric data from their body and obtaining the same information from a public space. "[F]ingerprints are deposited in public places, but their detailed structure is not common knowledge." Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 Cornell J L & Pub Pol'y 455, 475 (2001). The

mere fact that a person deposits fingerprints in a public space should not eliminate the privacy interest that person has in their body any more than spitting on the street eliminates the privacy interests that make a buccal swab a Fourth Amendment search.[2]

The compelled production of voice exemplars in *Dionisio*, 410 US at 14, is easily distinguishable. When a person speaks, anyone within earshot can listen to the words that are said as well as the tone and pitch of the person's voice. The individualized privacy expectation in the details of one's voice are minimal because voices are regularly exposed to the public in a way that others can understand and use the information gleaned from hearing the voice. A judge or juror has no need for advanced technology or training to listen to multiple voice recordings and decide whether he or she believes that the voice heard on the recordings is the same person. Obviously, such determinations could be enhanced by technology, but it is not necessary. A leading criminal-law treatise has drawn a similar analogy concerning hair. "[W]hile the hair is 'constantly exposed' in the sense that the person knowingly exposes the color and style of his hair, it cannot really be said that the hair is exposed in the sense of revealing those characteristics that can be determined only by microscopic examination." 1 LaFave, Search & Seizure, § 2.6(a) (6th ed) (December 2021 update). It is well understood that a government agent cannot com-

[2] I acknowledge that once people abandon greasy impressions of their fingerprints in a public space, such as on garbage that has been thrown away or on a door knob, then the public-exposure doctrine would likely allow law enforcement to obtain copies of such *abandoned* biometric information without triggering the Fourth Amendment. See *Horton v California*, 496 US 128, 141-142; 110 S Ct 2301; 110 L Ed 2d 112 (1990); *California v Greenwood*, 486 US 35, 39; 108 S Ct 1625; 100 L Ed 2d 30 (1988).

pel a person to turn over a sample of their hair or the scrapings under their fingernails without adequate justification because doing so would be a search of the person. See *Cupp v Murphy*, 412 US 291; 93 S Ct 2000; 36 L Ed 2d 900 (1973). Like a hair sample or fingernail scrapings, some form of advanced examination, likely involving a trained expert using sense-enhancing technology or computers, is necessary to make a fingerprint useful to law enforcement or fact-finders.

Thus, I believe there is strong legal support for the notion that the collection of biometric information, like fingerprints, from a person's body is a search under the Fourth Amendment and that the focus of judicial review should include an analysis of the reasonableness of the search under the circumstances. There might soon be a time when we are called upon to determine the constitutionality of a nontouching/nontrespassory harvesting of biometric information for investigative purposes prior to arrest. Changing technologies require an evolving lens through which our search and seizure jurisprudence should be viewed. I respectfully concur.

MCCORMACK, C.J., and CAVANAGH, J., concurred with WELCH, J.

SAUGATUCK DUNES COASTAL ALLIANCE v
SAUGATUCK TOWNSHIP

Docket Nos. 160358 and 160359. Argued on application for leave to appeal October 7, 2021. Decided July 22, 2022.

Appellant, Saugatuck Dunes Coastal Alliance, brought two separate actions in the Allegan Circuit Court against Saugatuck Township, the Saugatuck Township Zoning Board of Appeals (the ZBA), and North Shores of Saugatuck, LLC, appealing the ZBA's decision that appellant lacked standing to appeal the zoning decision of the Saugatuck Township Planning Commission (the Commission) concerning a proposed residential site condominium project on property owned by North Shores. North Shores applied for approval of a planned unit development that would include condominium units with a private marina, which required special use approval. The Commission granted conditional, preliminary approval, and appellant appealed the approval to the ZBA, invoking Saugatuck Township Ordinance, § 40-72 and the Michigan Zoning Enabling Act (the MZEA), MCL 125.3101 *et seq*. Appellant attached affidavits from some of its members to establish standing to appeal under MCL 125.3604(1) of the MZEA, claiming that the members would be uniquely harmed by the approved development. On October 11, 2017, the ZBA held a public hearing and decided that appellant lacked standing to appeal the Commission's decision. The ZBA framed the allegations raised by appellant's members as complaints that might be true of any proposed development in the area and found that appellant had not demonstrated any special damages—environmental, economic, or otherwise—that would be different from those sustained by the general public. Appellant appealed the ZBA's decision in the Allegan Circuit Court and added two original claims: one for declaratory and injunctive relief and another seeking abatement of an alleged nuisance. While the first appeal was pending, North Shores obtained various state and federal approvals and applied to the Commission for final approval of the planned unit development, which included the marina. The Commission granted final approval, and appellant appealed the decision to the ZBA. After another public hearing on April 9, 2018, the ZBA adopted a resolution that largely mirrored

the prior resolution and denied standing to appellant. Appellant also appealed this decision in the Allegan Circuit Court. On February 6, 2018, the circuit court, Wesley J. Nykamp, J., affirmed the ZBA's October 11, 2017 decision and dismissed the appeal; the court did not, however, address the original claims that appellant had raised. On November 14, 2018, the circuit court, Roberts A. Kengis, J., affirmed the ZBA's April 9, 2018 decision and dismissed the appeal. Appellant appealed both circuit court decisions in the Court of Appeals, and the Court of Appeals consolidated the cases. After determining that it had jurisdiction, the Court of Appeals, GADOLA, P.J., and MARKEY and RONAYNE KRAUSE, JJ., affirmed the circuit court's and the ZBA's decisions in an unpublished per curiam opinion issued August 29, 2019 (Docket Nos. 342588 and 346677), holding that appellant lacked standing to appeal because appellant was not a "party aggrieved" by the approvals. The panel relied on *Olsen v Chikaming Twp*, 325 Mich App 170 (2018), and MCL 125.3605. However, the panel remanded Docket No. 342588 to the circuit court for plenary consideration of the original claims that appellant had raised in that case. Appellant sought leave to appeal in the Supreme Court, and the Supreme Court ordered oral argument on the application, directing the parties to address three issues: (1) whether the "party aggrieved" standard of MCL 125.3605 requires a party to show some special damages not common to other property owners similarly situated; (2) whether the meaning of "person aggrieved" in MCL 125.3604(1) differs from that of "party aggrieved" in MCL 125.3605 and, if so, which standard applies to this case; and (3) whether the Court of Appeals erred by affirming the circuit court's dismissal of appellant's appeals. 505 Mich 1056 (2020).

In an opinion by Justice WELCH, joined by Chief Justice MCCORMACK and Justices BERNSTEIN, CLEMENT, and CAVANAGH, the Supreme Court, in lieu of granting leave to appeal, *held*:

The MZEA does not require an appealing party to own real property and to demonstrate special damages only by comparison to similarly situated real-property owners; *Olsen*, 325 Mich App 170, *Joseph v Grand Blanc Twp*, 5 Mich App 566 (1967), and related Court of Appeals decisions were overruled to the limited extent that they required (1) real-property ownership as a prerequisite to being "aggrieved" by a zoning decision under the MZEA and (2) special damages to be shown only by comparison to similarly situated real-property owners. Additionally, "aggrieved" has the same meaning in MCL 125.3604(1) and MCL 125.3605,

and appellant in this case met the definition of a "person," MCL 125.3604(1), and a "party," MCL 125.3605.

1. MCL 125.3604(1) provides, in relevant part, that an appeal to the ZBA may be taken by a person aggrieved or by an officer, department, board, or bureau of this state or the local unit of government. MCL 125.3605 provides, in pertinent part, that a party aggrieved by the decision of the ZBA may appeal to the circuit court for the county in which the property is located as provided under MCL 125.3606. MCL 125.3606(1) provides, in pertinent part, that any party aggrieved by a decision of the ZBA may appeal to the circuit court for the county in which the property is located. Zoning statutes in Michigan have a long history of making the ability to appeal an administrative zoning decision contingent on establishing that one was "aggrieved" by the decision, but the Legislature has never defined what it means to be aggrieved by a zoning decision. *Joseph*, an original action challenging a rezoning ordinance, had been repeatedly cited for the proposition that to be "aggrieved" by a zoning decision for purposes of an appeal, a comparison to similarly situated property owners was required, which implicitly required the complaining party to be a property owner, but there was no discussion about why property ownership was itself key to one's ability to contest a zoning decision or how that requirement could be derived from any of Michigan's zoning statutes that were then in effect. In *Unger*, the Court of Appeals applied the *Joseph* property-ownership formulation in the context of zoning appeals. In this case, the Court of Appeals relied on *Olsen*, which reaffirmed *Joseph*'s primary holding without analyzing the procedural differences or the minimal source material relied on in *Joseph*. Over time, the term "aggrieved" in the MZEA became inappropriately intertwined with real-property ownership to a point where judicial decisions began to suggest that only real-property owners had the ability to appeal a zoning decision. But there is no indication in the text of the MZEA that the Legislature intended to grant the right to appellate review of zoning decisions only to real-property owners. Neither the MZEA nor any of Michigan's previous zoning statutes explicitly require one to own real property in order to be "aggrieved" by local land-use decisions or to prove "aggrieved" status by comparison to other property owners who are similarly situated. By requiring one to be a "party aggrieved" by a zoning decision under MCL 125.3605 and MCL 125.3606, the Legislature implicitly rejected the idea that standing can be based on mere proximity to a development. The Legislature omitted mention of ownership or occupancy status when describing the class of individuals or entities that are

entitled to appeal a decision under MCL 125.3605 or MCL 125.3606. Instead, the Legislature used the broader phrase "party aggrieved" without mandating that the party own any property within the relevant jurisdiction or that the required harm be shown by comparison to other property owners. That choice of words established a class of potential appellants broader than real-property owners, with the focus being on whether the decision at issue "aggrieved" the complaining party.

2. To be a "party aggrieved" under MCL 125.3605 and MCL 125.3606, the appellant must meet three criteria: (1) the appellant must have participated in the challenged proceedings by taking a position on the contested decision, such as through a letter or oral public comment; (2) the appellant must claim some legally protected interest or protected personal, pecuniary, or property right that is likely to be affected by the challenged decision; and (3) the appellant must provide some evidence of special damages arising from the challenged decision in the form of an actual or likely injury to or burden on their asserted interest or right that is different in kind or more significant in degree than the effects on others in the local community. The phrase "others in the local community" refers to persons or entities in the community who suffer no injury or whose injury is merely an incidental inconvenience and excludes those who stand to suffer damage or injury to their protected interest or real property that derogates from their reasonable use and enjoyment of it. Factors that can be relevant to this final element of special damages include but are not limited to: (1) the type and scope of the change or activity proposed, approved, or denied; (2) the nature and importance of the protected right or interest asserted; (3) the immediacy and degree of the alleged injury or burden and its connection to the challenged decision as compared to others in the local community; and (4) if the complaining party is a real-property owner or lessee, the proximity of the property to the site of the proposed development or approval and the nature and degree of the alleged effect on that real property.

3. Several well-established principles that are relevant to the standing analysis were reaffirmed. Under the current MZEA, mere ownership of real property that is adjacent to a proposed development or that is entitled to statutory notice, without a showing of special damages, is not enough to show that a party is aggrieved. Additionally, generalized concerns about traffic congestion, economic harms, aesthetic harms, environmental harms, and the like are not sufficient to establish that one has been aggrieved by a zoning decision; however, a specific change or

exception to local zoning restrictions might burden certain properties or individuals' rights more heavily than others. Further, unlike in an original lawsuit, a circuit court sits as an appellate body with a closed record when reviewing an appeal brought under MCL 125.3605 and MCL 125.3606; accordingly, if the circuit court determines that the record is inadequate to make the review that MCL 125.3606 requires for purposes of analyzing standing under MCL 125.3605 and MCL 125.3606, then the court shall order further proceedings on conditions that the court considers proper, which may include a remand to the relevant planning or zoning body whose decision is being contested with instructions as to what is expected by the circuit court.

4. The term "aggrieved" must be given the same meaning in both MCL 125.3604(1) and MCL 125.3605. The Legislature has provided no indication that the term "aggrieved" was intended to have different meanings in these closely related statutes. Additionally, appellant in this matter met the definition of a "person," MCL 125.3604(1), and a "party," MCL 125.3605. To determine whether the ZBA's standing decision was correct in this case, on remand the circuit court was directed to first determine whether appellant was aggrieved by the Commission's decision for the purpose of appealing to the ZBA under MCL 125.3604, which will inform the subsequent analysis of whether appellant was aggrieved by the ZBA's standing decision for the purpose of appealing in the circuit court under MCL 125.3605 and MCL 125.3606.

Olsen, *Joseph*, and related Court of Appeals decisions are overruled to the limited extent that they (1) require real-property ownership as a prerequisite to being "aggrieved" by a zoning decision under the MZEA and (2) require special damages to be shown only by comparison to similarly situated real-property owners; Part IV of the Court of Appeals opinion is vacated; Allegan Circuit Court's judgment regarding standing is vacated; and the cases are remanded to the Allegan Circuit Court for reconsideration of appellant's arguments regarding standing under MCL 125.3604(1) and MCL 125.3605, for consideration of appellant's original causes of action as directed by Part V of the Court of Appeals opinion, and for other proceedings as may be necessary or appropriate under MCL 125.3606.

Justice VIVIANO, joined by Justice ZAHRA, dissenting, would have held that to appeal the decision of the ZBA, plaintiff needed to show that its members would suffer some harms that were different from the harms suffered by similarly situated community members and that the Court of Appeals correctly determined that plaintiff had not made that showing because the harms

alleged were either common to other similarly situated community members or were not damages as a result of the decision of the Commission or the ZBA. The Court of Appeals in this case correctly understood that whether a party has standing is a distinct inquiry from whether a party is "aggrieved" for purposes of the MZEA. And because there has been long and consistent interpretation of the phrase "party aggrieved" in Michigan zoning jurisprudence, it was not only proper, but necessary, for the Court of Appeals to consider that caselaw in determining whether plaintiff was a "party aggrieved" under MCL 125.3605. The Court of Appeals has never held that a person must be a property owner to appeal a zoning decision or that, to determine aggrieved status, the appellant must be compared to property owners; rather, the Court of Appeals merely recognized that the parties challenging the ZBA decisions in *Joseph* and its progeny were, in fact, property owners. With regard to interpreting the term "party aggrieved," the statutory history of the MZEA and the acts that it replaced demonstrated that the Legislature intended to return to a narrower "aggrieved" standard in place of the relaxed "interest affected" standard that it had adopted in 1979. And because the phrase "party aggrieved" had received past judicial interpretation, the requirement that a party show that he or she suffered some special damages not common to other property owners similarly situated would have been part of the Legislature's understanding of the phrase "party aggrieved" when it enacted the MZEA. The majority abandoned the interpretation of "aggrieved" that stood for decades, including at the time the Legislature adopted the MZEA, and the majority's expansive new definition of "party aggrieved" is contrary to the intent of the Legislature, confusing, and unnecessary to resolve this case. This new definition will have far-ranging and destabilizing effects on Michigan zoning law, which had been settled and had operated well for over a century.

1. ZONING — APPEALS — WORDS AND PHRASES — "AGGRIEVED."

MCL 125.3604(1) provides, in relevant part, that an appeal to the zoning board of appeals (the ZBA) may be taken by a person aggrieved or by an officer, department, board, or bureau of this state or the local unit of government; MCL 125.3605 provides, in pertinent part, that a party aggrieved by the decision of the ZBA may appeal to the circuit court for the county in which the property is located as provided under MCL 125.3606; "aggrieved" has the same meaning in MCL 125.3604(1) and MCL 125.3605.

2. ZONING — APPEALS — WORDS AND PHRASES — "PARTY AGGRIEVED"– CRITERIA.

MCL 125.3605 provides, in pertinent part, that a party aggrieved by the decision of the zoning board of appeals (the ZBA) may appeal to the circuit court for the county in which the property is located as provided under MCL 125.3606; MCL 125.3606(1) provides, in pertinent part, that any party aggrieved by a decision of the ZBA may appeal to the circuit court for the county in which the property is located; to be a "party aggrieved" under MCL 125.3605 and MCL 125.3606, the appellant must meet three criteria: (1) the appellant must have participated in the challenged proceedings by taking a position on the contested decision, such as through a letter or oral public comment; (2) the appellant must claim some legally protected interest or protected personal, pecuniary, or property right that is likely to be affected by the challenged decision; and (3) the appellant must provide some evidence of special damages arising from the challenged decision in the form of an actual or likely injury to or burden on their asserted interest or right that is different in kind or more significant in degree than the effects on others in the local community; factors that can be relevant to this final element of special damages include but are not limited to: (1) the type and scope of the change or activity proposed, approved, or denied, (2) the nature and importance of the protected right or interest asserted, (3) the immediacy and degree of the alleged injury or burden and its connection to the challenged decision as compared to others in the local community, and (4) if the complaining party is a real-property owner or lessee, the proximity of the property to the site of the proposed development or approval and the nature and degree of the alleged effect on that real property.

Olson, Bzdok & Howard, PC (by *Scott W. Howard* and *Rebecca L. Millican*) for Saugatuck Dunes Coastal Alliance.

Straub, Seaman & Allen, PC (by *James M. Straub* and *Sarah J. Hartman*) for Saugatuck Township and the Saugatuck Township Zoning Board of Appeals.

Gabrielse Law, PLC (by *Carl J. Gabrielse*) and *Warner Norcross + Judd LLP* (by *Gaëtan Gerville-Réache* and *Ashley G. Chrysler*) for North Shores of Saugatuck, LLC.

Amici Curiae:

Margrethe Kearney for the Environmental Law & Policy Center and the National Trust for Historic Preservation in the United States.

McClelland & Anderson, LLP (by *Melissa A. Hagen* and *David E. Pierson*) for Michigan Realtors.

Rosati Schultz Joppich & Amtsbuechler PC (by *Matthew J. Zalewski* and *Carol A. Rosati*) for the Michigan Municipal League.

WELCH, J. This case requires us to determine what it means to be aggrieved for purposes of appealing certain land-use decisions to a zoning board of appeals, MCL 125.3604(1), and appealing a zoning board of appeals' decision to the circuit court, MCL 125.3605. Appellant, Saugatuck Dunes Coastal Alliance,[1] argues that the lower courts erred when they found that the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*., denied it standing to appeal the decisions of the Saugatuck Township Planning Commission (Commission). Prior Court of Appeals decisions relied on by the Saugatuck Township Zoning Board of Appeals (ZBA) and lower courts have repeatedly and erroneously read the term "party aggrieved" too narrowly. Specifically, we hold that the MZEA does not require an appealing party to own real property and to demonstrate special damages only by comparison to other real-property owners similarly situated. Cf. *Olsen v Chikaming Twp*, 325 Mich App 170; 924 NW2d 889 (2018), lv den sub

[1] Appellant is a nonprofit organization based in Saugatuck, Michigan. Its membership consists of a coalition of individuals and organizations, and appellant's stated mission is protecting and preserving the natural geography, historical heritage, and rural character of the Saugatuck Dunes coastal region in the Kalamazoo River Watershed.

nom *Olsen v Jude & Reed, LLC*, 503 Mich 1018 (2019); *Joseph v Grand Blanc Twp*, 5 Mich App 566; 147 NW2d 458 (1967). We overrule *Olsen*, *Joseph*, and related Court of Appeals decisions to the *limited extent* that they require (1) real-property ownership as a prerequisite to being "aggrieved" by a zoning decision under the MZEA and (2) special damages to be shown only by comparison to other real-property owners similarly situated.

As explained later in this opinion, to be a "party aggrieved" under MCL 125.3605 and MCL 125.3606, the appellant must meet three criteria. First, the appellant must have participated in the challenged proceedings by taking a position on the contested proposal or decision. Second, the appellant must claim some protected interest or protected personal, pecuniary, or property right that will be or is likely to be affected by the challenged decision. Third, the appellant must provide some evidence of special damages arising from the challenged decision in the form of an actual or likely injury to or burden on their asserted interest or right that is different in kind or more significant in degree than the effects on others in the local community. We agree with the parties' arguments that "aggrieved" has the same meaning in MCL 125.3604(1) and MCL 125.3605. We also agree with the parties that appellant in this matter meets the definition of a "person," MCL 125.3604(1), and a "party," MCL 125.3605.

It is not clear whether the lower courts would have reached the same result as to appellant's standing in the absence of errors in then-binding precedent. Accordingly, we vacate Part IV of the Court of Appeals opinion and the Allegan Circuit Court's judgments as to standing and remand both cases to the circuit court

for reconsideration of appellant's standing arguments under MCL 125.3604(1) and MCL 125.3605. On remand, the circuit court shall also address appellant's original causes of action as directed by Part V of the Court of Appeals opinion and conduct such other proceedings as may be necessary or appropriate under MCL 125.3606.

I. FACTUAL AND PROCEDURAL BACKGROUND

At issue are two separate zoning decisions the Commission made concerning a proposed residential site condominium project that includes a marina and boat basin with boat slips[2] on property owned by North Shores of Saugatuck, LLC (North Shores). North Shores owns approximately 300 acres of land with frontage on the north shore of the Kalamazoo River and on Lake Michigan. The proposed development that is the subject of the appeal occupies a residentially zoned subset of the larger parcel that North Shores refers to as the "Harbor Cluster."

North Shores applied for approval of a planned unit development.[3] The planned unit development would

[2] Appellant contends that the proposed marina would be, in fact, an artificial channel, violating Saugatuck Township's zoning ordinance. We take no position on the merits of this contention because its resolution is premature before it is determined whether appellant is "aggrieved" under the MZEA.

[3] See MCL 125.3503(1) ("As used in this section, 'planned unit development' includes such terms as cluster zoning, planned development, community unit plan, and planned residential development and other terminology denoting zoning requirements designed to accomplish the objectives of the zoning ordinance through a land development project review process based on the application of site planning criteria to achieve integration of the proposed land development project with the characteristics of the project area.").

include 23 residential site condominium units[4] surrounding the boat basin, a community building, a private marina with 33 "dockominium" boat slip condominium units, and open spaces designated as general common elements. The marina was proposed as a supplement to North Shores' application and required special use approval.

A. PLANNING COMMISSION AND ZONING BOARD OF APPEALS DECISIONS

The Commission granted conditional, preliminary approval of the proposed planned unit development and the special use approval for the marina on April 26, 2017. Invoking Saugatuck Township Ordinance, § 40-72 and the MZEA, appellant appealed these preliminary approvals to the ZBA in June 2017 and provided supplemental arguments in September 2017. With the supplemental arguments, appellant attached affidavits from some of its members to establish standing to appeal under MCL 125.3604(1) given that North Shores had challenged appellant's stand-

[4] "Site condominium" is not a term defined under the MZEA, but it has been described as " 'a method of building "subdivisions" without officially subdividing land.' . . . The single family residence type of site condo can resemble either a traditional subdivision home or a detached condominium. The difference depends on what use the owner has of the immediate lot on which the building sits." Comment, *Site Condominiums: Fast Homes, For A Price*, 6 Cooley L Rev 511, 512 (1989), quoting Wynant & Williams, *Site Condos: A Quiet Revolution*, 1988 Plan & Zoning News 5, 5 (1988). A site condominium unit is "that portion of the condominium project designed and intended for separate ownership and use, as described in the master deed, regardless of whether it is intended for residential, office, industrial, business, recreational, use as a timeshare unit, or any other type of use." MCL 559.104(3).

ing. The affidavits alleged ways in which the members claimed they would be uniquely harmed by the approved development.[5]

At a hearing on October 11, 2017, the ZBA heard comments from the public, including from members of appellant and from appellant's counsel. The ZBA adopted a resolution that relied on *Unger v Forest Home Twp*, 65 Mich App 614; 237 NW2d 582 (1976), and decided that appellant lacked standing to appeal the Commission's decision. The ZBA framed the allegations raised by appellant's members as complaints that might be true of any proposed development in the area and found that appellant had not demonstrated any special damages—environmental, economic, or otherwise—that would be different from those sustained by the general public as a result of the proposed development. Appellant appealed the ZBA's decision in the Allegan Circuit Court and added two original claims: one for declaratory and injunctive relief and another seeking abatement of an alleged nuisance.

While the first appeal was pending, North Shores obtained various state and federal approvals and applied to the Commission for final approval of the planned unit development, which included the marina. The Commission granted final approval on October 23,

[5] The members included Dave Engel (a local resident and owner and operator of a salmon and trout charter boat who alleged injury to his business), Liz Engel (a local resident and Realtor selling homes in the area who alleged injury to her business), Patricia Birkholz (a local resident and former Michigan state senator who alleged injury to her legacy and the natural area that bears her name), Mike Johnson (a local resident and owner of the Coral Gables Complex in Saugatuck who alleged injury to his businesses), Kathi Bily-Wallace (a local resident and neighboring property owner who alleged injury to property and riparian rights), and Chris Deam (an owner of a seasonal cottage and land located near the Old Saugatuck Lighthouse who alleged injury to his property and riparian rights).

2017. Appellant appealed this decision to the ZBA in a written statement dated December 7, 2017. Prior to the public hearing scheduled for April 9, 2018, appellant again submitted a letter providing a detailed basis for its standing and the alleged merits of its appeal. The letter raised arguments regarding the depositing of dredge spoils within 300 feet of some members' property and the potential adverse effects on sturgeon restoration, local hydrology, and the nearby Patricia Birkholz Natural Area. Appellant requested that the ZBA revisit and reverse its prior decision that appellant did not have standing to appeal. On April 9, 2018, after another public hearing, the ZBA adopted a resolution that largely mirrored the prior resolution and denied standing to appellant. Appellant also appealed this decision in the Allegan Circuit Court.

B. CIRCUIT COURT DECISIONS

The appeal from the October 11, 2017 ZBA decision was assigned Case No. 17-058936-AA. In that case, the circuit court incorporated by reference a prior circuit court opinion addressing appellant's standing to appeal a different land-use decision involving different portions of property that North Shores now owns. Relying on this prior opinion and its analysis of *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), the circuit court affirmed the ZBA's decision and dismissed the appeal on February 6, 2018. The circuit court did not, however, address the original claims that appellant raised in this case. The appeal from the April 9, 2018 ZBA decision was assigned Case No. 18-059598-AA. On November 14, 2018, relying on the oral statements made on the record, the circuit court affirmed the ZBA's decision and dismissed the appeal.

C. COURT OF APPEALS DECISION

Appellant appealed both circuit court decisions in the Court of Appeals, and the Court of Appeals consolidated the cases.[6] *Saugatuck Dunes Coastal Alliance v Saugatuck Twp*, unpublished order of the Court of Appeals, entered January 22, 2019 (Docket Nos. 342588, 346677, and 346679).[7] After determining that it had jurisdiction, the Court of Appeals affirmed the circuit court's and ZBA's decisions holding that appellant lacked standing to appeal because appellant was not a "party aggrieved" by the approvals. *Saugatuck Dunes Coastal Alliance v Saugatuck Twp*, unpublished per curiam opinion of the Court of Appeals, issued August 29, 2019 (Docket Nos. 342588 and 346677), pp 3-5.

The panel relied on *Olsen*, 325 Mich App 170, and MCL 125.3605. It observed that in *Olsen*, the Court had explained that "the term 'standing' generally refers to the right of a plaintiff initially to invoke the power of a trial court to adjudicate a claimed injury." *Olsen*, 325 Mich App at 180. But under MCL 125.3605, " 'a party seeking relief from a decision of a ZBA is not required to demonstrate "standing" but instead must demonstrate to the circuit court acting in an appellate context that he or she is an "aggrieved" party.' " *Saugatuck Dunes Coastal Alliance*, unpub op at 4, quoting *Olsen*, 325 Mich App at 180-181. The panel noted that

[6] The appeal from Case No. 17-058936-AA was assigned Court of Appeals Docket No. 342588, and the appeal from Case No. 18-059598-AA was assigned Court of Appeals Docket No. 346677.

[7] The Court of Appeals consolidated the appeals in Docket Nos. 342588 and 346677 but denied the portion of appellant's motion requesting consolidation of Docket Nos. 342588 and 346677 with Docket No. 346679 because the application for leave to appeal in Docket No. 346679 had not yet been decided.

both common-law standing and demonstrating aggrieved-party status require a party to " 'establish that they have special damages different from those of others within the community.' " *Saugatuck Dunes Coastal Alliance*, unpub op at 5, quoting *Olsen*, 325 Mich App at 193. But under *Olsen*, 325 Mich App at 185, the aggrieved-party analysis refers to " 'other property owners similarly situated,' " whereas the common-law standing analysis under *Lansing Sch*, 487 Mich at 372, refers to " 'the citizenry at large.' " *Saugatuck Dunes Coastal Alliance*, unpub op at 5.

The panel echoed *Olsen*'s holding that ownership of adjacent land, entitlement to notice, " '[i]ncidental inconveniences, such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes' were all deemed inadequate to establish that a party is 'aggrieved.' " *Id*. at 5, quoting *Olsen*, 325 Mich App at 185. "Ecological harms" and "[c]oncerns over potential harms are also insufficient, at least where there is some basis, such as health and building permit requirements, to conclude that the potential is unlikely to become actual." *Saugatuck Dunes Coastal Alliance*, unpub op at 5, citing *Olsen*, 325 Mich App at 186-187. The panel did not read *Olsen* to preclude "any possibility that such harms *could* result in a party being aggrieved" if it was "specifically or disproportionately" affected "in a manner meaningfully distinct from 'other property owners similarly situated.' " *Saugatuck Dunes Coastal Alliance*, unpub op at 5. But the panel concluded that appellant's arguments were incorrect to the extent that they referred "to injuries that differ from 'the public at large.' " *Id*. While recognizing that appellant submitted affidavits "apparently tending to show that the affiants will suffer harms distinct from

the general public," *id*., the Court reasoned that appellant had not met the standard established by *Olsen*:

> *Plaintiff has not shown, however, that the affiants will suffer harms distinct from other property owners similarly situated*. A party generally cannot show a sufficiently unique injury from a complaint that "any member of the community might assert." *Olsen*, 325 Mich App at 193. We reiterate that we do not consider whether plaintiff might have *standing* in an appropriate procedural context. However, *some of the affiants are not even actual owners of nearby property*; and otherwise all of the articulated concerns are either speculative, broad environmental policy matters, or pertain to harms that could be suffered by any nearby neighbor, business, or tourist. Irrespective of the seriousness of those harms, or of whether those harms might differ from the citizenry at large, the trial court properly concluded that plaintiff was not an aggrieved party pursuant to MCL 125.3605, so plaintiff's appeals were correctly dismissed. See *id*. at 194. [*Saugatuck Dunes Coastal Alliance*, unpub op at 5 (emphasis added).]

However, the panel remanded Docket No. 342588 to the circuit court for plenary consideration of the original claims that appellant raised in that case.

II. ANALYSIS

We directed the parties to address three issues. *Saugatuck Dunes Coastal Alliance v Saugatuck Twp*, 505 Mich 1056, 1056 (2020). First, whether the " 'party aggrieved' standard of MCL 125.3605 requires a party to show some special damages not common to other property owners similarly situated . . . ." *Id*. Second, whether the "meaning of 'person aggrieved' in MCL 125.3604(1) differs from that of 'party aggrieved' in MCL 125.3605, and if so what standard applies" to this case. *Id*. Third, whether the Court of Appeals erred by

affirming the circuit court's dismissal of appellant's appeals. *Id*. These issues turn on questions of statutory interpretation, which we review de novo. *Kyser v Kasson Twp*, 486 Mich 514, 519; 786 NW2d 543 (2010). Whether a party has standing is also a question of law that we review de novo. *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019).

A. ZONING APPEALS UNDER THE MZEA

Local governments have no inherent power to regulate land use, but the "Legislature has empowered local governments to zone for the broad purposes identified in" the MZEA at MCL 125.3201(1). *Kyser*, 486 Mich at 520. The MZEA was enacted in 2006 and consolidated three zoning statutes for cities and villages, for townships, and for counties. 2006 PA 110. In addition to setting the parameters of local zoning power, the MZEA also established processes and standards for when, how, and who can appeal official decisions related to the regulation and development of land. See MCL 125.3603 to MCL 125.3607. At issue in this matter is the standard for a party to show that it has been "aggrieved" by a decision of a planning commission or zoning board of appeals for purposes of appealing those decisions under MCL 125.3604(1) and MCL 125.3605.

Several provisions of the MZEA address the appellate process. "For special land use and planned unit development decisions, an appeal may be taken to the zoning board of appeals only if provided for in the zoning ordinance." MCL 125.3603(1).[8] When a zoning

[8] When these appeals were taken, Saugatuck Township Ordinance, § 40-72 empowered the ZBA to "[h]ear and decide appeals from and review any order, requirement, decision or determination made by the Zoning Administrator or the Planning Commission . . . ." However, ef-

ordinance allows for an appeal from a planned unit development or special-land-use decision to a zoning board of appeals, MCL 125.3604(1) governs.

> *An appeal to the zoning board of appeals may be taken by a person aggrieved* or by an officer, department, board, or bureau of this state or the local unit of government. . . . The zoning board of appeals shall state the grounds of any determination made by the board. [MCL 125.3604(1) (emphasis added).]

MCL 125.3605 addresses the finality of a zoning board of appeals' decision and who can appeal such a decision in the circuit court. The statute provides: "The decision of the zoning board of appeals shall be final. *A party aggrieved by the decision may appeal to the circuit court* for the county in which the property is located as provided under [MCL 125.3606]." MCL 125.3605 (emphasis added). MCL 125.3606(1), in turn, provides:

> (1) *Any party aggrieved by a decision of the zoning board of appeals may appeal to the circuit court for the county in which the property is located*. The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:
>
> (a) Complies with the constitution and laws of the state.
>
> (b) Is based upon proper procedure.
>
> (c) Is supported by competent, material, and substantial evidence on the record.
>
> (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals. [Emphasis added.]

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fective June 20, 2018, an amendment of § 40-72 removed the ZBA's authority to "hear appeals from a decision on a special approval use, planned unit development, or rezoning." We express no opinion about how this amendment might affect future proceedings in these cases.

B. MEANING OF "AGGRIEVED" UNDER THE MZEA

Zoning statutes in Michigan have a long history of making the ability to appeal an administrative zoning decision contingent on establishing that one was "aggrieved" by the decision. The Legislature included this requirement in the MZEA when it repealed the City and Village Zoning Act, the Township Zoning Act, and the County Zoning Act. 2006 PA 110. Each of those prior laws used the term "person aggrieved" to describe who could appeal a local zoning decision.[9] Despite the prevalence of the terms "person aggrieved" and "party aggrieved" in Michigan's zoning laws for the better part of a century, our Legislature has never defined what it means to be aggrieved by a zoning decision.[10] That task now falls to this Court.

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[9] See 1921 PA 207, § 5 ("[An] appeal may be taken by any person aggrieved or by any officer, department, board or bureau of the city or village."); 1943 PA 184, § 20 ("[An] appeal may be taken by any person aggrieved or by any officer, department, board or bureau of the township, county or state."); 1943 PA 183, § 20 ("[An] appeal may be taken by any person aggrieved or by any officer, department, board or bureau of the township, county or state."). But see 2000 PA 20, § 5(11) (providing that "a person having an interest affected by the zoning ordinance may appeal to the circuit court").

[10] Some states have defined "person aggrieved" or "party aggrieved" within their zoning statutes. See, e.g., Conn Gen Stat 8-8(a)(1) (" 'aggrieved person' includes any person owning land in this state that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board"); Fla Stat 163.3215(2) (" 'aggrieved or adversely affected party' means any person or local government that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan . . . . The alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all persons"); Ind Code 36-7-4-1603(b) (establishing a four-part test for determining whether a person has been aggrieved by a zoning decision); Nev Rev Stat 278.3195(1)(d) (stating that, in a county with a specified population size, one is aggrieved if they appeared in

1. HISTORICAL UNDERSTANDING OF THE TERM "AGGRIEVED"

We do not approach our task with a blank slate. The meaning of "aggrieved" has been developing in the Court of Appeals for decades. Many of the seminal cases addressing the meaning of "aggrieved" under prior zoning statutes were never appealed to this Court. This is the first opportunity for us to decide this issue on the merits. In 1965, the Court of Appeals recognized a national consensus "that to have any status in court to attack the actions of a zoning board of appeals, the party must be an aggrieved party, and said party must be more than a resident of the city."[11] *Marcus v Busch*, 1 Mich App 134, 136; 134 NW2d 498 (1965), citing 58 Am Jur, Zoning, § 253 (1956); Anno: *Construction and Application of Provisions for Variations in Application of Zoning Regulations and Special Exceptions Thereto*, 168 ALR 133 (1947); 8 McQuillin, Municipal Corporations, § 25.292 (3d ed rev 1957).

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person, through a representative, or in writing before the relevant decision-making individual or entity); RI Gen Laws 45-24-31(4) (defining "aggrieved party" as one whose "property will be injured by a decision of any officer or agency responsible for administering the zoning ordinance of a city or town" or "[a]nyone requiring notice pursuant to this chapter"); Wash Rev Code 36.70C.060 (establishing a four-part test for determining whether someone is aggrieved by a land-use decision); W Va Code 8A-1-2(b) (defining "aggrieved person" as one who was denied the relief sought in an application or appeal or one who will "suffer a peculiar injury, prejudice or inconvenience beyond that which other residents of the county or municipality may suffer"); Wis Stat 68.06 (defining "person aggrieved" as one "whose rights, duties or privileges are adversely affected by a determination of a municipal authority").

[11] This consensus appears to remain true, 83 Am Jur 2d, Zoning and Planning (November 2021 update), § 880, except in those jurisdictions that have adopted a more lenient standard by statute, see, e.g., Tex Loc Gov't Code Ann 211.011(a) (allowing persons aggrieved by a decision of the board of adjustment, taxpayers, and certain government officials to challenge a decision of the board in court).

A few years later, the Court of Appeals decided *Joseph v Grand Blanc Twp*, 5 Mich App 566; 147 NW2d 458 (1967). *Joseph* concerned a township resident's *original action* challenging the adoption of an ordinance that rezoned certain property within the township. *Id*. at 569-570. The plaintiff, who owned land about one mile from the rezoned property, had not alleged special damages. *Id*. The Court acknowledged that *Marcus* held that in the absence of special damages, the plaintiff could not contest the decision in court. *Id*. at 570-571. The Court then linked its special-damages analysis to property ownership specifically:

> In order to maintain this action, *plaintiff, a nonabutting property owner, must allege and prove that he has suffered a substantial damage which is not common to other property owners similarly situated*. *Victoria Corporation* v. *Atlanta Merchandise Mart, Inc.* (1960), 101 Ga App 163 (112 SE2d 793). See comment in 64 MLR 1070, 1079. In his complaint, plaintiff claims that because of this rezoning, traffic will be increased on the dirt road fronting on his property; because of this, he will suffer economic and aesthetic losses. The record further discloses that the question of whether or not plaintiff suffered special damage was before the court for a period in excess of 5 months, during which time special damages could have been alleged.
>
> Other jurisdictions have held that a mere increase in traffic with its incidental inconvenience did not constitute a substantial damage and, therefore, the plaintiff was not considered to be an aggrieved party. The reasoning in the cases is that such increase in traffic congestion, with its attendant difficulties for property owners whose property fronts on the street, is a matter which addresses itself to the police authorities of the municipality rather than to the zoning authorities. [*Joseph*, 5 Mich App at 570-571 (citation omitted; emphasis added).]

The addition of a "property ownership" requirement for zoning appeals was not analyzed in any way in *Joseph*. While *Joseph* involved a property owner challenging a rezoning decision, there was no discussion about why property ownership was itself key to one's ability to contest a zoning decision or how that requirement could be derived from any of Michigan's zoning statutes that were then in effect. Over time, *Joseph* repeatedly has been cited for the proposition that to be "aggrieved" by a zoning decision for purposes of an appeal, a comparison to *other property owners* is required, which implicitly requires the complaining party to be a property owner. As the quotation above shows, *Joseph*'s standard came from a single Georgia Court of Appeals decision and a student-authored law-review comment. Both were questionable sources of authority for Michigan law then, and they remain questionable today.[12]

The Court of Appeals then applied the *Joseph* property-owner formulation in the context of zoning appeals. The ZBA relied on *Unger*, 65 Mich App 614, in this matter. *Unger* concerned an appeal by a nearby property owner who opposed the approval of permits

[12] *Victoria Corp* was not an original action challenging the validity of a legislative zoning action. Rather, *Victoria Corp* interpreted the meaning of "substantial interest," a phrase used in a Georgia statute governing when a party is entitled to appeal the grant of a zoning variance. *Victoria Corp* specifically involved a complaining nearby property owner who had not participated in the administrative proceedings but filed an appeal based on concerns about potential increases in traffic congestion. *Victoria Corp*, 101 Ga App at 163-164. The cited student-authored comment, Comment, *Standing To Appeal Zoning Determinations: The "Aggrieved Person" Requirement*, 64 Mich L Rev 1070 (1966), quoted *Victoria Corp* and included a national survey of general trends in zoning law. The comment did not substantively engage with Michigan law, but it noted ambiguities and inconsistencies in how different jurisdictions addressed standing in third-party zoning appeals.

for a new apartment complex. *Id*. at 616. *Unger* reiterated the holding from *Joseph* that a plaintiff "must allege and prove that he has suffered some special damages not common to other property owners similarly situated," *id*. at 617, and it rejected the argument that ownership of land on the same lake as the property in question alleviated the need for special damages, *id*. at 618. Reiteration of the standard from *Joseph* continued in zoning-appeal cases for many years without question, despite *Joseph* not being based on any of Michigan's then existing zoning statutes.[13]

The Court of Appeals in this case relied on the recent decision in *Olsen*, 325 Mich App 170. *Olsen* concerned an appeal from an original variance decision by a zoning board of appeals and addressed the "party aggrieved" standard in MCL 125.3605. *Olsen* correctly recognized that "the term 'standing' generally refers to the right of a plaintiff initially to invoke the power of a trial court to adjudicate a claimed injury." *Id*. at 180, citing *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290; 715 NW2d 846 (2006). The Court further observed that an appeal under MCL 125.3605 is different from an original action because the former

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[13] See *Western Mich Univ Bd of Trustees v Brink*, 81 Mich App 99, 102-103, 105; 265 NW2d 56 (1978) (holding that receiving statutory notice and having a "financial interest in throttling the development of neighboring properties is not" sufficient for a party to be considered "aggrieved"); *Village of Franklin v Southfield*, 101 Mich App 554, 556-557; 300 NW2d 634 (1980) (holding that ownership of adjacent land or being an adjacent municipality was not enough to be considered "aggrieved" in the absence of special damages). But see *Brown v East Lansing Zoning Bd of Appeals*, 109 Mich App 688, 699-701; 331 NW2d 828 (1981) (holding that allegations that the development would "intensify the change in the character of the neighborhood as well as increase the number of its residents" were "special damages" and that appellants met the requirements under either the "interests affected" or the "aggrieved party" standards), superseded by statute as stated in *Ansell v Delta Co Planning Comm*, 332 Mich App 451, 459 (2020).

invokes a circuit court's appellate authority and requires the party to be "aggrieved" by the decision of the zoning board of appeals. *Id*. at 180-181. The *Olsen* panel also relied on the zoning decisions discussed earlier in this opinion, going back to *Joseph*. Without analyzing the procedural differences or the minimal source material relied on in *Joseph*, the Court reaffirmed *Joseph*'s primary holding. *Id*. at 185-186.

> Given the long and consistent interpretation of the phrase "aggrieved party" in Michigan zoning jurisprudence, we interpret the phrase "aggrieved party" in § 605 of the MZEA consistently with its historical meaning. Therefore, to demonstrate that one is an aggrieved party under MCL 125.3605, a party must "allege and prove that he [or she] has suffered some special damages not common to other property owners similarly situated[.]" *Unger*, 65 Mich App at 617. Incidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved. See *id*.; *Joseph*, 5 Mich App at 571. Instead, there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience. See *Brink*, 81 Mich App at 103 n 1. Moreover, mere ownership of an adjoining parcel of land is insufficient to show that a party is aggrieved, *Village of Franklin*, 101 Mich App at 557-558, as is the mere entitlement to notice, *Brink*, 81 Mich App at 102-103. [*Olsen*, 325 Mich App at 185.]

Olsen, thus, followed the precedent of linking a person's ability to appeal a zoning decision to real-property ownership and comparison of the alleged harms to other property owners similarly situated. The *Olsen* panel went on to agree with the township that the appellees lacked standing to appeal in the circuit court. *Id*. at 193. In doing so, the panel rejected the appellees' argument that they could rely on the prudential standard for standing adopted in *Lansing Sch*,

487 Mich 349, because the appellees had appealed a zoning board of appeals' decision under the MZEA rather than commencing an original action. *Olsen*, 325 Mich App at 193.

2. "PARTY AGGRIEVED" UNDER MCL 125.3605

We specifically requested briefing on whether the "party aggrieved" standard in MCL 125.3605 requires a party to show some special damages not common to other property owners similarly situated. "The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). As discussed in Part II(B)(2)(b) of this opinion, the term "aggrieved" has become a legal term of art. This triggers several additional considerations. MCL 8.3a requires that "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." We have adopted a similar principle at common law. See *Prod Credit Ass'n of Lansing v Dep't of Treasury*, 404 Mich 301, 312; 273 NW2d 10 (1978). We are also mindful that generally "[w]hen a term has received past judicial interpretation, the Legislature is presumed to have intended the same meaning." *People v Wright*, 432 Mich 84, 92; 437 NW2d 603 (1989).

Over time, the term "aggrieved" in the MZEA has become inappropriately intertwined with real-property ownership to a point where judicial decisions have begun to suggest that only real-property owners have the ability to appeal a zoning decision. In nearly every case already discussed in this opinion, the parties seeking to appeal a zoning decision premised their

right to appeal primarily or solely on their ownership of real property near or adjacent to the land subject to the challenged decision. This context makes it unsurprising that most Court of Appeals decisions have focused on real-property ownership and the harms experienced by such property owners. But there is no indication in the text of the MZEA that the Legislature intended to grant the right to appellate review of zoning decisions only to real-property owners. Neither the MZEA nor any of Michigan's previous zoning statutes explicitly require one to own real property in order to be "aggrieved" by local land-use decisions or to prove "aggrieved" status by comparison to other property owners who are similarly situated.

We take this opportunity to set Michigan zoning law back on its proper trajectory. By requiring one to be a "party aggrieved" by a zoning decision under MCL 125.3605 and MCL 125.3606, the Legislature implicitly rejected the idea that standing can be based on mere proximity to a development. Neither MCL 125.3103 (providing for advance notice to property owners and occupants within 300 feet of a potential zoning decision) nor MCL 125.3502 (requiring advance notice of a public hearing to property owners or occupants within 300 feet of property considered for special land use) is tied to any appeal rights. Similarly, the MZEA does not say that taxpayer or residency status makes one aggrieved by a zoning decision. The MZEA thus suggests that more is required to be "aggrieved."

The first part of this key phrase is easy enough to parse. To be a "party"[14] under MCL 125.3605 and 125.3606 means that the appellant must have participated in the zoning board of appeals proceedings, such

[14] See *Black's Law Dictionary* (11th ed) (defining "party" as "[s]omeone who takes part in a transaction . . . .").

as by taking a position on the contested issue in writing or through public comment.[15] It is the meaning of "aggrieved" that has led to disputes.

There is no reference to an appellant's property ownership in MCL 125.3605 or MCL 125.3606. The MZEA provides that a zoning board of appeals' decision is "final" and that "[a] *party aggrieved* by the decision may appeal to the circuit court for the county *in which the property is located*" under MCL 125.3606. MCL 125.3605 (emphasis added). Similarly, MCL 125.3606(1) states that "[a]ny *party aggrieved* by a decision of the zoning board of appeals may appeal to the circuit court *for the county in which the property is located*." (Emphasis added.) While both MCL 125.3605 and MCL 125.3606 refer to "property," in each statute the term is linked not to the appellant's property but to the real property subject to the zoning board of appeals' decision. This is unsurprising. The MZEA authorizes the adoption of local zoning ordinances to regulate land use and development to meet the needs of Michiganders. See MCL 125.3201; MCL 125.3202. Further, the powers of a zoning board of appeals are limited to "questions that arise in the administration of the zoning ordinance . . . ." MCL 125.3603(1). A zoning board's power is understandably linked to real-property regulation.

This makes sense because zoning ordinances affect all who reside or do business within the local jurisdiction or community regardless of whether they own real property in that location. Zoning ordinances control

[15] The ZBA was empowered to hear these appeals when they were filed. See note 8 of this opinion. Therefore, we need not address whether the "party aggrieved" standard applies in an appeal to the circuit court where there is no statute providing for an appeal to a zoning board of appeals. See MCL 125.3603(1); *Ansell*, 332 Mich App at 459.

land use, which affects where people can live and where businesses can operate. If being aggrieved by a zoning decision under the MZEA required proof of " 'special damages *not common to other property owners similarly situated*,' " *Olsen*, 325 Mich App at 185 (emphasis added), quoting *Unger*, 65 Mich App at 617, then all renters of real property (including business owners who lease space) within a jurisdiction would be effectively excluded from appealing zoning decisions.[16] We can assume that this is no small group of hypothetical individuals or businesses.[17] It is unlikely that the Legislature intended to completely exclude leaseholders from those who may obtain judicial review of a zoning board of appeals' administrative decisions by mere implication.

The Legislature, in fact, has specifically required "property ownership" as a statutory criterion in other

[16] Other jurisdictions have recognized that there might be circumstances in which a person or entity renting real property would have sufficient interest and potential for injury to be entitled to challenge local zoning decisions. See, e.g., *Moutinho v Planning & Zoning Comm of Bridgeport*, 278 Conn 660, 667-668; 899 A2d 26 (2006) ("It is clear . . . that a lessee may have a sufficient interest in leased property to be aggrieved by a zoning decision affecting that property."); *Sun-Brite Car Wash, Inc v Bd of Zoning & Appeals of North Hempstead*, 69 NY2d 406, 414-415; 508 NE2d 130 (1987) (explaining that "[a] leaseholder may . . . have the same standing to challenge municipal zoning action as the owner.").

[17] While local and regional figures vary, a 2019 study from the Michigan State Housing Development Authority found that 25% of housing stock in the state was renter-occupied and only 60% was owner-occupied. See Michigan State Housing Development Authority, *Michigan Homeownership Study: Understanding and Advancing Homeownership in Michigan, Companion Report: Key Trends and Measures by Prosperity Region* (March 2019), p 20, available at <https://www.michigan.gov/documents/mshda/MSHDA-Michigan-Homeownership-Study-Companion-Report_653597_7.pdf> (accessed January 5, 2022) [https://perma.cc/7WTA-QCHN].

parts of the MZEA. For example, MCL 125.3103(2) requires that advance notice of a public hearing be provided to "owners of property" that is subject to a potential zoning decision and "occupants of all structures within 300 feet" of the property. Similarly, MCL 125.3502(2) entitles the "property owner or the occupant of any structure located within 300 feet of the property" being considered for a special land use to notice of public hearings on the issue and allows them to demand that a public hearing be held before a decision is made. The MZEA also allows "an interested property owner" to request a public hearing on a proposed zoning ordinance. MCL 125.3401(4). Moreover, MCL 125.3406(3) grants certain exceptions to an applicant for a zoning permit who "became the owner of the property by foreclosure or by taking a deed in lieu of foreclosure" under certain circumstances.

The Legislature omitted mention of ownership or occupancy status when describing the class of individuals or entities that are entitled to appeal a decision under MCL 125.3605 or MCL 125.3606. Instead, the Legislature used the broader phrase "party aggrieved" without mandating that the party own any property within the relevant jurisdiction or that the required harm be shown by comparison to other property owners. That choice of words establishes a class of potential appellants broader than real-property owners, with the focus being on whether the decision at issue "aggrieved" the complaining party.

a. PROPERTY OWNERSHIP IS NOT REQUIRED TO APPEAL ZONING DECISIONS

As already discussed, Court of Appeals precedent incorrectly imposed an extra-statutory property-ownership limitation on the term "aggrieved" within

the MZEA. While the purported requirement dates back to *Joseph*, that decision was not appealed in this Court. *Joseph* is also distinguishable because it concerned an *original action* challenging the validity of a legislative act of rezoning property as opposed to an appeal from an administrative zoning decision.[18] The *Joseph* decision imported a requirement that the alleged special damages be based on a comparison to other property owners similarly situated. The *Unger*, *Brink*, and *Village of Franklin* decisions, which also were not appealed in this Court, doubled down on *Joseph* by grafting the nonstatutory standard onto the statutory standards for seeking appellate review of administrative zoning decisions. *Olsen* then applied the same standard to MCL 125.3605 based on an assumption that the Legislature relied on what we have identified as incorrect judicial construction of prior statutes. *Olsen*, 325 Mich App at 182-185. In light of the precedent discussed below that predates *Joseph* and defines the term "aggrieved" without regard to property ownership, we decline to recognize an extra-

[18] The zoning and rezoning of property are considered legislative functions under Michigan law. *Schwartz v Flint*, 426 Mich 295, 307-308; 395 NW2d 678 (1986). There is authority to suggest that " '[t]he remedy of the party who conceives himself injured by an amendment is to wait until it has been adopted and then challenge it in court' " rather than to seek an administrative appeal. *Sun Communities v Leroy Twp*, 241 Mich App 665, 669-670; 617 NW2d 42 (2000), quoting Crawford, Michigan Zoning and Planning (3d ed), § 1.11, p 53. *Sun Communities* was not appealed in this Court. We take no position on the issue decided in *Sun Communities* beyond recognizing that there is a difference between appealing the administrative application of existing zoning ordinances under the MZEA and challenging the legal validity of a municipality's legislative zoning actions.

statutory property-ownership requirement merely because a mistake has been repeated over time.[19]

b. WHAT IT MEANS TO BE AGGRIEVED BY A ZONING DECISION

We must decide the standard for determining when a potential appellant has been "aggrieved" by a zoning decision.[20] Long before *Olsen* or *Joseph* were decided,

[19] The dissent argues that the "Court of Appeals has never held that a person must be a property owner to appeal a zoning decision or that, to determine aggrieved status, the appellant must be compared to property owners" and further states that "[n]or do the cases hold that the 'similarly situated' component of the test requires comparing the appellant to property owners." Such arguments ignore the actual statements of law made by the Court of Appeals in *Olsen*, related decisions, and this case. See *Olsen*, 325 Mich App at 185; *Unger*, 65 Mich App at 617; *Brink*, 81 Mich App at 103 n 1. *Olsen* itself is internally inconsistent because it simultaneously refers to special damages as harm "not common to other property owners similarly situated," *Olsen*, 325 Mich App at 183, 184, 185, 186 (quotation marks and citation omitted), "harm different from that suffered by people in the community generally," *id*. at 183, 186, "a unique harm different from similarly situated community members," *id*. at 186, and harms "different from those of others within the community," *id*. at 194. In this case, the Court of Appeals, citing *Olsen*, noted that "[p]laintiff has *not* shown, however, that the affiants will suffer harms distinct from *other property owners similarly situated*" and that "some of the affiants are not even actual owners of nearby property[.]" *Saugatuck Dunes Coastal Alliance*, unpub op at 5, citing *Olsen*, 325 Mich App at 193. In the absence of a Court of Appeals decision regarding an aggrieved nonproperty owner, we cannot know whether zoning boards of appeal and circuit courts have been more literal in their reading of the law than what the dissent suggests the Court of Appeals has historically been. Those bodies are the bodies who primarily decide who has been "aggrieved" for purposes of MCL 125.3605 and MCL 125.3606, and it is those bodies that will most benefit from clarification of the law. Nor can we know how attorneys counsel their clients based upon the caselaw.

[20] Appellant and the Environmental Law and Policy Center ask us to effectively adopt the *Lansing Sch* prudential standard for standing as the interpretive explanation for the "aggrieved party" standard under the MZEA or, alternatively, to harmonize the two. Conversely, North

the term "aggrieved" had a settled meaning in Michigan outside the zoning context. Nearly 100 years ago, we stated that " '[t]he question of who may be aggrieved was settled in *Labar* v. *Nichols*, 23 Mich. 310 [(1871)]. To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency.' " *George Realty Co v Paragon Refining Co of Mich*, 282 Mich 297, 301; 276 NW 455 (1937), quoting *In re Miller Estate*, 274 Mich 190, 194; 264 NW 338 (1936). It is not clear why the *Joseph*, *Unger*, and later decisions failed to mention this precedent when interpreting the term "aggrieved" within the context of zoning appeals.[21] More recently, in the context of establishing standing to appeal a judicial decision, we reiterated that

> standing refers to the right of a party plaintiff *initially* to invoke the power of the court to adjudicate a claimed injury in fact. In such a situation it is usually the case that the defendant, by contrast, has no injury in fact but is compelled to become a party by the plaintiff's filing of a lawsuit. In appeals, however, a similar interest is vindicated by the requirement that the party seeking appellate relief be an "aggrieved party" under MCR 7.203(A) and our case law. This Court has previously stated, "To be aggrieved, one must have some interest of a pecuniary

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Shores argues that property ownership is not a prerequisite to claiming an appeal under the MZEA and suggests that the reference to property ownership is merely a mechanism for ensuring that the special-damages assessment looks at those "who share the same legally cognizable interest."

[21] The Legislature is presumed to have had knowledge of all caselaw regarding the definition of "aggrieved"—including the pre-1970s precedent from this Court concerning what it means to be aggrieved by a legal determination—when it enacted the MZEA in 2006. See 2006 PA 110. Thus, just as the Legislature is presumed to have known of *Joseph* and its progeny, it is also presumed to have known that this Court's pre-1970s precedent was inconsistent with *Joseph* and its progeny and that this Court had never adopted or endorsed the *Joseph* formulation.

> nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *In re Estate of Trankla*, 321 Mich 478, 482; 32 NW2d 715 (1948), citing *In re Estate of Matt Miller*, 274 Mich 190, 194; 264 NW 338 (1936). An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. The only difference is a litigant on appeal must demonstrate an injury arising 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. [*Federated Ins Co*, 475 Mich at 290-292 (citations omitted).][22]

Additionally, *Black's Law Dictionary* defines "aggrieved" as "([o]f a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights" and defines "aggrieved party" as "[a] party entitled to a remedy; esp., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." *Black's Law Dictionary* (11th ed), pp 83 and 1351.

We are tasked with now determining what it means to be aggrieved by a zoning decision. Synthesizing concepts from caselaw and *Black's Law Dictionary*, as a general matter, to be aggrieved by a legal determination, one must have a *protected interest or a protected personal, pecuniary, or property right that is or will be adversely affected* by the substance and effect of the challenged decision. Moreover, despite some disagreements with prior Court of Appeals precedent, we

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[22] Even a prevailing party can be "aggrieved" by a decision for appellate purposes if the legal effects of the decision mean that the party "nonetheless suffered a concrete and particularized injury as a result . . . ." *Manuel v Gill*, 481 Mich 637, 644; 753 NW2d 48 (2008).

agree with the longstanding requirement that a party appealing under the MZEA must demonstrate special damages as a part of demonstrating aggrieved-party status. This is a derivative of the requirement that the complaining party demonstrate injury to a protected right or interest. Such a requirement is necessary to balance the rights of private-property owners seeking zoning approval and the interests of third parties seeking to ensure that local zoning ordinances are correctly and lawfully administered. Requiring an appellant to demonstrate special damages also aligns with how a majority of other jurisdictions have construed the requirement of being aggrieved in their zoning statutes.[23] This requirement also aligns with the observations offered in a leading legal encyclopedia:

> To maintain standing to challenge a zoning decision as an aggrieved person, a person must have and maintain a specific, personal, and legal interest in the subject matter of the appeal throughout the course of the appeal and must present proof of the adverse effect the changed status has or could have on the use, enjoyment, and value of his or her property. The zoning board decision must not only affect a matter in which the protestant has a specific

[23] See, e.g., *Virginia Beach Beautification Comm v Bd of Zoning Appeals of Virginia Beach*, 231 Va 415, 419-420; 344 SE2d 899 (1986) ("The word 'aggrieved' in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally."); *Safest Neighborhood Ass'n v Athens Bd of Zoning Appeals*, 2013-Ohio-5610, ¶ 26; 5 NE3d 694 (Ohio App, 2013) ("A party is directly affected by an administrative decision, as distinguished from the public at large, when he or she can demonstrate a unique harm."); *Copple v City of Lincoln*, 210 Neb 504, 507; 315 NW2d 628 (1982) ("In order to have standing as an aggrieved person for the purpose of attacking a change of zone, the plaintiff must demonstrate that he suffers a special injury different in kind from that suffered by the general public.").

> interest or property right, but he or she must also be personally and specially affected in a way different from that of the public generally. [83 Am Jur 2d, Zoning and Planning (November 2021 update), § 882 (citations omitted).]

Based on our review of the statutes and other available authority, we hold that to be a "party aggrieved" under MCL 125.3605 and MCL 125.3606, the appellant must meet three criteria.

- First, the appellant must have participated in the challenged proceedings by taking a position on the contested decision, such as through a letter or oral public comment.
- Second, the appellant must claim some legally protected interest or protected personal, pecuniary, or property right that is likely to be affected by the challenged decision.
- Third, the appellant must provide some evidence of special damages arising from the challenged decision in the form of an actual or likely injury to or burden on their asserted interest or right that is different in kind or more significant in degree than the effects on others in the local community.

We use "others in the local community" to refer to persons or entities in the community[24] who suffer no injury or whose injury is merely an incidental inconvenience and *exclude* those who stand to suffer damage

[24] The local community will often be limited to those within the jurisdictional boundaries of the body making the zoning decision. There are situations where the scope or nature of the decision—or the location of the proposed land use—will affect persons or entities in adjacent jurisdictions. In such situations, it would be appropriate to consider those individuals or entities to be part of the relevant community for purposes of analyzing whether they have standing to appeal a zoning decision.

or injury to their protected interest or real property that derogates from their reasonable use and enjoyment of it.[25] Factors that can be relevant to this final element of special damages include but are not limited to: (1) the type and scope of the change or activity proposed, approved, or denied; (2) the nature and importance of the protected right or interest asserted; (3) the immediacy and degree of the alleged injury or burden and its connection to the challenged decision as compared to others in the local community; and (4) if the complaining party is a real-property owner or lessee, the proximity of the property to the site of the proposed development or approval and the nature and degree of the alleged effect on that real property.[26]

We reaffirm several well-established principles that are relevant to the standing analysis. Under the current MZEA, mere ownership of real property that is adjacent to a proposed development or that is entitled to statutory notice, *without a showing of special damages*, is not enough to show that a party is aggrieved.

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[25] In other words, to be a party aggrieved, the appellant must show an injury different in kind or more significant in degree from others in the relevant community who suffer incidental inconvenience as a result of the contested decision. But one need not show an injury different in kind or more significant in degree from others who also stand to suffer actionable damage or injury to their real property that derogates from their reasonable use and enjoyment of it. It would not be appropriate, for example, to say that a neighbor of a proposed apartment development who can present evidence of harm to his or her protected property rights does not have standing to appeal merely because another neighbor to the same development would suffer the same or similar harm. Rather, the inquiry must go beyond adjacent neighbors and consider what harms are and are not shared by the local community as a whole to ensure a proper measurement of special damages.

[26] While we reject appellant's request to graft the prudential standard for standing to initiate a lawsuit that we adopted in *Lansing Sch* onto MCL 125.3605 and MCL 125.3606, we expect some overlap in analysis because of similarities in the legal standard.

See *Olsen*, 325 Mich App at 185; *Village of Franklin*, 101 Mich App at 557-558; *Brink*, 81 Mich App at 102-103. It also remains true that *generalized* concerns about traffic congestion, economic harms, aesthetic harms, environmental harms, and the like are not sufficient to establish that one has been aggrieved by a zoning decision. See *Olsen*, 325 Mich App at 185; *Unger*, 65 Mich App at 617. But we caution courts and zoning bodies against an overbroad construction of allegations as mere generalizations to avoid addressing the merits of an appeal. While *generalized* concerns are not sufficient, a specific change or exception to local zoning restrictions might burden certain properties or individuals' rights more heavily than others. A party who can present some evidence of such disproportionate burdens likely will have standing to appeal under MCL 125.3605 and MCL 125.3606.[27] In light of the modest clarification to the law that this opinion makes and the breadth of existing precedent that has been retained, we disagree with the dissent's suggestion that this decision will cause confusion or "upend[] decades of stability in Michigan zoning law."

Further, unlike in an original lawsuit, a circuit court sits as an appellate body with a closed record when

[27] We observe, for example, that the Court of Appeals' evaluation of the alleged special damages incurred by waterfront property owners and river-using business owners in the present matter seems at odds with another unpublished decision that was decided about a month later. See *Deer Lake Prop Owners Ass'n v Indep Charter Twp*, unpublished per curiam opinion of the Court of Appeals, issued October 10, 2019 (Docket No. 343965), p 9 (holding that a lakefront property owners' association was aggrieved by a special-land-use approval when the association alleged "that the additional docks may disrupt or destroy the shoreline and its ecosystem" because, "[a]s riparian owners who share this shoreline, [the members of the association] have an interest beyond that of other lake users, the public at large, or even similarly situated neighbors").

reviewing an appeal brought under MCL 125.3605 and MCL 125.3606. If the circuit court determines that "the record [is] inadequate to make the review required by [MCL 125.3606] or finds that additional material evidence exists that with good reason was not presented" for purposes of analyzing standing under MCL 125.3605 and MCL 125.3606, then the court "shall order further proceedings on conditions that the court considers proper." MCL 125.3606(2). These additional proceedings may include a remand to the relevant planning or zoning body whose decision is being contested with instructions as to what is expected by the circuit court.

3. INTERPLAY BETWEEN MCL 125.3604(1) AND MCL 125.3605

We also requested briefing as to whether there is a substantive difference between the "person aggrieved" standard in MCL 125.3604(1) and the "party aggrieved" standard in MCL 125.3605. The task of the ZBA here was to determine whether appellant was a "person aggrieved" by the Commission's planned unit development and special use approval decisions for purposes of an appeal to the ZBA under MCL 125.3604(1). The ZBA determined that appellant was not a person aggrieved, and that decision was appealed in the circuit court under MCL 125.3605. In both lower-court proceedings, the circuit court either overlooked or failed to mention these nuances. Similarly, the Court of Appeals focused solely on whether appellant was a "party aggrieved" by the ZBA's decision for purposes of MCL 125.3605, which was the statute analyzed in *Olsen*, without any discussion of whether it was a "person aggrieved" by the Commission's deci-

sions for purposes of MCL 125.3604(1). This was a clear error, but not one of consequence for present purposes.

Appellant meets the broad definition of "person" under MCL 125.3102(q) (" 'Person' means an individual, partnership, corporation, association, governmental entity, or other legal entity."). Thus, appellant is a "person" for purposes of MCL 125.3604(1). The parties do not dispute this. The record also shows that appellant, its members, and its representatives participated in both the Commission and the ZBA proceedings concerning the proposed North Shores development; therefore, they were "parties" under MCL 125.3605. While it is possible that an individual or entity could be a "person" under MCL 125.3604(1) but not a "party" for purposes of MCL 125.3605, that is not the situation here.

We also agree with the parties' arguments that "aggrieved" must be given the same meaning in both MCL 125.3604(1) and MCL 125.3605. The Legislature has provided no indication that "aggrieved" was intended to have different meanings in these closely related statutes.[28] See *Robinson v Lansing*, 486 Mich 1, 17; 782 NW2d 171 (2010) ("[U]nless the Legislature indicates otherwise, when it repeatedly uses the same phrase in a statute, that phrase should be given the same meaning throughout the statute."). To determine whether the ZBA's standing decision was correct in this case, on remand the circuit court first must determine whether appellant was aggrieved by the Commission's decision for the purpose of appealing to the ZBA

[28] We acknowledge that the procedural distinctions between the two statutes might mean that the facts that make a person "aggrieved" under one statute might differ from the facts that make a party "aggrieved" under the other statute.

under MCL 125.3604. This determination will inform the subsequent analysis of whether appellant was aggrieved by the ZBA's standing decision for the purpose of appealing in the circuit court under MCL 125.3605 and MCL 125.3606.

III. CONCLUSION

We overrule *Olsen*, *Joseph*, and related Court of Appeals decisions to the *limited extent* that they (1) require real-property ownership as a prerequisite to being "aggrieved" by a zoning decision under the MZEA and (2) require special damages to be shown only by comparison to other real-property owners similarly situated. Real-property ownership is not a requirement to appeal under the MZEA, and whether someone is "aggrieved" for purposes of claiming an appeal under the MZEA should be determined using the analysis laid out in Part II(B)(2)(b) of this opinion. It is not clear whether the lower courts would have reached the same result as to standing in the absence of the errors in existing precedent. Accordingly, we decline to decide whether the Court of Appeals erred when it affirmed the circuit court's decisions. Instead, we vacate Part IV of the Court of Appeals opinion, vacate the Allegan Circuit Court's judgment regarding standing, and remand both cases to the circuit court for reconsideration of appellant's arguments regarding standing under MCL 125.3604(1) and MCL 125.3605. On remand, the circuit court shall also address appellant's original causes of action as directed by Part V of

the Court of Appeals opinion and conduct such other proceedings as may be necessary or appropriate under MCL 125.3606.[29]

MCCORMACK, C.J., and BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with WELCH, J.

VIVIANO, J. (*dissenting*). The majority's decision today to redefine what it means to be a "party aggrieved" for purposes of the Michigan Zoning Enabling Act (the MZEA), MCL 125.3101 *et seq*., will have far-ranging and destabilizing effects on Michigan zoning law. The majority conjures new definitions, criteria, and factors —the contours of which will be litigated for years to come. In doing so, the majority abandons the interpretation of "aggrieved" that has stood for decades, including at the time the Legislature adopted the MZEA. The majority's expansive new definition of "party aggrieved" is contrary to the intent of the Legislature, confusing, and unnecessary to resolve this case. Its decision will unsettle an area of the law that has been settled and has operated well for over a century. For these reasons, I respectfully dissent.

I. FACTS AND PROCEDURAL HISTORY

In 2017, the Saugatuck Township Planning Commission provided conditional approval and final approval for a condominium development proposed by defendant North Shores of Saugatuck, LLC (North

[29] Depending on the outcome of the circuit court's analysis of standing, it might be necessary for the court to also address what effect, if any, Saugatuck Township's amendment of § 40-72 of its zoning ordinance regarding the ZBA's authority to hear appeals related to special approval use and planned unit development approval will have on future proceedings in this matter.

Shores). Plaintiff, the Saugatuck Dunes Coastal Alliance, appealed those decisions to the Saugatuck Township Zoning Board of Appeals (the ZBA). Plaintiff submitted evidence in the form of written statements and testimony at the ZBA hearing that it contended gave it standing to appeal the decisions of the Planning Commission. The ZBA concluded that plaintiff lacked standing in two separate resolutions. Plaintiff appealed both resolutions in the circuit court, which affirmed both decisions of the ZBA. Plaintiff appealed both circuit court decisions in the Court of Appeals, which consolidated the cases. The Court of Appeals affirmed the circuit court's decisions but remanded one case to the circuit court for it to consider the original claims plaintiff had raised in that case. *Saugatuck Dunes Coastal Alliance v Saugatuck Twp*, unpublished per curiam opinion of the Court of Appeals, issued August 29, 2019 (Docket Nos. 342588 and 346677). Plaintiff then sought leave to appeal in this Court.

II. LEGAL ANALYSIS

A. "PARTY AGGRIEVED" AS USED IN MICHIGAN'S ZONING STATUTES IS A LEGAL TERM OF ART

To properly interpret "aggrieved" in the MZEA, a brief overview of the history of the appeal provisions in Michigan's various zoning statutes is necessary. Michigan did not always have a single consolidated law governing local zoning, such as the MZEA. Previously, the state had three separate zoning statutes: (1) the City and Village Zoning Act, 1921 PA 207, later codified at MCL 125.581 to MCL 125.600; (2) the County Zoning Act, 1943 PA 183, later codified at MCL 125.201 to MCL 125.240; and (3) the Township Zoning Act, 1943 PA 184, later codified at MCL 125.271 to MCL 125.310.

The City and Village Zoning Act used the term "person aggrieved" when providing for appeals to the ZBA, former MCL 125.585(a), as enacted by 1921 PA 207, and used the term "party aggrieved" when allowing appeals of certain ZBA decisions in the circuit court, former MCL 125.590, as added by 1947 PA 272. But in 1979, the Legislature specifically added a provision allowing for appeals of all ZBA decisions in the circuit court by "a person having an interest affected by the zoning ordinance . . . ." Former MCL 125.585(6), as added by 1978 PA 638. The County Zoning Act used the same "person aggrieved" language for appeals to the ZBA, former MCL 125.220(2), and the "person having an interest affected" language for appeals of a ZBA decision in the circuit court, former MCL 125.223(2). The Township Zoning Act mirrored the County Zoning Act. Former MCL 125.290; former MCL 125.293. Thus, beginning in 1979, all appeals from a ZBA in the circuit court used the "person having an interest affected" standard, regardless of whether the jurisdiction at issue was a city, village, township, or county.

A host of cases before and after the 1979 amendments examined the "aggrieved" person or party standard. One case addressed zoning appeals and aggrieved-party status without looking to the statutes. In *Marcus v Busch*, 1 Mich App 134, 136; 134 NW2d 498 (1965), the Court of Appeals observed that "[t]he consensus of authority throughout the country is that to have any status in court to attack the actions of a zoning board of appeals, the party must be an aggrieved party, and said party must be more than a resident of the city." Rather than determining whether the plaintiffs were aggrieved parties, the Court of Appeals remanded the case to the circuit court to make that determination. *Id*.

Two years later, the Court of Appeals in *Joseph v Grand Blanc Twp*, 5 Mich App 566, 570-571; 147 NW2d 458 (1967), relied on *Marcus* and other caselaw for the proposition that "[i]n order to maintain this action, plaintiff, a nonabutting property owner, must allege and prove that he has suffered a substantial damage which is not common to other property owners similarly situated." The Court determined that the plaintiff, who was merely a resident of the township, was not an "aggrieved party" because he had not alleged any special damages "different in kind from those suffered by the community . . . ." *Id*. at 571. This caselaw was cited in *Unger v Forest Home Twp*, 65 Mich App 614, 617-618; 237 NW2d 582 (1975), to reject the appellant's challenge of the issuance of a building permit for a condominium complex: while he claimed to own real property that bordered the land in question, he had not shown any special damages. For that reason, his allegations were insufficient to establish standing. *Id*. at 618. The Court of Appeals also rejected the appellant's argument that the township's zoning ordinance gave standing to any township property owner, noting that the ordinance was in conflict with MCL 125.293. *Id*. Significantly, despite referring to MCL 125.293, the Court of Appeals never addressed that MCL 125.293 contained the phrase "person having an interest affected" instead of "aggrieved" party or person.

In *Western Mich Univ Bd of Trustees v Brink*, 81 Mich App 99; 265 NW2d 56 (1978), the Court of Appeals addressed an appeal of a ZBA decision in the circuit court under the City and Village Zoning Act. The Kalamazoo Zoning Board of Appeals had granted the defendant's petition to expand a nonconforming use. *Id*. at 100. The plaintiff had wanted to purchase Brink's property. *Id*. at 104. Unlike the three cases

discussed above, the Court in this case did look to the zoning statute to determine who may appeal a ZBA decision in the circuit court, noting that MCL 125.590 limited "the right to institute a suit for review of the [ZBA's] decision to parties thereby 'aggrieved[.]' " *Brink*, 81 Mich App at 101. The Court of Appeals observed that the "aggrieved party" "requirement has repeatedly been recognized and applied in the decisions of this Court." *Id*. at 102, citing *Unger*, 65 Mich App 614, *Joseph*, 5 Mich App 566, and *Marcus*, 1 Mich App 134. The Court quoted *Unger* for the proposition that the "aggrieved" standard requires a plaintiff-appellant to " 'allege and prove that he has suffered some special damages not common to other property owners similarly situated . . . .' " *Brink*, 81 Mich App at 104, quoting *Unger*, 65 Mich App at 617. The plaintiff had only alleged that it would have to pay a higher price to purchase the land it wanted to purchase and made a general allegation about the construction causing it irreparable harm. *Brink*, 81 Mich App at 104. The Court of Appeals affirmed the trial court's holding that the plaintiff had not been aggrieved. *Id*. at 105.

Similarly, in *Village of Franklin v Southfield*, 101 Mich App 554, 556-558; 300 NW2d 634 (1980), the Court of Appeals applied the "party aggrieved" language from MCL 125.590 and relied on *Unger*, *Joseph*, and *Brink* to interpret the standard. The plaintiffs challenged approval of a proposed residential and commercial development. *Id*. at 556. The Court of Appeals held that the plaintiffs lacked standing, noting that they had not proven special damages and were therefore not "aggrieved." *Id*. at 558.

The following year, in *Brown v East Lansing Zoning Bd of Appeals*, 109 Mich App 688, 699; 311 NW2d 828 (1981), the Court of Appeals applied the "person having

an interest affected" standard after recognizing that it was a less-stringent standard than the "party aggrieved" standard. See also *Olsen v Chikaming Twp*, 325 Mich App 170, 189; 924 NW2d 889 (2018) (noting that *Brown* involved the more-permissive "person having an interest affected" standard). In *Brown*, the Court of Appeals determined that "active opposition" to a variance and participation in ZBA hearings was sufficient to demonstrate that an individual has an "interest affected" by a decision to grant a variance. *Brown*, 109 Mich App at 699, quoting MCL 125.585(6). Under the "person having an interest affected" standard, there was no requirement that the appellant suffer any damages at all by the decision, let alone "special damages."

In 2006, the Legislature repealed the separate zoning acts and adopted the MZEA. MCL 125.3604 addresses appeals to the ZBA and states, in relevant part, that "[a]n appeal to the zoning board of appeals may be taken by a person aggrieved or by an officer, department, board, or bureau of this state or the local unit of government." MCL 125.3604(1). MCL 125.3605 addresses appeals from a ZBA to the circuit court and states: "The decision of the zoning board of appeals shall be final. A party aggrieved by the decision may appeal to the circuit court for the county in which the property is located as provided under section 606." Thus, the Legislature abandoned the "person having an interest affected" standard that had been in the original Township Zoning Act and County Zoning Act and the amended City and Village Zoning Act; instead, the Legislature adopted a "party aggrieved" standard similar to that in the original City and Village Zoning

Act for appeals to circuit court from ZBA decisions pertaining to nonconforming uses.[1]

The Court of Appeals properly recognized the Legislature's adoption of the "party aggrieved" standard in *Olsen*, 325 Mich App 170, in which the Court sought to interpret the phrase "party aggrieved" in MCL 125.3605. The Court of Appeals understood that the proper framing of the issue under the MZEA is not one of "standing," as that word is traditionally used, but whether the appellees were "parties aggrieved by the decision" of the ZBA as defined by the MZEA. *Id*. at 181. The Court recognized the presumption that the Legislature uses "words in the sense in which they previously have been interpreted," *id*. at 182, and looked to *Unger*, *Joseph*, *Village of Franklin*, and *Brink* for how the panels in those cases had defined "party aggrieved," *id*. at 182-185. The Court then explained:

> Given the long and consistent interpretation of the phrase "aggrieved party" in Michigan zoning jurisprudence, we interpret the phrase "aggrieved party" in § 605 of the MZEA consistently with its historical meaning. Therefore, to demonstrate that one is an aggrieved party under MCL 125.3605, a party must "allege and prove that he [or she] has suffered some special damages not common to other property owners similarly situated[.]" *Unger*, 65 Mich App at 617. Incidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved. See *id*.; *Joseph*, 5 Mich App at 571. Instead, there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience. See

[1] As the majority notes, in a subsequent case, the Court of Appeals recognized that its decision in *Brown* applying the "person having an interest affected" standard was superseded by statute when the Legislature repealed the City and Village Zoning Act. See *Ansell v Delta Co Planning Comm*, 332 Mich App 451, 459; 957 NW2d 47 (2020).

> *Brink*, 81 Mich App at 103 n 1. Moreover, mere ownership of an adjoining parcel of land is insufficient to show that a party is aggrieved, *Village of Franklin*, 101 Mich App at 557-558, as is the mere entitlement to notice, *Brink*, 81 Mich App at 102-103. [*Olsen*, 325 Mich App at 185 (alterations in original).]

Applying the principles from cases that had interpreted the phrase "aggrieved party" to the facts at issue, the Court concluded that the appellees had failed to show that they were aggrieved parties for purposes of the MZEA. *Olsen*, 325 Mich App at 186. The appellees had alleged that "they would suffer aesthetic, ecological, practical, and other alleged harms from the grant of the zoning variance," but the Court held that these alleged harms did not show " 'special damages not common to other property owners similarly situated[.]' " *Id*. (alteration in original), quoting *Unger*, 65 Mich App at 617. The Court of Appeals specifically distinguished *Brown*, finding it "unpersuasive" on the ground that the "interest affected by the zoning ordinance" standard was "a more permissive threshold" than the "aggrieved person" threshold the MZEA incorporated. *Olsen*, 325 Mich App at 189. The panel concluded:

> [W]e reiterate that the inquiry here involves not an application of concepts of standing generally, but a specific assessment of whether, under the MZEA, appellees have established their status as aggrieved parties empowered to challenge a final decision of the ZBA. We conclude that appellees are not parties "aggrieved" under MCL 125.3605, having failed to demonstrate special damages different from those of others within the community. [*Olsen*, 325 Mich App at 194.]

Just as in *Olsen*, the Court of Appeals in this case correctly understood that whether a party has standing is a distinct inquiry from whether a party is

"aggrieved" for purposes of the MZEA.[2] And because there has been "long and consistent interpretation of the phrase 'party aggrieved' in Michigan zoning jurisprudence," *Olsen*, 325 Mich App at 185, it was not only proper, but necessary, for the Court of Appeals to consider that caselaw in determining whether plaintiff was a "party aggrieved" under MCL 125.3605.

B. THE COURT OF APPEALS CORRECTLY INTERPRETED "PARTY AGGRIEVED"

In light of this history, the first problem with the majority opinion is readily apparent: it goes to great lengths to rid Michigan caselaw of a rule that has never existed. The Court of Appeals has never held that a person must be a property owner to appeal a zoning decision or that, to determine aggrieved status, the appellant must be compared to property owners. Indeed, had the Court of Appeals made such an assertion, it would have been dicta, since none of the

[2] A number of plaintiff's members participated in the ZBA hearings and submitted affidavits, but only plaintiff was a named appellant in the court proceedings. Neither party has addressed the specific test for determining when an association representing its members is aggrieved for purposes of the MZEA. The Court of Appeals looked at whether any of plaintiff's members were aggrieved for purposes of determining whether plaintiff, as an association, was aggrieved. The point at which an association representing its members qualifies as "aggrieved" under the MZEA is an issue that has not received significant attention from our appellate courts, and I have found no Michigan caselaw directly addressing whether the standard is different for an association than it is for an individual. But the Court of Appeals' approach in this case is consistent with the majority approach, which looks at whether one or more of an association's members would qualify as "aggrieved" for purposes of determining whether the association is aggrieved. See 4 Salkin, American Law of Zoning (5th ed, May 2022 update), § 42:14. Because the parties have not briefed this issue and because the Court of Appeals reached the correct result, there is no need to resolve the issue today.

appellants in those cases was a nonproperty owner. Rather, in the cases discussed above, the Court of Appeals merely recognized that the parties challenging the ZBA decisions were, in fact, property owners. Therefore, those cases stand for the proposition that when a party challenging a ZBA decision is a property owner, the comparison is to other similarly situated property owners.[3] Nothing in *Joseph* or its progeny ever held that a nonproperty owner may not be a "party aggrieved."

Nor do the cases hold that the "similarly situated" component of the test requires comparing the appellant to property owners. That is, although the Court of Appeals asked in those cases whether the appellant had suffered injuries different from those experienced by similarly situated property owners, this was again because the appellants in those cases were property owners. The very nature of a "similarly situated" test entails comparing the appellant to individuals or entities who are, in fact, similarly situated (not just to property owners). The Court of Appeals caselaw appears to recognize this. In *Olsen*, 325 Mich App at 186, for example, the Court determined that the parties were not aggrieved because they "failed to show that they suffered a unique harm different from similarly situated *community members* . . . ." (Emphasis added.) Even *Joseph*, 5 Mich App at 571, concluded by noting that any damages alleged by the plaintiff were not "different in kind from those suffered by the community . . . ."[4] As a result, at the time the Legislature

[3] It makes sense that because property owners are often the most intimately affected by zoning decisions, they are frequently the litigants who challenge those decisions.

[4] See also *Ansell*, 332 Mich App at 460 ("Such concerns, however, do not show that appellants stand to suffer any greater negative impacts

enacted the MZEA, it would not have understood "party aggrieved" to be limited to property owners or to require comparisons to the harms suffered by similarly situated property owners.

Second, and more importantly, even if the majority is correct that *Joseph* and the cases that relied on it incorrectly defined "aggrieved" for purposes of zoning law, our role in this case is not to determine whether "aggrieved" was properly understood in those cases but to determine what the Legislature meant when it used the term "party aggrieved" in the MZEA. For zoning in townships, the Legislature made the conscious choice to change from a standard that looked at whether one has "an interest affected" and to return to a standard that looked at whether one is "aggrieved." Significantly, the Legislature had previously used an "aggrieved" standard in the state's zoning laws. "[C]ourts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute." *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009); see also Scalia & Garner: *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 73 (" '[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.' "), quoting

from the proposals than do their *neighbors or others in the community*.") (emphasis added). North Shores cites a host of unpublished opinions that illustrate this same point. See, e.g., *Deer Lake Prop Owners Ass'n v Independence Charter Twp*, unpublished per curiam opinion of the Court of Appeals, issued October 10, 2019 (Docket No. 343965), p 9 (comparing the injuries of the party property owners to those of "other lake users, the public at large, [and] even similarly situated neighbors").

Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum L Rev 527, 537 (1947).

The Legislature's use of old legislation to craft new legislation is not an uncommon occurrence and can aid courts in the proper interpretation of new or revised legislation.

> Most statutes have had many precursors because legislatures avoid the sudden, sporadic, and unexpected enactment of unprecedented legislation. A particular act usually expands or restricts the regulation of former acts, but seldom breaks with the principle of regulation expressed by its predecessors. . . .
>
> Thus, a full appreciation of any specific enactment requires an examination of all legislation in a particular field. . . . Such an inquiry will usually reveal a legislative common law of surprising consistency and continuity, may help disclose the "legislative intent" behind a particular statute, and also can pave the way for constructive judicial use of legislative as well as case law precedents. [2A Singer & Singer, Sutherland Statutory Construction (7th ed, November 2021 update), § 45:10 (citations omitted).]

Absent any evidence that the Legislature thought those cases had been wrongly decided when it adopted the MZEA, the word "aggrieved" in MCL 125.3604(1) and MCL 125.3605 should be understood consistently with those cases.

Thus, the question at issue is not whether *Joseph* and its progeny were correct; the question is what the Legislature intended when it chose to use the phrase "party aggrieved" in MCL 125.3605. At the time the Legislature adopted the MZEA, our courts had uniformly construed the word "aggrieved" in the context of zoning law for nearly 40 years. See *Reading Law*, p 322 ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction

by inferior courts . . . , they are to be understood according to that construction."). The statutory history of the MZEA and the acts that it replaced demonstrate that the Legislature intended to return to a narrower "aggrieved" standard in place of the relaxed "interest affected" standard that it had adopted in 1979. Notably, this "aggrieved" standard was different from the "person having an interest affected" standard that had been used in all three zoning statutes prior to their replacement. See *Olsen*, 325 Mich App at 189.

In 2006, the phrase "party aggrieved" had acquired a particular meaning within zoning law—that given to it in *Joseph*, *Unger*, *Brink*, and *Village of Franklin*: when an individual challenges a ZBA decision, a party aggrieved was one who suffered some special damages not common to other similarly situated community members. As noted, because "party aggrieved" had received past judicial interpretation, it is presumed that the Legislature intended "party aggrieved" to have the same meaning given to it in prior zoning caselaw. See *People v Wright*, 432 Mich 84, 92; 437 NW2d 603 (1989).[5] Absent any evidence to the contrary, the presumption that the Legislature intended

[5] Although the majority is correct that the Legislature is presumed to have had knowledge of all caselaw involving the definition of "aggrieved," only caselaw defining "aggrieved" in the zoning context is relevant to determining the Legislature's intent when enacting the MZEA. When a phrase has received uniform construction by our courts, the phrase acquires a technical legal sense *specific to that field of law*. See *Reading Law*, p 324 ("The word or phrase at issue is a statutory term used in a particular field of law (to which the statute at issue belongs). When that term has been . . . given uniform interpretation by the lower courts . . . , the members of the bar practicing in that field reasonably enough assume that, in statutes pertaining to that field, the term bears this same meaning. The term has acquired, in other words, a technical legal sense . . . that should be given effect in the construction of later-enacted statutes.").

"party aggrieved" to have the meaning consistently given to it by Michigan courts should stand. Regardless of whether it was originally proper to define "party aggrieved" to require a party to show that he or she "suffered some special damages not common to other property owners similarly situated," *Unger*, 65 Mich App at 617, that requirement would have been part of the Legislature's understanding of the phrase "party aggrieved" when it enacted the MZEA.

C. THE MAJORITY'S STANDARD WILL UNSETTLE AN AREA OF THE LAW THAT HAS BEEN SETTLED FOR DECADES

The majority, in rejecting the proper interpretation of the statute, adopts one that is troublesome in both its development and effects. In establishing the three new "party aggrieved" criteria, the majority appears to have spliced together bits and pieces from a number of other authorities. How exactly the majority arrived at these three criteria is not entirely clear. The majority discusses a number of cases—some pertaining to zoning law and others not—and statutes from other jurisdictions, but it does not cite specific authority for establishing the three criteria in our state. And the factors the majority announces for determining whether special damages exist, which appear to have been created out of whole cloth, are not discussed anywhere else in the majority's opinion. Thus, when courts have questions about how the criteria and factors should be applied, they will be left wondering where to look for further explanation.

Beyond the confusion created by the majority's method in establishing the criteria, the criteria themselves are problematic in a number of ways. First, the majority does away with the requirement that the harm suffered must be different from the harm suf-

fered by those who are similarly situated. The "similarly situated" requirement ensures that only those who suffer damages different from those damages suffered by the community in general may appeal a zoning decision. See Boerner, *Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement*, 64 Mich L Rev 1070, 1079-1080 (1966); *Miller v Fulton Co*, 258 Ga 882, 883; 375 SE2d 864 (1989).[6] This Court's opinion in *Spiek v Dep't of Transp*, 456 Mich 331, 349; 572 NW2d 201 (1998), addressing an inverse-condemnation suit, demonstrates why such a requirement is necessary:

> Where harm is shared in common by many members of the public, the appropriate remedy lies with the legislative branch and the regulatory bodies created thereby, which participate extensively in the regulation of vibrations, pollution, noise, etc., associated with the operation of motor vehicles on public highways. Only where the harm is peculiar or unique in this context does the judicial remedy become appropriate.

The same principle applies to zoning decisions appealed to and from a ZBA. If the basis for the appeal is that the underlying zoning ordinance is allowing for harm shared by many community members, the appropriate remedy is to have those community members urge the legislative body of the municipality to change the zoning ordinance. In any event, it seems inescapable that one person's special damages will likely be different in kind or more significant in degree than at least one other person's when the comparison is to everyone else in the community. Thus, by changing the relevant comparison to "others in the local community"

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[6] *Joseph*, 5 Mich App at 570-571, had relied on Georgia caselaw when it recognized the "similarly situated" requirement, so it is helpful to look at Georgia caselaw to explain that requirement.

instead of those who are "similarly situated," the majority's standard significantly broadens who can qualify as "aggrieved."

Second, the majority's expansion of what constitutes "special damages" also has the potential to dramatically expand who qualifies as "aggrieved." *Joseph* required the special damages to be "different in kind from those suffered by the community . . . ." *Joseph*, 5 Mich App at 571. The majority's third factor expands this, making one aggrieved if the special damages are "different in kind or more significant in *degree* than the effects on others in the local community." (Emphasis added.) It will almost always be possible to find "others in the local community" who have not suffered the same kind of damages or who have suffered them to a lesser degree. This hollows out the special-damages requirement and disregards its origins. The special-damages requirement comes from public-nuisance law. See 4 Rathkopf, The Law of Zoning and Planning (4th ed, June 2022 update), § 63:14. In Michigan, to bring an action to abate a public nuisance, one has to show " 'damage of a special character, distinct and different from the injury suffered by the public generally.' " *Morse v Liquor Control Comm*, 319 Mich 52, 59; 29 NW2d 316 (1947), quoting 39 Am Jur, p 378, overruled in part on other grounds by *Bundo v Walled Lake*, 395 Mich 679, 691-692 (1976). *Joseph*'s focus on the kind of harm, rather than the degree of harm, is consistent with the development of the special-damages requirement in public-nuisance law.

The majority's unsupported and unexplained addition of "degree" of harm to the inquiry is likely to have significant effects on zoning law in Michigan. Burdens and injuries to interests or rights will typically be more significant for those who are closer to the property for

which a zoning decision was made. The degree of harm will typically continue to decrease for those farther and farther from the property at issue. Thus, the majority's standard will likely give "aggrieved" status to all but the most remote individual or entity who is least harmed by a zoning decision—as long as they will actually or likely suffer an injury.

The practical effect of the majority's new standard is that the threshold for who qualifies as "aggrieved" will be significantly more permissive. The majority ignores the Legislature's decision to abandon a "more permissive" standard for a narrower one and in the process upends decades of stability in Michigan zoning law.[7]

III. CONCLUSION

To appeal the decision of the ZBA, plaintiff needed to show that its members would suffer some harms that were different from harms suffered by similarly situated community members. The Court of Appeals was correct in determining that plaintiff had not made such a showing. The harms alleged were either common to other similarly situated community members or were not damages as a result of the decision of the Planning Commission or the ZBA. Therefore, I would affirm the judgment of the Court of Appeals.

ZAHRA, J., concurred with VIVIANO, J.

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[7] Although the majority does not fully resurrect the "interest affected" standard, its use of the phrase "legally protected interest" in its second factor is, at a minimum, puzzling given the Legislature's express choice to abandon the "interest affected" standard.

PEOPLE v LUCYNSKI

Docket No. 162833. Argued April 26, 2022 (Calendar No. 2). Decided July 26, 2022.

David A. Lucynski was charged in the 71B District Court with operating a vehicle while intoxicated (OWI), MCL 257.625(9)(c); driving with a suspended license, MCL 257.904(3)(b); and operating a vehicle with an open container of alcohol in the vehicle, MCL 257.624a(1). On a January morning, Tuscola County Sheriff's Deputy Ryan Robinson observed two cars stopped in the middle of the road; the vehicles were facing opposite directions with the drivers' windows next to one another, and the drivers appeared to be talking to one another with their windows down. One of the vehicles was defendant's car. Robinson testified at the preliminary examination that he believed that the vehicles were impeding traffic in violation of MCL 257.676b, even though there were no other vehicles on the road at the time. Robinson also testified that he thought a drug transaction might have occurred. Robinson followed defendant in a marked patrol vehicle and turned onto the same one-lane driveway that defendant had entered, parking a few feet behind defendant's car and blocking the only path of egress. Neither the siren nor the emergency lights on Robinson's vehicle were activated. When Robinson exited his patrol car, defendant was standing next to the driver's side door of his car, facing Robinson. Robinson immediately asked whether defendant lived there, and defendant responded that it was a friend's house as he walked toward the deputy. Robinson asked defendant if defendant had his driver's license, to which defendant replied in the negative; upon Robinson's further questioning, defendant responded that he did not have a valid driver's license. Robinson testified that because he smelled the odor of marijuana and alcohol emanating from defendant and noticed that defendant's eyes were bloodshot, he proceeded to investigate whether defendant was intoxicated. Defendant admitted to smoking marijuana about 20 minutes earlier and to consuming alcohol during the day. Defendant then consented to a search of his vehicle, and Robinson found both marijuana and an open container of alcohol inside. Robinson performed several field-sobriety tests, and defendant was arrested. At the preliminary examina-

tion, defendant's attorney asked to submit briefing to challenge the validity of the stop under MCL 257.676b and to argue that the evidence obtained by the police should be excluded. The district court, Jason E. Bitzer, J., allowed briefing and later held that the prosecution failed to prove that Robinson had sufficient cause to initiate the stop. The court held that MCL 257.676b(1) could not be violated without a showing that traffic was actually impeded in some way. Accordingly, the court held that all evidence obtained from the stop would be inadmissible in any proceeding moving forward, and it dismissed the OWI charge. The prosecution sought leave to appeal in the Tuscola Circuit Court, and the court, Amy Gierhart, J., denied the application. The prosecution then sought leave to appeal in the Court of Appeals, and the Court of Appeals granted the application, limiting the issues to those raised in the application. Despite this, the Court of Appeals resolved the appeal based on a legal theory that the parties had not raised in the trial court or on appeal: whether defendant had been seized at all. In an unpublished per curiam opinion issued December 17, 2020 (Docket No. 353646), the Court of Appeals, LETICA, P.J., and RIORDAN and CAMERON, JJ., held that based on the totality of the circumstances, the earliest point at which the encounter with Robinson could have become a seizure implicating the Fourth Amendment was when defendant admitted to not having a valid driver's license, because that was the earliest point at which a reasonable person would not have felt free to leave. Subsequent investigation into and arrest for suspicion of OWI was deemed justifiable because defendant had been seen driving and the deputy had observed signs of possible intoxication. The Court held that even if MCL 257.676b(1) required actual impediment of traffic, under *People v Salters*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2001 (Docket No. 215396), the evidence should not have been suppressed because a traffic stop would have been based on Robinson's reasonable mistake of law. Accordingly, the Court of Appeals held that the district court abused its discretion when it held that the Fourth Amendment was violated and thus that the district court erred by excluding evidence from the seizure and by dismissing the OWI charge. Defendant sought leave to appeal in the Supreme Court, and the Supreme Court granted the application, limited to three issues: (1) whether Robinson seized defendant when Robinson pulled his patrol vehicle behind defendant's vehicle in the driveway; (2) whether defendant impeded traffic in violation of MCL 257.676b(1) when there was no actual traffic to impede at that time; and (3) if not, whether Robinson made a

reasonable mistake of law by effectuating a traffic stop of defendant for violating MCL 257.676b(1). 508 Mich 947 (2021).

In an opinion by Justice WELCH, joined by Chief Justice MCCORMACK and Justices BERNSTEIN, CLEMENT (as to Parts I, II(A), and II(B)), and CAVANAGH, the Supreme Court *held*:

Defendant was seized under the Fourth Amendment when a police officer blocked the driveway and defendant's path of egress with a marked patrol car because, under the totality of the circumstances, a reasonable person would not have felt free to leave or to terminate the interaction; the impeding-traffic statute, MCL 257.676b(1), is only violated if the normal flow of traffic has actually been disrupted; and no reasonable mistake of law occurred because the police officer's mistaken reading of MCL 257.676b(1), an unambiguous statute, was not objectively reasonable.

1. The Fourth Amendment of the United States Constitution protects individuals from being subjected to unreasonable searches and seizures. A person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that they were not free to leave. While police officers generally need a warrant to search or seize someone, there are recognized exceptions to this general rule, such as an investigatory stop. A brief seizure for investigative purposes does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot. In this case, Robinson did not initiate a formal traffic stop for a violation of MCL 257.676b(1), despite his testimony that this was his intention when he began following defendant. Robinson pulled onto the driveway behind defendant, parked a few feet behind defendant, and blocked the exit. Robinson did not turn his emergency lights on, sound his siren, or direct defendant to pull over on the side of the road. What was not clear under the facts of this case was whether defendant had an independent desire to keep moving. The driveway and home belonged to his friend. The record was silent on whether defendant was planning to visit with his friend before Robinson began following defendant or whether defendant was planning to keep driving. However, under either of these hypothetical scenarios, defendant was seized. Defendant was seized at the moment Robinson, in his marked police vehicle, blocked defendant's car, resulting in no means for defendant to exit the single-lane driveway. Using a marked police vehicle to block a civilian vehicle's ability to exit a single-lane driveway to facilitate questioning or an investigation is a show of force on

behalf of the police that can give rise to a seizure within the meaning of the Fourth Amendment. Under the circumstances of this case—including the rural setting, the way the encounter was initiated by the officer swiftly following defendant down a private driveway, and the fact that the officer's police vehicle blocked defendant's car in the driveway—a reasonable person would not have felt free to leave the scene, even though the police officer did not activate emergency lights or a siren. The same facts would cause a reasonable person to feel compelled to answer questions posed by the officer who had followed him and blocked his path of egress from the driveway of a home he did not own. If a reasonable person in defendant's place did not have an independent desire to leave, but nevertheless did not want to interact with Robinson, the other options available to them would have been to attempt to enter a home that they did not own (and without knowledge whether the owner was home) or wander off into a frozen field some distance from town in a rural area. Neither would have been a viable option from the perspective of a reasonable person after having been followed and then blocked in by a police officer. Accordingly, the Court of Appeals erred by holding that defendant was not seized until after he had made incriminating statements about not having a valid driver's license.

2. MCL 257.676b(1) provides, in relevant part, that a person, without authority, shall not block, obstruct, impede, or otherwise interfere with the normal flow of vehicular, streetcar, or pedestrian traffic upon a public street or highway in this state by means of a barricade, object, or device or with his or her person. The parties did not dispute that defendant could be a "person" and his vehicle an "object" under MCL 257.676b(1); therefore, it was assumed without deciding that MCL 257.676b(1) applies to a person operating a vehicle on a roadway. The clear terms of MCL 257.676b(1) require some evidence that the accused's conduct actually affected the usual smooth, uninterrupted movement or progress of the normal flow of traffic on the roadway, which requires an assessment of traffic at the time of the alleged offense. MCL 257.676b(1) is not violated if the normal flow of traffic was never impeded, blocked, or interfered with. The potential interference with hypothetical or nonexistent traffic is not sufficient because this interpretation ignores the phrase "normal flow of . . . traffic" in MCL 257.676b(1) and would lead to the untenable situation in which every person crossing a street and every vehicle attempting to park along the side of a road would potentially be guilty of a civil infraction even if no other vehicles or pedestrians were present on the roadway. In this case, the

prosecution did not introduce evidence sufficient to establish even reasonable suspicion to believe that defendant violated MCL 257.676b(1) because the normal flow of vehicular traffic on the road was not impeded or disrupted. It was undisputed that no vehicles other than Robinson's, defendant's, and a third unidentified driver's were on the road during the relevant time period. Robinson admitted that he did not have to slow his car down or go around either vehicle. Accordingly, there was no evidence in the record to sustain the accusation that defendant violated MCL 257.676b(1).

3. The Fourth Amendment is not violated if a police officer's suspicion that the defendant's conduct was illegal is based on an objectively reasonable mistake about what the law required. The subjective understanding of the particular officer involved is not examined. Objectively reasonable mistakes of law occur in exceedingly rare circumstances in which an officer must interpret an ambiguous statute. Additionally, while qualified immunity applies to officers so long as they have not violated a clearly established statutory right, the mistake-of-law doctrine is not as forgiving. In this case, to the extent that Robinson's seizure of defendant was based on a belief that MCL 257.676b(1) was violated, Robinson's mistake of law was not objectively reasonable. One cannot be guilty of violating MCL 257.676b(1) without evidence that the normal flow of actual traffic was disrupted, and Robinson admitted that no disruption had occurred. The Court of Appeals' reliance on *Salters* was not persuasive. In *Salters*, the Court of Appeals based its holding entirely on the perceived purpose of MCL 257.676b(1) instead of also engaging with the text of the statute; the Court of Appeals in this case made the same error by failing to independently analyze MCL 257.676b(1). Additionally, *Salters* had not been cited or relied on for its conclusory interpretation of MCL 257.676b in any appellate decision in Michigan until the Court of Appeals' decision in this case. A single unpublished decision coming out the other way does not transform an unambiguous statute into an ambiguous one.

4. Given that defendant was seized the moment Robinson blocked the driveway and prevented egress, defendant's incriminating statements and the officer's visual and olfactory observations that the Court of Appeals relied upon to justify further inquiry and an eventual arrest were obtained in violation of defendant's Fourth Amendment rights. Prior to Robinson blocking defendant in, defendant had not made any incriminating statements, and thus such statements could not have justified a seizure. A suspected violation of MCL 257.676b(1) also could not

serve as reasonable suspicion. Accordingly, there was no lawful justification for the seizure, and the district court did not err by holding that the seizure violated defendant's constitutional rights.

Reversed and remanded to the Court of Appeals to determine whether application of the exclusionary rule was the appropriate remedy for the violation of defendant's Fourth Amendment rights.

Justice CLEMENT, concurring in part and dissenting in part, joined the majority opinion as to Parts I, II(A), and II(B), because she agreed that the traffic stop constituted a seizure under the Fourth Amendment and that this seizure was not justified by reasonable suspicion of criminal wrongdoing. However, Justice CLEMENT joined the dissent as to its Part II because she believed that the evidence should not have been excluded given that the unconstitutional seizure was a result of Robinson's reasonable mistake of law.

Justice ZAHRA, joined by Justice VIVIANO (and by Justice CLEMENT as to Part II), dissenting, would have held that Robinson did not stop or in any way seize defendant when he pulled his patrol car into the driveway behind defendant's parked car and that because there was no seizure, this case did not require interpretation of MCL 257.676b(1). Parking cars one after another is typically the way a driveway functions; there is nothing inherently coercive about a police officer parking behind another car in a driveway. An objectively reasonable person would not have felt obligated to talk to Robinson simply because he was a law enforcement officer who parked his police car in the driveway behind that person's car. Further, in this case, Robinson approached defendant in a courteous, nonthreatening fashion and engaged defendant in conversation. Only one officer was present, and he did not activate his emergency lights or siren, draw his gun, or give any orders or commands. Accordingly, no seizure occurred as a matter of law until after defendant incriminated himself. Justice ZAHRA further concluded that even if Robinson had seized defendant, the Fourth Amendment was not violated because Robinson's actions were the product of a reasonable mistake of law. Robinson did not have the benefit of the majority's interpretation of the impeding-traffic statute at the time of the alleged offense. In fact, the only opinion at the time of these events that had interpreted the impeding-traffic statute, *Salters*, had reached the exact opposite conclusion, and that determination had stood unchallenged for more than 20 years. It was reasonable for Robinson to interpret the statute as the Court of Appeals had. Under the majority's ruling, to be

reasonable, police officers must be so adept and assured in their own statutory interpretation that they would reject longstanding conclusions by Court of Appeals judges if they anticipate that the Supreme Court will one day disagree; law enforcement officers should not be held to a higher standard of legal interpretation than judges.

1. CONSTITUTIONAL LAW — SEARCH AND SEIZURE — INVESTIGATORY STOP — USING A MARKED POLICE VEHICLE TO BLOCK A CIVILIAN VEHICLE'S ABILITY TO EXIT A SINGLE-LANE DRIVEWAY TO FACILITATE AN INVESTIGATION.

The Fourth Amendment of the United States Constitution protects individuals from being subjected to unreasonable searches and seizures; a person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that they were not free to leave; using a marked police vehicle to block a civilian vehicle's ability to exit a single-lane driveway to facilitate questioning or an investigation is a show of force on behalf of the police that can give rise to a seizure within the meaning of the Fourth Amendment.

2. STATUTES — MICHIGAN VEHICLE CODE — IMPEDING-TRAFFIC STATUTE — ACTUAL DISRUPTION OF TRAFFIC REQUIRED.

MCL 257.676b(1) of the Michigan Vehicle Code, MCL 257.1 *et seq*., provides, in relevant part, that a person, without authority, shall not block, obstruct, impede, or otherwise interfere with the normal flow of vehicular, streetcar, or pedestrian traffic upon a public street or highway in this state by means of a barricade, object, or device or with his or her person; MCL 257.676b(1) is only violated if the normal flow of traffic has actually been disrupted.

3. CONSTITUTIONAL LAW — SEARCH AND SEIZURE — IMPEDING-TRAFFIC STATUTE — MISTAKE OF LAW.

Objectively reasonable mistakes of law occur in exceedingly rare circumstances in which a police officer must interpret an ambiguous statute; MCL 257.676b(1) of the Michigan Vehicle Code, MCL 257.1 *et seq*., provides, in relevant part, that a person, without authority, shall not block, obstruct, impede, or otherwise interfere with the normal flow of vehicular, streetcar, or pedestrian traffic upon a public street or highway in this state by means of a barricade, object, or device or with his or her person; because MCL 257.676b(1) is an unambiguous statute that requires the normal flow of traffic to have actually been disrupted, to the extent that a police officer's actions are based on a belief that

MCL 257.676b(1) is violated when no traffic has actually been disrupted, that officer's mistaken understanding of MCL 257.676b(1) is not a reasonable mistake of law.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Mark E. Reene*, Prosecuting Attorney, and *Eric F. Wanink*, Chief Assistant Prosecuting Attorney, for the people.

Bernard A. Jocuns, Jr., for defendant.

Amici Curiae:

David Rudoi for the Michigan Association of OWI Attorneys.

Doug Lloyd, *Kym L. Worthy*, *John P. Wojtala*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

WELCH, J. The Fourth Amendment protects individuals from being subjected to unreasonable searches and seizures. While police officers generally need a warrant to search or seize someone, there are recognized exceptions to this general rule. If an officer has at least a reasonable suspicion of criminal activity, based on articulable facts, then a temporary warrantless seizure is constitutional. *Terry v Ohio*, 392 US 1, 20-27; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Reasonable suspicion can be based on a mistaken belief that someone violated the law, so long as that mistake is objectively reasonable. *Heien v North Carolina*, 574 US 54, 60-63, 66; 135 S Ct 530; 190 L Ed 2d 475 (2014).

When a defendant challenges the constitutionality of an alleged seizure, there are two questions that must be answered. First, when was the defendant seized by the officer, if at all? And second, at that

moment, was the seizure constitutional? In this case, to determine whether a seizure was constitutional, we also must determine whether the officer's interpretation of the applicable statute, MCL 257.676b(1), was correct, and if not, whether the mistake was objectively reasonable.

The officer in this case claimed that he followed defendant because he believed that defendant committed a traffic violation that would have justified the subsequent seizure, questioning, search, and arrest of defendant. The district court held that there was no traffic violation, that the seizure was unconstitutional, that defendant would not be bound over for operating while intoxicated (OWI), and that the unlawfully obtained evidence must be suppressed. The prosecution argued that a "reasonable mistake" occurred as to the traffic violation, that suppression of the evidence was not required, and that the bindover decision was incorrect. The Court of Appeals agreed and further held that defendant had not been seized until after he made incriminating statements, and thus the district court erred.

Accordingly, we must decide when defendant was seized and if, at that moment, the officer had reasonable suspicion that defendant had committed a crime or, if not, whether the officer's mistaken belief was objectively reasonable. First, we hold that defendant was seized under the Fourth Amendment when the officer blocked the driveway and defendant's path of egress with a marked patrol car because, under the totality of the circumstances, a reasonable person would not have felt free to leave or to terminate the interaction. Second, the "impeding traffic" statute at issue, MCL 257.676b(1), is only violated if the normal flow of traffic is actually disrupted. Third, the officer's

mistaken reading of this unambiguous statute was not objectively reasonable, and thus no reasonable mistake of law occurred.

Accordingly, we reverse the judgment of the Court of Appeals and remand this case to that Court to determine whether application of the exclusionary rule was the appropriate remedy for the violation of defendant's Fourth Amendment rights.

I. BACKGROUND

On a brisk January morning, Tuscola County Sheriff's Deputy Ryan Robinson was traveling westbound on Old State Road in rural Wisner Township when he observed two cars stopped in the middle of the road from some distance away.[1] At the preliminary-examination hearing, Robinson testified that the vehicles were facing opposite directions with the drivers' windows next to one another and that the drivers appeared to be talking to one another with their windows down. One of the vehicles, a red Chevrolet Cobalt, was defendant's car. Robinson did not observe any narcotics activity and did not hear what the drivers said, but he testified that he thought a drug transaction might have occurred. Even though there were no other vehicles on Old State Road at the time, Robinson testified at the preliminary-examination hearing that he believed the vehicles were impeding traffic in violation of MCL 257.676b. Robinson also testified that he saw both cars begin moving when he was approximately 800 feet away, he did not have to

[1] Old State Road is a two-mile stretch of rural road, which Deputy Robinson described as "dirt" or unpaved. Old State Road is approximately 10 miles east of Bay City, Michigan, and appears to provide access to a handful of farms and residential homes before reconnecting to Michigan Highway 25.

slow down or avoid either vehicle, and he did not observe any erratic driving.

Robinson testified that he followed defendant's car "with the intention to stop the red Cobalt for impeding traffic." Robinson followed defendant in a marked patrol vehicle and turned onto the same one-lane driveway that defendant had entered, parking a few feet behind defendant's car and blocking the only path of egress. While a single lane was cleared within the driveway, the surrounding area was covered with several inches of snow. Neither the siren nor the emergency lights on Robinson's vehicle were activated by the officer.

Body-camera footage of the encounter that followed was introduced at the preliminary-examination hearing. Robinson, upon pulling into the driveway behind defendant, started to exit his car prior to putting the car in the parked position. When Robinson exited his patrol car, defendant was standing next to the driver's side door of the Cobalt facing Robinson. Robinson immediately asked whether defendant lived there, and defendant responded that it was a friend's house as he walked toward the deputy. Robinson asked what defendant was doing on the road, to which defendant replied, "Just talking about fishing." During this period, defendant had moved to put his hands in his pockets, and Robinson ordered him not to do so; defendant complied with the directive. Robinson then said, "I didn't know if maybe there was a drug deal going on, and that when I ran the plate it [came] back to" an address in Reese, Michigan. Defendant denied any drug transaction and said that Reese was where he lived and that he worked just up the road. After confirming the name of the homeowner, Robinson asked defendant if defendant had his driver's license,

to which defendant replied in the negative; upon Robinson's further questioning, defendant responded that he did not have a valid driver's license. This all occurred within the first two minutes of Robinson pulling into the driveway.

The possibility of a citation for impeding traffic was never mentioned during Robinson's encounter with defendant. However, Robinson testified that because he smelled the odor of marijuana and alcohol emanating from defendant and noticed that defendant's eyes were bloodshot, he proceeded to investigate whether defendant was intoxicated. Defendant admitted to smoking marijuana about 20 minutes earlier and to consuming alcohol during the day. Defendant then consented to a search of his vehicle, and Robinson found both marijuana and an open container of alcohol inside. Robinson performed several field-sobriety tests, and based upon those tests, defendant was arrested.[2] No "impeding traffic" citation was issued, but defendant was charged with operating while intoxicated (OWI), driving with a suspended license, and having an open container of alcohol in the vehicle.

A. THE DISTRICT AND CIRCUIT COURT PROCEEDINGS

Robinson testified at defendant's preliminary-examination hearing to the facts outlined earlier. However, Robinson conceded on redirect examination that his "initial thought was that there, there may have been a drug deal or something going on, because it was a rural area and no one was around." While the deputy knew of drug exchanges in rural areas, he knew of none on Old State Road. He also acknowledged that it

[2] Defendant also consented to a breath test and a blood draw, and after making the arrest, Robinson took defendant to a hospital for the blood draw.

is not uncommon for people to stop their vehicle, roll down their window, and talk with acquaintances on rural roads.

Defendant's attorney asked to submit briefing to challenge the validity of the stop under MCL 257.676b and to argue that the evidence obtained by the police should be excluded. The prosecution countered that the evidence was sufficient and that, based on the facts and the statute at issue, the officer had sufficient probable cause to initiate the stop. Additionally, the prosecution argued that a reasonable mistake of law or fact does not mandate the suppression of evidence under United States Supreme Court precedent.

The district court allowed briefing and later held that the prosecution failed to prove that Robinson had sufficient cause to initiate the stop. The court held that the prosecution had presented nothing more than "an inchoate or unparticularized suspicion or hunch" that was legally insufficient to believe that a drug transaction had transpired. As to the alleged impeding-traffic violation under MCL 257.676b(1), the court held that the statute could not be violated without a showing that "real, not imagined, traffic was actually impeded or obstructed in some way by a person or a vehicle." No evidence of such impediment was presented by the prosecution, and thus the court determined that the traffic stop was invalid. Accordingly, the court held that all evidence obtained from the stop would be inadmissible in any proceeding moving forward, and it dismissed the OWI charge. The court did not address the prosecution's reasonable-mistake-of-law argument.

The prosecution sought leave to appeal in the Tuscola Circuit Court, which was denied. The prosecution then sought leave to appeal in the Court of Appeals.

B. COURT OF APPEALS PROCEEDINGS

The Court of Appeals granted the prosecution's application, limiting the issues to those raised in the application. *People v Lucynski*, unpublished order of the Court of Appeals, entered July 21, 2020 (Docket No. 353646). Despite this, the Court of Appeals resolved the appeal based on a legal theory that was not raised by the parties in the trial court or on appeal. Specifically, the panel focused on whether defendant was seized at all, a point that neither party contested in the lower courts.[3]

The Court acknowledged the constitutional right to be free from unreasonable searches and seizures and that "[a] person is seized if, 'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *People v Lucynski*, unpublished per curiam opinion of the Court of Appeals, issued December 17, 2020 (Docket No. 353646), pp 3-4 (citation omitted). The panel relied on *People v Jenkins*, 472 Mich 26, 33; 691 NW2d 759 (2005), for the proposition that " '[w]hen an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized.' " *Lucynski*, unpub op at 4. The Court also acknowledged that a temporary detention for questioning is constitutionally reasonable when based on reasonable suspicion of criminal activity under *Terry*. *Id*.

The panel noted that while Robinson had followed defendant, Robinson did not turn on his lights or signal

[3] Both in the district court and in its application to the Court of Appeals, the prosecution argued that Robinson had intended to initiate and did initiate a traffic stop when he pulled into the driveway behind defendant. The question whether defendant was seized at all was first raised by the Court of Appeals during oral argument.

for defendant to pull over. Rather, defendant voluntarily pulled into a driveway, and Robinson pulled in and parked behind defendant's car. "Lucynski then approached Deputy Robinson and began voluntarily answering Deputy Robinson's questions, which included what Lucynski had been doing on the roadway with the driver of the other vehicle and whether the homeowner was home." *Id*. at 5. The Court of Appeals held that based on the totality of the circumstances, the earliest point at which the encounter with Robinson could have become a seizure implicating the Fourth Amendment was when defendant admitted to not having a valid driver's license, because that was the earliest point at which a reasonable person would not have felt free to leave.[4] Subsequent investigation into and arrest for suspicion of OWI was deemed justifiable because defendant had been seen driving and the deputy observed signs of possible intoxication.

In a footnote, the Court held that even if MCL 257.676b(1) requires actual impediment of traffic, in light of unpublished authority holding to the contrary, i.e., *People v Salters*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2001 (Docket No. 215396), "the evidence should not have been suppressed because the traffic stop was based on Deputy Robinson's reasonable mistake of law or fact." *Lucynski*, unpub op at 6 n 5, citing *Heien*, 574 US at 60-68.

The panel concluded by holding that the district court abused its discretion when it held that the Fourth Amendment was violated and thus that the

[4] Stated differently, the panel concluded that Robinson did not seize defendant merely by following him into the driveway and blocking defendant's car. Rather, the encounter became a seizure a little less than two minutes later.

district court erred by excluding evidence from the seizure and by dismissing the OWI charge. Accordingly, the circuit court abused its discretion by denying leave to appeal. Defendant then sought leave to appeal in this Court. We granted defendant's application for leave to appeal, limited to three issues:

> (1) whether the defendant impeded traffic, in violation of MCL 257.676b(1), where there was no actual traffic to impede at that time; (2) if not, whether the deputy sheriff made a reasonable mistake of law by effectuating a traffic stop of the defendant for violating MCL 257.676b(1), see *Heien v North Carolina*, 574 US 54 (2014); and (3) whether the deputy sheriff seized the defendant when he pulled his patrol vehicle behind the defendant's vehicle in a driveway. [*People v Lucynski*, 508 Mich 947, 947 (2021).]

II. ANALYSIS

We are tasked with determining whether the district court erred by refusing to bind defendant over for trial on the OWI charge. To bind a criminal defendant over for trial, the district court must find probable cause to believe that the defendant committed a felony. *People v Magnant*, 508 Mich 151, 161; 973 NW2d 60 (2021). "This requires evidence as to each element of the charged offense that would 'cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt.' " *Id*., quoting *People v Shami*, 501 Mich 243, 250-251; 912 NW2d 526 (2018).[5]

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[5] A district court's bindover decision is reviewed "for an abuse of discretion, which occurs when the district court's decision falls outside the range of principled outcomes." *Magnant*, 508 Mich at 161. A trial court abuses its discretion when it bases its ruling on an error of law. *People v Rajput*, 505 Mich 7, 11; 949 NW2d 32 (2020). Questions of statutory interpretation and questions of constitutional law are reviewed de novo. *Magnant*, 508 Mich at 161; *People v Lockridge*, 498 Mich

Defendant does not dispute that if all relevant evidence presented by the prosecution at the preliminary-examination hearing is considered, probable cause existed to support his bindover on the OWI charge. However, defendant argues that the evidence supporting his bindover—i.e., his admissions to the officer, the field-sobriety tests, and the blood-draw results—must be suppressed because it was obtained in violation of his constitutional rights against unreasonable search and seizure and thus constitutes fruit of the poisonous tree. See *People v Stevens (After Remand)*, 460 Mich 626, 633-634; 597 NW2d 53 (1999). Without the admission of this evidence, probable cause does not exist supporting the OWI charge. Accordingly, we must first determine whether defendant was unconstitutionally seized.

A. DEFENDANT WAS SEIZED WHEN THE POLICE BLOCKED THE ONLY PATH OF EGRESS FROM A DRIVEWAY USING A MARKED POLICE VEHICLE

The United States Constitution guarantees an individual's right to be free from unreasonable searches and seizures. US Const, Am IV.[6] As Justice Stewart explained in *United States v Mendenhall*, 446 US 544, 553-555; 100 S Ct 1870; 64 L Ed 2d 497 (1980) (opinion of Stewart, J.):

358, 373; 870 NW2d 502 (2015). The district court's factual determinations are reviewed for clear error. *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012).

[6] Const 1963, art 1, § 11 has historically been interpreted coextensively with the Fourth Amendment, "absent compelling reason to impose a different interpretation." *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011) (quotation marks and citation omitted). See also *Sitz v Dep't of State Police*, 443 Mich 744, 764-779; 506 NW2d 209 (1993). No party has presented an argument under the Michigan Constitution, and therefore, we do not reach the issue whether a compelling reason warrants a different interpretation.

> [A] person is "seized" only when, *by means of physical force or a show of authority*, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. . . . As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.
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> * * *
>
> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. [Emphasis added.]

The United States Supreme Court eventually adopted Justice Stewart's *Mendenhall* test,[7] with the added caveat that if "a person 'has no desire to leave' for reasons unrelated to the police presence, the 'coercive effect of the encounter' can be measured better by asking whether '*a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter*.' " *Brendlin v California*, 551 US 249, 255; 127 S Ct 2400; 168 L Ed 2d 132 (2007) (emphasis added), quoting *Florida v Bostick*, 501 US 429, 435-436; 111 S Ct 2382; 115 L Ed 2d 389 (1991). Hence, there are arguably two separate standards to apply—

[7] See *Immigration & Naturalization Serv v Delgado*, 466 US 210, 215; 104 S Ct 1758; 80 L Ed 2d 247 (1984).

one when a person has an independent desire to leave and another if the person does not—even if they are effectively two sides of the same coin. The "test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Michigan v Chesternut*, 486 US 567, 573; 108 S Ct 1975; 100 L Ed 2d 565 (1988). "Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Id*.

This Court has adopted the same general principles, as recognized in *Jenkins*, 472 Mich at 32-33:

> A "seizure" within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave. *People v Mamon*, 435 Mich 1, 11; 457 NW2d 623 (1990). When an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized. *Florida v Royer*, 460 US 491, 497-498, 103 S Ct 1319; 75 L Ed 2d 229 (1983) (plurality opinion).

Some interactions with the police do not rise to the level of a "seizure" under the Fourth Amendment. As noted in *Jenkins*, when there is no show of force and an officer approaches an individual in a public place and asks for "voluntary cooperation through noncoercive questioning," there will generally be no seizure. *Jenkins*, 472 Mich at 33. See also *Royer*, 460 US at 497. When exactly an interaction crosses the line and becomes a seizure, thus triggering the protections of the Fourth Amendment, is a difficult question that often sparks disagreement.

A warrantless search or seizure is presumed unconstitutional unless shown to be within one of several established exceptions. See *Illinois v Gates*, 462 US 213, 236; 103 S Ct 2317; 76 L Ed 2d 527 (1983); *People v Hughes*, 506 Mich 512, 524-525; 958 NW2d 98 (2020); *People v Reed*, 393 Mich 342, 362; 224 NW2d 867 (1975). One frequently implicated exception to the prohibition on warrantless seizures that is relevant in this case is the investigatory stop. A brief seizure for investigative purposes does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot. *Terry*, 392 US at 22, 30-31; *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001). Like an investigatory stop, a traffic stop is " 'more analogous to a so-called "*Terry* stop" . . . than to a formal arrest.' " *Rodriguez v United States*, 575 US 348, 354; 135 S Ct 1609; 191 L Ed 2d 492 (2015), quoting *Knowles v Iowa*, 525 US 113, 117; 119 S Ct 484; 142 L Ed 2d 492 (1998), in turn quoting *Berkemer v McCarty*, 468 US 420, 439; 104 S Ct 3138; 82 L Ed 2d 317 (1984).

As previously stated, Robinson did not initiate a formal traffic stop for a violation of MCL 257.676b(1),[8]

[8] "[T]he Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Kansas v Glover*, 589 US ___, ___; 140 S Ct 1183, 1187; 206 L Ed 2d 412 (2020) (quotation marks and citation omitted). See also *Whren v United States*, 517 US 806, 810; 116 S Ct 1769; 135 L Ed 2d 89 (1996) ("[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."). We have recognized the same principle under state law. See *People v Dunbar*, 499 Mich 60, 66; 879 NW2d 229 (2016) (" 'A police officer who witnesses a person violating [the Michigan Vehicle Code, MCL 257.1 through MCL 257.923] . . . , which violation is a civil infraction, may stop [and temporarily] detain the person . . . .' "), quoting MCL 257.742(1) (alterations in original).

despite his testimony that this was his intention when he began following defendant.[9] Pulling defendant over on the side of the road would have been a seizure. Instead, Robinson pulled onto the driveway behind defendant, parked a few feet behind defendant, and blocked the exit. Robinson did not turn his lights on, sound his siren, or direct defendant to pull over on the side of the road. Because Robinson did not outwardly communicate his subjective intentions to defendant, they are not relevant in determining when defendant's encounter with Robinson became a seizure.

We must therefore decide when a reasonable person in defendant's shoes would either (1) have not felt free to leave or (2) have ceased to feel free to decline Robinson's requests or otherwise terminate the encounter. *Brendlin*, 551 US at 255. Was it when defendant admitted to lacking a valid driver's license, as the Court of Appeals held, or was it sooner? In this regard, three decisions from the United States Court of Appeals for the Sixth Circuit are particularly relevant because each involves similar constitutional questions and relatively similar facts.[10]

In *United States v See*, 574 F3d 309, 311 (CA 6, 2009), a police officer saw the defendant and two other men in an unlit car parked in the lot of a public-housing complex in a high-crime neighborhood at

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[9] That a police officer intended to stop or seize an individual does not mean that a seizure has occurred for Fourth Amendment purposes, because the constitutional question focuses on the objective manifestations of intent, see *Brendlin*, 551 US at 260, although subjective intentions might be relevant when they are conveyed to the person confronted, see *Chesternut*, 486 US at 576.

[10] The decisions of intermediate federal courts are not binding on this Court, although they may be considered for their persuasive value. See *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

about 4:30 a.m. The officer parked his patrol car in front of the defendant's vehicle in a manner that prevented the defendant from driving away. *Id*. The subsequent encounter led to a search of the defendant's vehicle, during which a firearm was found. *Id*. at 312. The defendant sought to suppress the evidence obtained from the search. The Sixth Circuit affirmed the district court's holding that blocking the defendant's vehicle " 'to determine the identity of the occupants and maintain the status quo while obtaining this information was a warrantless *Terry* seizure.' " *Id*. at 313. As the panel noted, "Given the fact that [the officer] blocked See's car with his marked patrol car, a reasonable person in See's position would not have felt free to leave." *Id*. Because the Sixth Circuit also held that reasonable suspicion did not support the seizure, it further held that the seizure was unlawful and that suppression of the evidence resulting from the seizure was appropriate. *Id*. at 313-315.

In *United States v Gross*, 662 F3d 393, 396 (CA 6, 2011), during an early morning patrol, an officer noticed a vehicle legally parked in a parking lot of a public-housing complex with its engine running but with no apparent driver. The officer "noticed a barely-visible passenger" who was slumped over in the front passenger seat. *Id*. The officer "parked his police vehicle directly behind the [car] and turned on his vehicle spotlights." *Id*. The officer then approached the vehicle on foot, identified himself through the closed window, and questioned the defendant. *Id*. at 397. After noticing a partially consumed bottle of liquor in the car, the officer asked for identification or identifying information, which the occupant provided after several repeated questions. *Id*. The officer ran a warrant check and discovered that the defendant had an outstanding

felony warrant, which led to the defendant's arrest and the discovery of incriminating evidence. *Id*.

Relying on *See*, the court held that the officer's act of parking his vehicle behind the defendant's legally parked car in a manner that prevented the car from leaving was a warrantless seizure and thus required reasonable suspicion of misconduct, which was lacking.[11] *Id*. at 399-400. Additionally, the panel emphasized that the officer in *Gross* had the right to engage in a consensual encounter if done in a manner that did not amount to a *Terry* stop, such as parking alongside the vehicle. *Id*. at 401.

The decision in *O'Malley v Flint*, 652 F3d 662 (CA 6, 2011), illustrates how slightly different facts can lead to the opposite conclusion.[12] In *O'Malley*, a police officer in the city of Flint "was driving an *unmarked police vehicle* and noticed a blue Chevrolet Tahoe that looked like a Michigan State Police vehicle." *Id*. at 665 (emphasis added). The officer began following the vehicle because he suspected that it was being used to impersonate a law-enforcement officer. *Id*.

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[11] The panel rejected the government's argument that the officer was merely engaged in a community-caretaker function under *United States v Koger*, 152 F Appx 429, 430-431 (CA 6, 2005). *Gross*, 662 F3d at 400-401. In *Koger*, the officers had approached an illegally stopped vehicle that was blocking a local highway and had a sleeping or unconscious driver. *Koger*, 152 F Appx at 430. The court found that the illegality of that situation justified a brief seizure, and the community-caretaker function was merely an alternative rationale. *Gross*, 662 F3d at 400-401.

[12] *O'Malley* was a civil action filed under 42 USC 1983 seeking damages for the alleged unlawful search, seizure, and detention of O'Malley. Thus, rather than deciding whether evidence should be suppressed as in *See*, the *O'Malley* court was determining whether the officer was entitled to qualified immunity under federal law, which required an assessment of the constitutionality of the police encounter. *O'Malley*, 652 F3d at 665, 668-671.

> Eventually, the Tahoe was driven into a residential driveway and parked. After its driver, plaintiff O'Malley, exited the Tahoe and began walking toward the back of the house, [Officer] Hagler parked his police vehicle in the driveway behind the Tahoe. Thereafter, Hagler approached O'Malley, identified himself as a police officer, and said that he would like to speak with him. According to O'Malley, Hagler asked about the vehicle before identifying himself. [*Id*.]

The communications and interactions that followed led to O'Malley being detained at a nearby police station. *Id*. at 666. O'Malley was never charged, and he was eventually released. *Id*.

On the seizure question, the court distinguished *Gross* and *See*, holding that O'Malley was not seized for constitutional purposes at the time of the initial encounter and questioning. The panel emphasized several factual differences. First, O'Malley was out of his vehicle and walking toward the home when the officer parked behind the Tahoe. *Id*. at 669. The panel opined that "parking behind a vehicle in a driveway does not inherently send a message of seizure because it is how driveways are routinely used." *Id*. Second, the officer's tone, identification of himself as a police officer, and initial statement of " 'Hey! Whose truck is that?' " were not threatening and merely indicated a desire to "talk to O'Malley about the Tahoe." *Id*. Third, that "O'Malley stopped walking to respond to [Officer] Hagler's inquiry also does not, by itself, transform this encounter into a seizure for purposes of the Fourth Amendment." *Id*., citing 4 LaFave, Search & Seizure (4th ed), § 9.4, and *United States v Thomas*, 430 F3d 274, 277, 280 (CA 6, 2005).

Returning to the facts of this case, while Robinson did not activate his lights or siren, he parked a few feet behind defendant's car in the single-lane driveway.

Defendant described his vehicle as being blocked in, and the prosecution has not disputed this characterization. Robinson testified that his vehicle was not "offset very much because essentially it's just a one lane driveway. I can't say if it was offset or not, but it was behind his vehicle." Our review of the body-camera footage also supports defendant's characterization of being blocked in. The presence of several inches of snow on the ground and the apparent lack of an alternative path for exiting the driveway further supports this conclusion. The body-camera footage shows defendant standing next to the driver's side door of the Cobalt facing Robinson the moment defendant came into view as Robinson emerged from his patrol car. At the preliminary examination, Robinson also described defendant as "standing out of the vehicle" when Robinson arrived.

Beyond the positioning of defendant and Robinson's patrol car, other facts concerning the setting of this police–citizen encounter are also important. See *Chesternut*, 486 US at 573. The encounter at issue occurred on a cold January morning in rural Michigan in one of a handful of residential driveways off a dirt road. Robinson testified that he followed defendant's car for a short period before following defendant onto the driveway. The body-camera footage shows that Robinson quickly began exiting his car before the car even came to a full stop.

What is not clear under the facts of this case, as in many seizure cases, is whether defendant had an independent desire to keep moving. The driveway and home belonged to his friend. The record is silent on whether defendant was planning to visit with his friend before Robinson began following defendant or if defendant was planning to keep driving. Under either

of these hypothetical scenarios, we conclude that defendant was seized under the standards that the United States Supreme Court has set forth.

Under the totality of the circumstances, we hold that defendant was seized at the moment Robinson, in his marked police vehicle, blocked defendant's car, resulting in no means for defendant to exit the single-lane driveway. As aptly stated by Professor Wayne LaFave, "boxing the car in," among other things, "will likely convert the event into a Fourth Amendment seizure." 4 LaFave, Search and Seizure (6th ed), § 9.4(a), pp 596-599. Applying similar logic, using a marked police vehicle to block a civilian vehicle's ability to exit a single-lane driveway to facilitate questioning or an investigation is a show of force on behalf of the police that can give rise to a seizure within the meaning of the Fourth Amendment. Under the circumstances of this case, including the rural setting, the way the encounter was initiated by the officer swiftly following defendant down a private driveway, and the fact that the officer's police vehicle blocked defendant's car in the driveway, a reasonable person would not have felt free to leave the scene, even though the police officer did not activate emergency lights or a siren. The same facts would cause a reasonable person to feel compelled to answer questions posed by the officer who had followed him and blocked his path of egress from the driveway of a home he did not own. This is consistent with the Sixth Circuit's holding that blocking someone's parked car to " 'determine the identity of the occupants and maintain the status quo while obtaining this information was a warrantless *Terry* seizure . . . .' " *Gross*, 662 F3d at 400, quoting *See*, 574 F3d at 313. *Gross* and *See* are not anomalous decisions.

Many other courts have reached the same conclusion under a variety of similar factual circumstances.[13]

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[13] See, e.g., *State v Rosario*, 229 NJ 263, 273; 162 A3d 249 (2017) (holding that "[a] person sitting in a lawfully parked car outside her home who suddenly finds herself blocked in by a patrol car that shines a flood light into the vehicle, only to have the officer exit his marked car and approach the driver's side of the vehicle, would not reasonably feel free to leave"); *Robinson v State*, 407 SC 169, 177, 183; 754 SE2d 862 (2014) (holding that an investigatory stop occurred when an officer blocked a vehicle in a parking lot with the officer's patrol car); *United States v Jones*, 678 F3d 293, 297, 305 (CA 4, 2012) (holding that the defendant was seized when officers followed him from a public street onto private property, blocked his car from leaving without activating lights, and then quickly approached the defendant, who was near the car, to initiate questioning); *State v Garcia-Cantu*, 253 SW3d 236, 246 & n 44 (Tex Crim App, 2008) (holding that a seizure occurred when the officer "parked his patrol car" such that it " 'boxed in' [the defendant's] parked truck, preventing him from voluntarily leaving" and noting that "[m]ost courts have held that when an officer 'boxes in' a car to prevent its voluntary departure, this conduct constitutes a Fourth Amendment seizure"); *United States v Burton*, 441 F3d 509, 511 (CA 7, 2006) (holding that officers on bicycles seized a vehicle stopped in a roadway by placing their bicycles so that the driver could not drive away); *State v Jestice*, 177 Vt 513, 515; 2004 VT 65; 861 A2d 1060 (2004) (holding that "when a police cruiser completely blocks a motorist's car from leaving, courts generally find a seizure. . . . [T]he fact that it was possible for the couple to back up and maneuver their car past the patrol car and out of the trailhead parking lot does not convince us that this was a consensual encounter"); *State v Roberts*, 293 Mont 476, 483; 1999 MT 59; 977 P2d 974 (1999) (holding that a seizure occurred when an officer, "armed and in uniform," followed the defendant's car without activating lights or sirens, blocked the car from backing out of a driveway, and made an additional "show of authority in immediately exiting his patrol car and approaching" the defendant, who had exited his car simultaneously and was standing by the car door); *McChesney v State*, 988 P2d 1071, 1075 (Wy, 1999) (noting that an officer having "blocked in" a defendant's car was "sufficient to constitute a seizure"); *United States v Tuley*, 161 F3d 513, 515 (CA 8, 1998) (holding that "[b]locking a vehicle so its occupant is unable to leave during the course of an investigatory stop is reasonable to maintain the status quo while completing the purpose of the stop"); *Commonwealth v Helme*, 399 Mass 298, 300; 503 NE2d 1287 (1987) (holding that an investigatory stop occurred when an officer "parked the police cruiser so as to block the defendant's [parked]

We also note that, unlike in *O'Malley*, Robinson was not driving an unmarked police vehicle and did not wait until after the civilian vehicle had parked and its occupant had already begun walking around the home before pulling into the driveway and blocking the path of egress. Rather, when Robinson emerged from his vehicle, defendant was by the side of his vehicle and facing the patrol car, as if either defendant had just exited and was waiting for the police officer who had followed him into the driveway or defendant was already walking toward the police officer who had just blocked his car into the driveway. This is precisely what one would expect of a reasonable person under the circumstances.[14]

If a reasonable person in defendant's place did not have an independent desire to leave, but nevertheless did not want to interact with Robinson, the other options available to them would have been to attempt to enter a home that they did not own (and without knowledge whether the owner was home) or wander off

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automobile and prevent it from leaving the parking lot"); *United States v Kerr*, 817 F2d 1384, 1386-1387 (CA 9, 1987) (holding that when a uniformed officer approached a car after blocking the one-lane driveway as the defendant was backing out, a seizure occurred, leaving the defendant with "no reasonable alternative except an encounter with the police"); *People v Wilkins*, 186 Cal App 3d 804, 809; 231 Cal Rptr 1 (1986) (holding that a seizure occurred when the officer "stopped his marked patrol vehicle behind the parked station wagon in such a way that the exit of the parked vehicle was prevented"); *People v Jennings*, 45 NY2d 998, 999; 385 NE2d 1045 (1978) (holding that a seizure occurred when officers blocked the defendant's vehicle in a parking lot with a patrol car).

[14] While the dissent relies heavily on *O'Malley*, we find that decision to be distinguishable for the reasons previously explained, and thus it carries less persuasive value for purposes of determining when a seizure occurred under the facts of this case. See *Abela*, 469 Mich at 607 ("Although lower federal court decisions may be persuasive, they are not binding on state courts.").

into a frozen field some distance from town in a rural area. Neither would be a viable option from the perspective of a reasonable person after having been followed and then blocked in by a police officer. Accordingly, the Court of Appeals erred by holding that defendant was not seized until after he had made incriminating statements about not having a valid driver's license. Rather, under the facts of this case, defendant was seized at the moment the officer blocked defendant's car in the driveway with a marked police vehicle. The next question is whether there was legally sufficient suspicion of criminal activity at that moment.

B. MCL 257.676b(1) REQUIRES ACTUAL INTERFERENCE WITH THE NORMAL FLOW OF TRAFFIC

The warrantless seizure of a person generally must be supported by constitutionally sufficient suspicion that the individual has engaged in criminal conduct. As previously recognized in note 8 of this opinion, " '[a] police officer who witnesses a person violating [the Michigan Vehicle Code, MCL 257.1 through MCL 257.923] . . . , which violation is a civil infraction, may stop [and temporarily] detain the person . . . .' " *People v Dunbar*, 499 Mich 60, 66; 879 NW2d 229 (2016), quoting MCL 257.742(1) (alterations in original). This aligns with United States Supreme Court precedent stating that "the Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has a particularized and objective basis for suspecting the particular person stopped of criminal activity," *Kansas v Glover*, 589 US ___, ___; 140 S Ct 1183, 1187; 206 L Ed 2d 412 (2020) (quotation marks and citation omitted), and that a traffic stop is more similar to a temporary seizure under *Terry* than a formal arrest, *Rodriguez*, 575 US at 354. A brief seizure for investi-

gative purposes does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion[15] that criminal activity is afoot. *Terry*, 392 US at 22, 30-31; *Oliver*, 464 Mich at 192.

The stated justification for Robinson's encounter with defendant was an alleged violation of MCL 257.676b(1). The parties do not dispute that if Robinson observed defendant violate MCL 257.676b(1), then Robinson would have had constitutionally sufficient suspicion to temporarily seize defendant. The statute provides, in relevant part:

> Subject to subsection (2), *a person*, without authority, *shall not block, obstruct, impede, or otherwise interfere with the normal flow of vehicular*, streetcar, or pedestrian *traffic upon a public street or highway in this state, by means of a barricade, object, or device*, or with his or her person. This section does not apply to persons maintaining, rearranging, or constructing public utility or streetcar facilities in or adjacent to a street or highway. [MCL 257.676b(1) (emphasis added).]

Our primary goal when interpreting a statute is to give effect to the Legislature's intent. *Magnant*, 508 Mich at 162. We begin with the plain and ordinary meaning of the statute, and if the text is clear and unambiguous, then it will be enforced as written. *People v Sharpe*, 502 Mich 313, 326-327; 918 NW2d 504 (2018).

Given that the parties do not dispute that defendant could be a "person" and his vehicle an "object" under MCL 257.676b(1), we will assume without deciding that the statute applies to a person operating a vehicle

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[15] "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996).

on a roadway.[16] In light of that assumption, the focal issue is whether MCL 257.676b(1) requires evidence that the accused's conduct actually affected the normal flow of traffic or whether the mere possibility of it affecting traffic is sufficient.[17]

The prohibited conduct is to "block, obstruct, impede, or otherwise interfere with the normal flow of vehicular, streetcar, or pedestrian traffic upon a public street or highway . . . ." MCL 257.676b(1). The statute's clear terms thus require some evidence that the accused's conduct *actually affected* the usual smooth, uninterrupted movement or progress of the *normal flow* of traffic on the roadway, which requires an assessment of traffic at the time of the alleged offense. Interference with a police officer's ability to travel on a road could sustain a violation of MCL 257.676b(1) just as easily as interference with other vehicles traveling on a road. However, the statute is not violated if the normal flow of traffic was never impeded, blocked, or

[16] MCL 257.676b focuses on the conduct of a person in relationship to the "normal flow of vehicular, streetcar, or pedestrian traffic . . . ." MCL 257.676b(2) refers specifically to a person standing in a roadway and carves out exceptions for construction, maintenance, and utility work, as well as the solicitation of contributions for a charitable or civic organization under certain circumstances.

[17] The Court of Appeals has taken conflicting positions on this question in at least two unpublished opinions. Prior to the genesis of this case, the Court of Appeals had held without analysis that MCL 257.676b(1) does "not require a showing of an actual impediment to the smooth flow of traffic . . . ." *People v Salters*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2001 (Docket No. 215396), p 2. But after the Court of Appeals issued its opinion in this case, a different panel held that MCL 257.676b(1) was not violated when there was no evidence of any actual impediment of the flow of traffic. See *People v Estelle*, unpublished per curiam opinion of the Court of Appeals, issued September 16, 2021 (Docket No. 356656), p 3.

interfered with. In short, in order to interfere with the normal flow of traffic, some traffic must have actually been disrupted or blocked.

We reject the prosecution's argument that the potential interference with hypothetical or nonexistent traffic is sufficient. This argument ignores the phrase "normal flow of . . . traffic" as used in MCL 257.676b(1). Such an interpretation would also lead to the untenable situation in which every person crossing a street and every vehicle attempting to park along the side of a road would potentially be guilty of a civil infraction even if no other vehicles or pedestrians are present on the roadway.[18]

In this case, the prosecution has not introduced evidence sufficient to establish even reasonable suspicion to believe that defendant violated MCL 257.676b(1). Old State Road has been described as a rural stretch of unpaved road. While the record is silent as to typical traffic volume on Old State Road, it is undisputed that no vehicles other than Robinson's, defendant's, and a third unidentified driver's were on the road during the relevant time period. Robinson observed defendant's car and another car stopped side by side in the road from some distance away, but both cars began moving again when Robinson was still about 800 feet away. Robinson admitted that he did not have to slow his car down or go around either vehicle. Stated differently, the normal flow of vehicular traffic

[18] While "statutes must be construed to prevent absurd results, injustice, or prejudice to the public interest," *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999), we need not rely on this doctrine today because no reasonable reading of MCL 257.676b(1) supports the prosecution's argument. Moreover, MCL 257.672 appears to address the prosecution's concerns about people abandoning their vehicles in the middle of a road without fear of consequence or the effect on other drivers.

on the road was not impeded or disrupted. Under these facts, and in keeping with the district court's ruling, there is no evidence in the record to sustain the accusation that defendant violated MCL 257.676b(1).

C. ROBINSON'S MISTAKE OF LAW WAS NOT REASONABLE

In the absence of a warrant, constitutionally sufficient suspicion of a crime, or another recognized exception, the seizure of an individual is presumed unconstitutional. See *Gates*, 462 US at 236; *Hughes*, 506 Mich at 524-525. However, drawing on the notion that the "touchstone of the Fourth Amendment is 'reasonableness,' " the United States Supreme Court has held that "reasonable suspicion" or "probable cause" sufficient to seize an individual without a warrant can arise from a police officer's "reasonable mistake" of fact or law. *Heien*, 574 US at 60-61 (quotation marks and citation omitted). Stated differently, the Fourth Amendment is not violated if a police officer's suspicion that the defendant's conduct was illegal is based on a "reasonable mistake" about what the law required. *Id*. at 66.

A review of the facts and analysis in *Heien* provides insight into what kinds of mistakes of law are "reasonable." In *Heien*, a police officer saw the defendant driving down a highway with only one working brake light. *Id*. at 57. The officer pulled the defendant over, believing it was unlawful to have a single working brake light. *Id*. at 57-58. A subsequent search of the car revealed cocaine. *Id*. at 58.

Heien required the United States Supreme Court to decide whether the officer's belief that it was a traffic violation to have only one working brake light was a reasonable mistake of law. Under the state's vehicle code, a car needed to have "a stop lamp on the rear of

the vehicle" that could be "incorporated into a unit with one or more other rear lamps." *Id*. at 59 (quotation marks and citation omitted). In concluding that the mistake was reasonable, the Court noted the internal inconsistency in the vehicle code's language. *Id*. at 67. While the code stated that a driver must have "a stop lamp," suggesting that just one was enough, it later stated that the lamp "may be incorporated into a unit with one or more other rear lamps." *Id*. at 67-68. The word "other" suggested that a "stop lamp" is a kind of "rear lamp," and a different section of the vehicle code required "all originally equipped rear lamps" to be in "good working order." *Id*. (quotation marks and citation omitted). Put together, the code sections were unclear as to whether one faulty brake light alone would violate the law. Given the ambiguity in the code's language, which had also led to disagreement within the state courts, the Court concluded that the officer's mistaken belief was reasonable.

The Court's holding in *Heien* is not carte blanche authority to ignore or remain ignorant of the law, nor are reasonable mistakes easily established. "The Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable. We do not examine the subjective understanding of the particular officer involved." *Id*. *Heien* further held that this "inquiry *is not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity* for a constitutional or statutory violation. Thus, an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce." *Id*. at 67 (emphasis added).

We also find persuasive the guidance provided by Justice Kagan's concurring opinion in *Heien* about

what constitutes an objectively reasonable mistake. As she noted, reasonable mistakes of law should be "exceedingly rare." *Id*. at 70 (Kagan, J., concurring) (quotation marks and citation omitted). "If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not." *Id*. Stated differently, the misunderstanding of an unambiguous statute is not an objectively reasonable mistake of law.

Taken together, *Heien* tells us that objectively reasonable mistakes of law occur in exceedingly rare circumstances in which an officer must interpret an ambiguous statute. Other courts have reached the same conclusion. See, e.g., *United States v Stanbridge*, 813 F3d 1032, 1037 (CA 7, 2016) (holding that statutory ambiguity is a prerequisite to a determination that an officer's mistake of law was objectively reasonable); *United States v Alvarado-Zarza*, 782 F3d 246, 250 (CA 5, 2015) (holding that an officer's mistaken reading of an unambiguous statute was not objectively reasonable). Under our precedent, "[a] statute is ambiguous if two provisions irreconcilably conflict or if the text is equally susceptible to more than one meaning." *People v Hall*, 499 Mich 446, 454; 884 NW2d 561 (2016). While qualified immunity applies to officers so long as they have not violated a clearly established statutory right, the mistake-of-law doctrine announced in *Heien* is "not as forgiving." *Heien*, 574 US at 67.

We hold that to the extent Robinson's seizure of defendant was based on a belief that MCL 257.676b(1) was violated, his mistake of law was not objectively reasonable. Of critical importance is our prior conclusion that MCL 257.676b(1) is not ambiguous. One cannot be guilty of violating MCL 257.676b(1) without

evidence that the "normal flow" of actual traffic was disrupted, and Robinson admitted that no disruption occurred. Unlike the convoluted statute at issue in *Heien*, discerning the meaning of MCL 257.676b(1) does not require "hard interpretive work." *Heien*, 574 US at 70 (Kagan, J., concurring). See also *People v Maggit*, 319 Mich App 675, 690-691; 903 NW2d 868 (2017) (holding that a mistaken reading of an unambiguous ordinance was not a reasonable mistake of law); *United States v Stanbridge*, 813 F3d 1032, 1037 (CA 7, 2016) ("The statute isn't ambiguous, and *Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an *unambiguous* statute.").

We do not find the prosecution's or the Court of Appeals' reliance on the *Salters* decision to be persuasive. *Salters* was an unpublished decision; therefore, it is not a precedential statement of law. MCR 7.215(C)(1); *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 492 Mich 40, 51; 821 NW2d 1 (2012).[19] The more critical flaw with *Salters*, however, was the Court's decision to base its holding entirely on the perceived purpose of the statute instead of also engaging with the text of MCL 257.676b(1).[20] The Court of Appeals in this case committed the same error by failing to independently analyze MCL

[19] See *Davis v United States*, 564 US 229, 241; 131 S Ct 2419; 180 L Ed 2d 285 (2011) ("[W]hen *binding* appellate precedent specifically authorizes a particular police practice, well-trained officers will and should use that tool to fulfill their . . . responsibilities.") (emphasis altered).

[20] The entirety of the statutory analysis in *Salters* encompassed three conclusory sentences:

> The intent of the statute was clearly to prohibit a vehicle from impeding vehicular or pedestrian traffic in order to promote public safety. Consistent with this purpose, we conclude that the statute did not require a showing of an actual impediment to the

257.676b(1). Additionally, the 2001 *Salters* decision does not appear to have been cited or relied on for its conclusory interpretation of MCL 257.676b in any appellate decision in Michigan until the Court of Appeals' decision in this case. Moreover, in *People v Estelle*, unpublished per curiam opinion of the Court of Appeals, issued September 16, 2021 (Docket No. 356656), p 3, the Court of Appeals engaged with the text of MCL 257.676b(1) for the first time in 20 years and concluded, like we do today, that some evidence of actual interference with the normal flow of traffic is required. While *Estelle* was decided after the Court of Appeals issued its opinion in this case, the Court held that MCL 257.676b(1) was clear on its face as to requiring actual disruption or interference with the normal flow of traffic.

Simply put, a single unpublished decision coming out the other way does not transform an unambiguous statute into an ambiguous one. Nothing in the *Heien* majority opinion suggests that a single appellate decision incorrectly interpreting an unambiguous statute makes a mistaken understanding of such a statute automatically reasonable. This is not to say that favorable caselaw is irrelevant to whether a mistaken interpretation is reasonable. Nonprecedential, unpublished authority that has not been relied on in subsequent appellate decisions, like the *Salters* opinion, is simply less persuasive and less likely to be dispositive than published precedent. Objectively reasonable mis-

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smooth flow of traffic in order to establish a violation of the statute. The trial court did not err in finding that the stop was proper. [*Salters*, unpub op at 2.]

takes should be confined to the exceedingly rare instances of truly ambiguous statutes.[21]

The dissent's reliance on *Michigan v DeFillippo*, 443 US 31; 99 S Ct 2627; 61 L Ed 2d 343 (1979), is not persuasive. That case concerned the validity of an arrest made under an ordinance requiring individuals to identify themselves to a police officer upon request, and the statute was declared unconstitutional after the arrest. *Id*. at 33. The United States Supreme Court upheld the arrest as valid at the time because there was "no controlling precedent that [the] ordinance was or was not constitutional, and hence the *conduct observed violated a presumptively valid ordinance*," *id*. at 37 (emphasis added), although the "outcome might have been different had the ordinance been 'grossly and flagrantly unconstitutional,' " *Heien*, 574 US at 64, quoting *DeFillippo*, 443 US at 38. The presumption that an ordinance or statute is valid until declared otherwise is very different from determining what the text of a statute or ordinance allows or requires. *Heien* recognized this point by emphasizing that despite the subsequent ruling that the statute was unconstitutional, this ruling did "not change the fact that DeFillippo's conduct was lawful [sic] when the officers observed it." *Heien*, 574 US at 64. No one disputed whether the facts supported a violation of the ordinance, and because the ordinance was considered lawful at the time of the arrest, the officers had ample probable cause to arrest DeFillippo. *Id*. at 64-65.

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[21] While at least one federal court has held, in the qualified-immunity context, that "[f]avorable case law goes a long way to showing that an interpretation is reasonable," *Barrera v Mount Pleasant*, 12 F4th 617, 621 (CA 6, 2021), that principle is not controlling here. We do not find the principle articulated in *Barrera*, a decision about qualified immunity, to be applicable to the situation before this Court.

The same is not true in this case because the text of MCL 257.676b(1) is unambiguous and defendant's conduct, as observed by Robinson, did not violate the statute. This is contrary to *DeFillippo*, which involved conduct falling under an unambiguous ordinance that was later declared unconstitutional. Accordingly, Robinson's mistaken understanding of MCL 257.676b(1) was not a reasonable mistake of law under *Heien*, and we reverse the Court of Appeals' holding to the contrary.[22]

D. SUMMARY AND UNRESOLVED QUESTIONS

Given our conclusion that defendant was seized the moment Robinson blocked the driveway and prevented egress, defendant's incriminating statements and the officer's visual and olfactory observations that the Court of Appeals relied upon to justify further inquiry and an eventual arrest were obtained in violation of defendant's Fourth Amendment rights. Prior to Robinson blocking defendant in, defendant had not made any incriminating statements, and thus such statements could not have justified a seizure. A seizure could have been justified if Robinson had reasonable suspicion to believe that defendant had violated the law, but as the district court previously held, there was

[22] While *Heien* instructs us not to "examine the subjective understanding of the particular officer involved," *Heien*, 574 US at 66, it is noteworthy that Robinson did not mention impeding or interfering with traffic during his recorded interactions with defendant. This is contrary to the facts in *Heien*, in which the officer clearly informed the occupants that he stopped their vehicle because of a faulty rear brake light. *Id*. at 57-58. While we need not decide the issue today, we question whether an explanation for a warrantless stop or seizure of an individual that was never conveyed to the individual and was not raised until after prosecution of the individual commenced is entitled to deference as a reasonable mistake of law.

no evidence to support Robinson's hunch that an illegal drug transaction had taken place on the road, and that ruling was not appealed. A suspected violation of MCL 257.676b(1) also could not serve as reasonable suspicion given our previous conclusions. Accordingly, we have not been presented with any lawful justification for the seizure, and the district court did not err by holding that the seizure violated defendant's constitutional rights.

We reverse the Court of Appeals' holding that defendant's initial interactions with Robinson were consensual and that the earliest defendant was seized was when he admitted that he lacked a valid driver's license. Instead, we hold that defendant was seized when his egress was blocked by a marked police vehicle, and this seizure violated defendant's Fourth Amendment rights. However, the existence of a Fourth Amendment violation does not always mandate application of the exclusionary rule to evidence gathered as a result of the unlawful seizure. See *Gates*, 462 US at 223; *People v Hawkins*, 468 Mich 488, 499; 668 NW2d 602 (2003). The Court of Appeals did not determine whether exclusion of the evidence was the appropriate remedy because of its holding that no Fourth Amendment violation occurred. We leave the resolution of this question to the Court of Appeals on remand.

III. CONCLUSION

For the reasons previously discussed, we hold that defendant was seized at the moment his car was blocked in the driveway by a marked police vehicle, MCL 257.676b(1) is not violated unless the normal flow of traffic has actually been disrupted, and the officer's misunderstanding of the statute was not a reasonable mistake of law under *Heien*. We reverse the judgment

of the Court of Appeals and remand this case to that Court to determine whether application of the exclusionary rule was the appropriate remedy.

MCCORMACK, C.J., and BERNSTEIN, CLEMENT (as to Parts I, II(A), and II(B)), and CAVANAGH, JJ., concurred with WELCH, J.

CLEMENT, J. (*concurring in part and dissenting in part*). I join the majority opinion as to Parts I, II(A), and II(B) because I agree that the stop in question constituted a seizure under the Fourth Amendment and that this seizure was not justified by reasonable suspicion of criminal wrongdoing. However, I join the dissent as to its Part II because I believe that, pursuant to *Heien v North Carolina*, 574 US 54; 135 S Ct 530; 190 L Ed 2d 475 (2014), the evidence should not have been excluded given that the unconstitutional seizure was a result of a police officer's reasonable mistake of law.

ZAHRA, J. (*dissenting*). Deputy Robinson did not stop or in any way seize defendant when he pulled his patrol car into the driveway behind defendant's parked car. As expressed in *O'Malley v Flint*,[1] parking cars one after another is typically the way a driveway functions; there is nothing inherently coercive about a police officer parking behind another car in a driveway. Further, Deputy Robinson approached defendant in a courteous, nonthreatening fashion and engaged defendant in conversation. On these undisputed facts, no

[1] *O'Malley v Flint*, 652 F3d 662, 669 (CA 6, 2011).

seizure occurred as a matter of law until after defendant incriminated himself.[2]

Because there was no seizure, this case does not require interpretation of MCL 257.676b(1), the impeding-traffic statute. Nonetheless, a majority of this Court reaches the opposite conclusion. Accordingly, I further conclude that the Fourth Amendment was not violated because the actions of Deputy Robinson were the product of a reasonable mistake of law. Simply put, we should not hold a law enforcement officer to a higher standard of legal interpretation than judges. Because a prior panel of the Michigan Court of Appeals determined in 2001 that the impeding-traffic statute is violated when cars stop in a roadway—regardless of whether traffic is, in fact, impeded—and that determination has stood unchallenged for more than 20 years, it was reasonable for Deputy Robinson to interpret the statute in a like manner. For these independent reasons, I dissent. The evidence produced as a result of Deputy Robinson's encounter with defendant should not be suppressed.

I

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[3] A seizure of a person is "meaningful interference, however brief, with an individual's freedom of

[2] Defendant admitted to driving without a license and to drinking and smoking marijuana before driving; in addition, marijuana and an open container of alcohol were found in defendant's car.

[3] US Const, Am IV.

movement."[4] Put another way, a seizure occurs when "a police officer accosts an individual and restrains his freedom to walk away . . . ."[5] This can be accomplished either "by means of force or show of authority . . . ."[6] But "not all personal intercourse between [law enforcement] and citizens involves 'seizures' of persons."[7] "When an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized."[8]

The United States Court of Appeals for the Sixth Circuit found such an instance of voluntary cooperation in *O'Malley v Flint*.[9] *O'Malley* is instructive here given that the pertinent facts are virtually identical. In *O'Malley*, a police officer observed and followed a blue Chevrolet Tahoe that he suspected was being used to impersonate a police officer. The Tahoe was driven into a residential driveway and parked. After its driver, Sean O'Malley, exited the Tahoe and began walking toward the back of the house, the officer parked his police vehicle in the driveway behind the Tahoe. The

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[4] *United States v Jacobsen*, 466 US 109, 113 n 5; 104 S Ct 1652; 80 L Ed 2d 85 (1984).

[5] *Terry v Ohio*, 392 US 1, 16; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

[6] *Id*. at 19 n 16.

[7] *Id*.

[8] *People v Jenkins*, 472 Mich 26, 33; 691 NW2d 759 (2005). The majority opinion curiously states that "[w]hen exactly an interaction crosses the line and becomes a seizure" is a "difficult question." This is not a difficult question at all. If an officer, through the use of force or a show of authority, prevents a pedestrian from walking away, it is a seizure. If an officer talks to a pedestrian without the use of force or a show of authority, it is not a seizure.

[9] *O'Malley*, 652 F3d at 665.

officer approached O'Malley and said that he would like to speak with him. O'Malley stopped and answered the officer's questions.

Given these facts, the court held that no seizure occurred because "a reasonable person would feel free to continue walking even after [the officer's] vehicle was parked behind the unoccupied Tahoe."[10] The panel explained that O'Malley not only reasonably thought that he was free to leave his vehicle at the time of the alleged seizure but, in fact, had left it and was walking away from it. "[P]arking behind a vehicle in a driveway does not inherently send a message of seizure because it is how driveways are routinely used."[11] The court found the following facts probative: (1) the officer "was not accompanied by the threatening presence of several officers"; (2) the officer "neither displayed a weapon, nor touched O'Malley"; and (3) the officer "did not use language or a tone of voice compelling compliance. Rather, he merely stated that he was a police officer . . . and said he wanted to talk to O'Malley about the Tahoe."[12] The court explained that the mere fact that O'Malley stopped walking to respond to the officer's questions did not transform the encounter into a seizure, and it held that in view of the totality of the

[10] *Id*. at 669.

[11] *Id*.

[12] *Id*. (cleaned up). See also *United States v Matthews*, 278 F3d 560, 561-562 (CA 6, 2002) (holding that a person walking down the street was not detained when an officer driving in a marked police car yelled, "Hey, buddy, come here," because the statement was a request rather than an order) (quotation marks omitted); *United States v Caicedo*, 85 F3d 1184, 1191 (CA 6, 1996) (holding that no seizure occurred when, as the car in question moved slowly through a bus terminal's parking lot, the officer "asked for permission to speak to either [the driver] or his passenger as [the driver] drove toward the exit, and . . . [the driver] voluntarily stopped the car").

circumstances, "O'Malley was not 'seized' for purposes of the Fourth Amendment at the time of the initial encounter and questioning."[13]

Similarly, defendant in this case was not seized at the time of the initial encounter and questioning. Deputy Robinson observed and followed defendant from his police car. After defendant pulled into a driveway, Deputy Robinson pulled into the driveway behind him like any private citizen who wished to speak with him would do. By the time Deputy Robinson pulled into the driveway and exited his vehicle, defendant was out of his parked vehicle and appeared to be approaching the adjacent house. Deputy Robinson asked defendant if he lived there, and defendant stated that a friend lived there. Defendant then approached Deputy Robinson and began voluntarily answering questions. During the conversation, defendant admitted that he did not have a driver's license, admitted that he had been drinking and smoking marijuana earlier, and performed poorly on a field-sobriety test, all of which gave Deputy Robinson sufficient cause to place defendant under arrest.

These undisputed facts simply do not form a basis on which to conclude that Deputy Robinson seized defendant. An objectively reasonable person would not feel obligated to talk to Deputy Robinson simply because he was a law enforcement officer who parked his police car in the driveway behind that person's car. A critical component of a seizure is police coercion. Coercion is established by an affirmative use of force or show of authority that sends a message to someone that they are not free to go about their business. No coercive use of force or show of authority was present in this case.

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[13] *O'Malley*, 652 F3d at 669.

We are materially aided in this case by video evidence obtained from Deputy Robinson's body camera. As in *O'Malley*, the encounter here involved a lone officer; Deputy Robinson "was not accompanied by the threatening presence of several officers."[14] Deputy Robinson "neither displayed a weapon, nor touched [defendant]."[15] Further, Deputy Robinson "did not use language or a tone of voice compelling compliance."[16] Much like the officer in *O'Malley*, Deputy Robinson merely approached defendant and asked questions about what defendant was doing. Defendant could have declined to answer the questions and then continued to his friend's home. "The fact that [defendant] stopped walking to respond to [Deputy Robinson's] inquiry also does not, by itself, transform this encounter into a seizure for purposes of the Fourth Amendment."[17] Curiosity and the basic human instinct to engage with people who approach you in a nonthreatening manner are simply not enough to turn noncoer-

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[14] *Id*. (quotation marks and citation omitted).

[15] *Id*.

[16] *Id*. Deputy Robinson also did not touch defendant or display a weapon. See *United States v Mendenhall*, 446 US 544, 554; 100 S Ct 1870; 64 L Ed 2d 497 (1980) (opinion of Stewart, J.) ("Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."). The majority opinion cites Justice Stewart's list of circumstances indicating a seizure, but none of those circumstances is present here.

[17] *O'Malley*, 652 F3d at 669. See also *Immigration & Naturalization Serv v Delgado*, 466 US 210, 216; 104 S Ct 1758; 80 L Ed 2d 247 (1984) ("While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.").

cive police activity into a seizure. The majority opinion in essence concludes that Deputy Robinson's activity was coercive and amounted to an unconstitutional seizure merely because he was a uniformed deputy sheriff functioning out of a marked sheriff's vehicle. Caselaw is clear, however, that the Fourth Amendment is not violated under these circumstances. No action by Deputy Robinson amounted to a use of force or show of authority that would cause defendant to conclude that he was not free to decline to engage with Deputy Robinson and simply walk away.

The majority opinion acknowledges *O'Malley*, but it fails to articulate a genuine difference between the facts at issue in that case and the facts in the present case. It merely observes two mundane factual differences, neither of which is of consequence under Fourth Amendment seizure analysis. First, the majority opinion emphasizes that the police car in *O'Malley* was unmarked, whereas the police car here was marked. But the officer in *O'Malley* identified himself as a police officer before asking the driver questions;[18] O'Malley was under no illusion that he was talking to a private citizen. Moreover, the majority opinion offers no reason why an interaction between a law enforcement officer operating out of an unmarked police vehicle is less coercive than an interaction with a law enforcement officer operating out of a marked police vehicle. Caselaw is clear that the simple indication that one is a police officer is not a "show of authority" sufficient to initiate a seizure. Indeed, it is common sense that people are free to go about their business when they encounter police vehicles without their lights on. Regardless, given that the officer in *O'Malley* immediately identified himself, the difference between the

[18] *O'Malley*, 652 F3d at 665.

markings on the police vehicles in each case is no more probative than the difference between defendant driving a red Chevrolet Cobalt and O'Malley driving a blue Chevrolet Tahoe.

The other purported factual difference emphasized in the majority opinion is that when Deputy Robinson exited his vehicle, "defendant was by the side of his vehicle and facing the patrol car, as if either defendant had just exited and was waiting for the police officer who had followed him into the driveway or defendant was already walking toward the police officer who had just blocked his car into the driveway." The majority contrasts this with *O'Malley* because Deputy Robinson "did not wait until after the civilian vehicle had parked and its occupant had already begun walking around the home before pulling into the driveway and blocking the path of egress." As a preliminary note, this is a dubious summary of the facts of this case.[19] But even if defendant were standing idle outside his car, it is a distinction without a difference. The fact remains that defendant was outside his parked car and could have chosen to walk into his friend's home instead of talking to the officer. A reasonable person would feel free to walk to the house even after the officer's vehicle was parked in the driveway behind their unoccupied car.[20] Further, as was the case in *O'Malley*, not only would a reasonable person conclude that they were free to leave their vehicle at the time of the alleged seizure, but

[19] Defendant is not visible on the available body-camera footage until Deputy Robinson has stepped out of his vehicle and has taken a couple strides toward defendant. At that point, defendant appears to be around the front bumper of his car and is in midstride as he walks toward Deputy Robinson. This suggests that defendant had been between the house and the car moments before he appears in the video, not standing around waiting for the officer, as the majority suggests.

[20] See *O'Malley*, 652 F3d at 669.

defendant, in fact, had left it and appeared to be walking away. Finally, the majority suggests that a reasonable person would not walk toward the house because defendant was not the homeowner, but defendant stated that he had stopped at this house to visit a friend.[21] It makes no difference that defendant himself was not the homeowner.

The majority opinion's characterization of parking in a residential driveway—something any social guest would do—as "a show of force" is risible. Defendant was not in his vehicle when the officer arrived, and defendant indicated that he was visiting his friend, not planning to leave. Only one officer was present, and he did not physically touch defendant. The officer did not turn on his emergency lights or siren, he did not draw his gun, and he did not give any orders or commands. The officer's tone was conversational and not harassing or overbearing. Under these circumstances, there is no seizure. The majority opinion's contrary holding will make it nearly impossible for an officer to seek cooperation from a citizen unless the officer can articulate reasonable suspicion of a crime.

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[21] The majority opinion also attempts to inject doubt into a record that is otherwise clear when it muses about "whether defendant was planning to visit with his friend before Robinson began following defendant or if defendant was planning to keep driving" and when it states that the record is not clear "whether defendant had an independent desire to keep moving" after he got out of his vehicle. But the record supports only one conclusion: defendant was there to visit his friend. There is nothing in the record that suggests defendant wanted to leave but could not do so because his car was blocked. If he wanted to leave, he could have said so; if, at that point, the officer prevented defendant from leaving, it would be a seizure, but those are not the facts of this case.

II

Assuming for the sake of argument that there was a seizure, the next question would be whether there was " 'a particularized and objective basis for suspecting the particular person stopped' of breaking the law."[22] In numerous cases, the United States Supreme Court has made clear that "[t]he reasonable suspicion inquiry falls considerably short of 51% accuracy, for, as [it] has explained, to be reasonable is not to be perfect."[23] As the majority recognizes, reasonable suspicion sufficient to justify a vehicle stop under the Fourth Amendment may exist even when it "rest[s] on a mistaken understanding of the scope of a legal prohibition" so long as that mistaken understanding is objectively reasonable.[24] Thus, any seizure of defendant by Deputy Robinson may have been constitutionally permissible even if defendant did not violate the impeding-traffic statute.

In explaining the "reasonable mistake of law" standard in *Heien*, the United States Supreme Court discussed another case that arose out of this state, *Michigan v DeFillippo*.[25] There, Detroit police officers arrested the defendant under an ordinance that made it illegal for a person suspected of criminal activity "to refuse to identify himself and produce evidence of his identity."[26] Our Court of Appeals determined that the

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[22] See *Heien v North Carolina*, 574 US 54, 60; 135 S Ct 530; 190 L Ed 2d 475 (2014) (citation omitted).

[23] *Kansas v Glover*, 589 US ___, ___; 140 S Ct 1183, 1188; 206 L Ed 2d 412 (2020) (quotation marks, citations, and brackets omitted).

[24] *Heien*, 574 US at 60.

[25] *Michigan v DeFillippo*, 443 US 31; 99 S Ct 2627; 61 L Ed 2d 343 (1979).

[26] *Id*. at 33.

ordinance was unconstitutional and that the arrest was therefore invalid.[27] Accordingly, it ordered the suppression of drug evidence that had been discovered incident to the arrest. The United States Supreme Court accepted the unconstitutionality of the ordinance but reversed the suppression of the drug evidence, holding that the arrest was valid and that the evidence should not have been suppressed.[28] The Court explained that "there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance."[29] *Heien* then explained that *DeFillippo* is an example of a valid seizure under the Fourth Amendment based on a reasonable mistake of law. "That a court only *later* declared the ordinance unconstitutional does not change the fact that DeFillippo's conduct was lawful when the officers observed it. But the officers' assumption that the law was valid was reasonable, and their observations gave them 'abundant probable cause' to arrest DeFillippo."[30]

Although this case presents slightly different circumstances, *Heien*'s discussion of *DeFillippo* is instructive. Deputy Robinson observed two cars stopped next to each other in the middle of Old State Road. Deputy Robinson believed this to be a violation of MCL 257.676b(1), which states, in relevant part, that "a person, without authority, shall not block, obstruct, impede, or otherwise interfere with the normal flow of vehicular . . . or pedestrian traffic upon a public street or highway . . . ." The majority concludes that defen-

[27] *Id*. at 34.

[28] *Id*. at 40.

[29] *Id*. at 37.

[30] *Heien*, 574 US at 64 (citations omitted).

dant did not violate this statute because he did not actually interfere with the movement of any other vehicles or pedestrians. But the officer did not have the benefit of this Court's guidance at the time of the alleged offense. In fact, the only opinion at the time of these events that had interpreted the impeding-traffic statute reached the exact opposite conclusion.[31] In the unpublished *Salters* opinion, a unanimous Court of Appeals panel held that MCL 257.676b(1) "did not require a showing of an actual impediment to the smooth flow of traffic in order to establish a violation of the statute."[32] Thus, the circumstances here are similar to *DeFillippo*; in both cases, there was a law that appeared to be grounds for a valid seizure until those grounds were deemed inapplicable by a subsequent judicial ruling. Here, a statute appeared to apply to defendant's conduct based on the only available judicial guidance until this Court repudiated the decision. In *DeFillippo*, an ordinance appeared to apply to the defendant's conduct until the Court of Appeals determined that it was unconstitutional. In both cases, the defendant's conduct was lawful, but the officer's assumption that the defendant's conduct was unlawful was reasonable. Thus, any seizure that occurred in this case was the result of a reasonable mistake of law.

The majority concludes that Justice Kagan's concurring opinion in *Heien* provides persuasive guidance about what constitutes an objectively reasonable mistake.[33] But conspicuously absent from the majority's discussion of Justice Kagan's concurrence is her in-

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[31] *People v Salters*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2001 (Docket No. 215396).

[32] *Id*. at 2.

[33] It goes without saying that while Justice Kagan's opinion is interesting, a concurring opinion is not binding precedent. As explained

struction that "the test [for whether police action is a reasonable mistake of law] is satisfied when the law at issue is so doubtful in construction that a reasonable judge could agree with the officer's view."[34] In this case, not only *could* a reasonable judge agree with the officer's view, but three seasoned judges of the Court of Appeals, all of whom served as trial judges prior to their service as appellate judges, unanimously agreed with the officer's view.[35] Judges TALBOT, O'CONNELL, and COOPER[36] all concluded that MCL 257.676b(1) did not require a showing of an actual impediment to the smooth flow of traffic.[37] Although the decision is unpublished and not binding precedent, it is objective proof that three reasonable judges could—and, in fact, did—agree with Deputy Robinson's understanding of the statute at issue. It is also worth noting that this Court denied the defendant's application for leave to appeal in *Salters*.[38] The Court of Appeals' interpretation set out in *Salters* remained unchallenged in Michigan's court system until the present case, more than 20 years after *Salters* was decided.[39]

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earlier, the facts of the instant case support a finding of a reasonable mistake of law pursuant to the majority opinion in *Heien*.

[34] *Heien*, 574 US at 70 (Kagan, J., concurring) (quotation marks and citation omitted).

[35] See *People v Salters*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2001 (Docket No. 215396).

[36] Indeed, at the time *Salters* was decided, these three judges of the Court of Appeals possessed a combined 74 years of judicial experience.

[37] *Salters*, unpub op at 2.

[38] *People v Salters*, 465 Mich 920 (2001).

[39] The majority opinion misses the point in its discussion of *Salters* being unpublished and not relied on by another appellate decision in Michigan prior to this case. So what? This only suggests that no litigant who was issued a citation under MCL 257.676b(1) thought *Salters* was wrong. The fact that a recent panel of the Court of Appeals disagreed

The majority's implicit holding that *Salters* was so erroneous that no reasonable judge could reach its conclusion sets far too high a bar for the reasonable-mistake-of-law test. The *Heien* majority explained that "[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them fair leeway for enforcing the law in the community's protection."[40] A proper reasonableness analysis under the Fourth Amendment "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are [often] tense, uncertain, and rapidly evolving[.]"[41] In finding that this mistake was unreasonable, the majority holds police officers to an impossibly high standard: a standard of perfection. Under the majority's ruling, to be reasonable, police officers must be so adept and assured in their own statutory interpretation that they would reject longstanding conclusions by Court of Appeals judges if they anticipate that this Court will

with *Salters* only further undermines the majority's position. We now have two unpublished Court of Appeals opinions that have interpreted the same statute differently. This is prima facie proof that reasonable judicial minds can—and, in fact, did—differ over the interpretation of the impeding-traffic statute. See *Heien*, 574 US at 68 (holding that it was objectively reasonable for the officer to think that the defendant's faulty right brake light violated North Carolina law because there was a disagreement within the state courts on that very issue). Because Deputy Robinson's interpretation was consistent with that of the only panel of the Court of Appeals to have addressed the question at the time of defendant's arrest, *Heien* dictates that Deputy Robinson's error was a reasonable mistake of law.

[40] *Heien*, 574 US at 60-61 (quotation marks and citation omitted).

[41] *Graham v Connor*, 490 US 386, 396-397; 109 S Ct 1865; 104 L Ed 2d 443 (1989) (considering whether an officer's use of force was "reasonable" under the Fourth Amendment). Thus, "[c]ommon sense and everyday life experiences predominate over uncompromising standards." *People v Nelson*, 443 Mich 626, 635-636; 505 NW2d 266 (1993).

one day disagree. This ruling flies in the face of *Heien* and requires perfection—if not omniscience—instead of reasonableness. While the standard of perfection is ideal, it is neither required by our Constitution nor realistic. Deputy Robinson's conduct in this case was not only reasonable, it was exemplary, good police work. He should not be criticized for his conduct; instead, he should be congratulated.

III

Deputy Robinson did not seize defendant when he pulled his patrol vehicle into the driveway, and even if he had seized defendant, the seizure would be valid under the Fourth Amendment because Deputy Robinson made a reasonable mistake of law. For these reasons, I dissent.

VIVIANO, J., concurred with ZAHRA, J.

BAUSERMAN v UNEMPLOYMENT INSURANCE AGENCY

Docket No. 160813. Argued on application for leave to appeal on October 6, 2021. Decided July 26, 2022.

Grant Bauserman, Karl Williams, and Teddy Broe, on behalf of themselves and all others similarly situated, brought a putative class action in the Court of Claims against the Unemployment Insurance Agency, alleging that defendant had violated their due-process rights in violation of Const 1963, art 1, § 17 and that defendant had also engaged in unlawful collection practices. Plaintiffs, who were all recipients of unemployment compensation benefits, specifically alleged that defendant had used an automated fraud-detection system—the Michigan Integrated Data Automated System (MiDAS)—to determine that plaintiffs had received unemployment benefits for which they were not eligible and then garnished plaintiffs' wages and tax refunds to recover the amount of the alleged overpayments, interest, and penalties that defendant had assessed without providing meaningful notice or an opportunity to be heard. Defendant moved for summary disposition on multiple grounds, including that the claims were not timely filed and that plaintiffs could not pursue a constitutional-tort claim against defendant because plaintiffs had alternative remedies they could pursue under the Michigan Employment Security Act (MESA), MCL 421.1 *et seq*. The Court of Claims, CYNTHIA D. STEPHENS, J., denied defendant's motion, reasoning, in part, that plaintiff's constitutional claims were viable because the administrative remedies were inadequate. Defendant appealed. In an unpublished per curiam opinion issued July 18, 2017 (Docket No. 333181), the Court of Appeals, GADOLA, P.J., and METER and FORT HOOD, JJ., reversed, concluding that plaintiffs' claims were not timely filed. Plaintiffs sought leave to appeal in the Supreme Court, which ordered and heard oral argument on the application. 501 Mich 1047 (2018). In lieu of granting leave to appeal, the Supreme Court held that the actionable harm in a predeprivation due-process claim occurs when a plaintiff has been deprived of property and that such a claim accrues when a plaintiff has first incurred the deprivation. As a result, Bauserman and Broe had timely filed their claims within six months following the deprivation of their property, but

Williams had not. The Supreme Court thus affirmed in part and reversed in part the Court of Appeals judgment and remanded the case to the Court of Appeals for consideration of defendant's argument that plaintiffs failed to raise cognizable constitutional-tort claims. 503 Mich 169 (2019). On remand, in a published opinion issued December 5, 2019, the Court of Appeals, METER and FORT HOOD, JJ. (GADOLA, P.J., concurring), concluded that the alleged violations arose from actions taken by state actors pursuant to a governmental policy and that they could be characterized as an established practice of state government officials such that they amounted to a custom supported by the force of law. 330 Mich App 545 (2019). In concluding that damages were available as a remedy for the due-process deprivation plaintiffs alleged, the Court of Appeals applied the multifactor balancing test set forth by Justice BOYLE in her opinion in *Smith v Dep't of Pub Health*, 428 Mich 540 (1987) (BOYLE, J., concurring in part and dissenting in part). Defendant sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant defendant's application for leave to appeal or take other action. 506 Mich 965 (2020).

In an opinion by Justice CAVANAGH, joined by Chief Justice MCCORMACK and Justices BERNSTEIN, and WELCH, the Supreme Court, in lieu of granting leave to appeal, *held*:

A constitutional-tort action for monetary damages against the state exists except in two specific circumstances: (1) when the Constitution has delegated to another branch of government the obligation to enforce the constitutional right at issue or (2) when another branch of government has provided a remedy that the Supreme Court considers adequate. An alternative remedy is adequate when it is at least as protective of a particular constitutional right as a judicially recognized cause of action would be. Justice BOYLE's differing multifactor approach for determining whether a constitutional-tort action could be brought against the state was rejected as was her assertion that the state could not be held vicariously liable. People who have been deprived of a constitutional right may seek redress through the courts, regardless of whether the harm was inflicted pursuant to state custom or policy; in other words, the state can be responsible under a theory of respondeat superior for the actions of its agents whether or not the agents were acting under a state custom or policy at the time of the alleged tort. In this case, neither of the exceptions to the existence of liability for a constitutional tort applied to plaintiffs' claims that defendant violated their due-process rights. Plaintiffs alleged a cognizable constitutional-tort claim for which

they could recover money damages. The Court of Claims correctly denied defendant's motion for summary disposition.

1. Although the Court of Appeals has frequently applied the multifactor test set forth in Justice BOYLE's partial concurrence in *Smith*, the Michigan Supreme Court has not previously found consensus on whether violations of the state's Constitution are compensable through actions seeking monetary damages. However, in *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 US 388 (1971), which recognized for the first time a cause of action against federal agents for a violation of federal constitutional rights, the United States Supreme Court made clear that constitutional violations have historically been redressed with monetary damages; other state courts have similarly concluded that they bear the duty of vindicating rights guaranteed in their constitutions. The continued vitality of *Bivens* and how federal constitutional torts differ from state constitutional torts was not relevant to the holding of the Court in this case; the holding did not rely on *Bivens* but on the authorities discussed in that case. Plaintiffs' cause of action was grounded in state constitutional rights and the Michigan Supreme Court's authority and duty to say what the law is.

2. Relevant here, Article 1 of Michigan's Constitution, the Declaration of Rights, is the bedrock upon which everything else in the Constitution was built because it guarantees civil and political integrity and the freedom and independence of the state's citizens. Any right given in the Constitution must have a remedy or it is not a right at all but, instead, a voluntary obligation. The Constitution does not have to explicitly provide for a remedy for a constitutional violation in order for the Court to enforce its guarantees, regardless of whether the appropriate remedy is in the form of an injunction or money damages; indeed, only a handful of the 27 sections of the Declaration of Rights mention remedies at all.

3. While the Constitution vests the legislative power of the state in the Senate and House of Representatives, granting them the right to make laws and to alter or repeal them, it exclusively vests the judicial power of the state in the Court, which retains all judicial power not ceded to the federal government. The Separation of Powers Clause of Michigan's Constitution requires courts to recognize and redress constitutional violations; in that regard, the Michigan Supreme Court has primary responsibility for interpreting and enforcing the Constitution absent an explicit constitutional provision limiting its authority to redress constitutional violations. Stated differently, vindication of constitu-

tional rights is not dependent on legislative action unless the Constitution specifically delegates that power to the Legislature. The scope of the Legislature's authority to regulate tort liability created by statute has no bearing on whether the Legislature has authority to restrict rights codified in the Constitution, let alone whether those rights remain undeveloped without legislative enactment. Further, legislative silence on the issue of remedies for a due-process violation under Const 1963, art 1, § 17 does not signal the ratifiers' intent to preclude any mechanism of enforcement. However, while the Legislature may not trump the Constitution, it may enact a remedial scheme to provide a way in which to vindicate a constitutional right equal to that which the Court could afford. Thus, if the Legislature already provides an adequate mechanism to remedy a constitutional tort—i.e., one that is at least as protective of a particular constitutional right as a judicially recognized cause of action would be—the Court is not required to duplicate the effort. Absent those considerations, the Court retains authority to vindicate the rights guaranteed by the state's Constitution, including by recognizing actions seeking money damages. Accordingly, money damages are an available remedy for constitutional torts unless (1) enforcement of the constitutional right was delegated to another branch of government by the Constitution or (2) the Court considers adequate the remedy provided by another branch of government. By adopting this test, the Court rejected Justice BOYLE's multifactor approach in *Smith*. The Court's inherent judicial authority requires the Court to afford a remedy for *all* constitutional violations, not just those it deems wise or justified. Further, unlike Justice BOYLE's test, the standard of liability in a constitutional-damages claim is not limited to a direct standard of liability; people who have been deprived of a constitutional right may seek redress through the courts, regardless of whether their harm was inflicted pursuant to state custom or policy.

4. The Due Process Clause of Michigan's Constitution, which is part of the Declaration of Rights, provides that no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. The right of all individuals, firms, corporations, and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed. The language of the Due Process Clause does not confer authority on another branch of government to provide a remedy for a violation of that right; thus, courts may infer a damages remedy under that provision if another branch of government has not provided an adequate remedy.

5. In this case, plaintiffs asserted that defendant's use of MiDAS deprived them of their property without adequate process and an opportunity to be heard. The Due Process Clause did not confer authority on another branch of government to provide a remedy for violation of that right. MESA did not provide a remedy for plaintiffs because they did not challenge the administration of the act or seek a super appeal from a benefits determination. Instead, plaintiffs brought a tort claim challenging defendant's use of MiDAS to deprive plaintiffs of property without due process of law, and no other adequate remedy existed to vindicate the alleged violation of plaintiffs' rights. Under the facts alleged, plaintiffs' allegations, if proven, were sufficient to sustain a constitutional-tort claim under Michigan's Due Process Clause for which they could recover monetary damages. The Court of Claims correctly denied defendant's motion for summary disposition.

Affirmed; case remanded to the Court of Claims for further proceedings.

Justice WELCH, concurring, agreed with the majority that a party has the ability to sue the state for monetary damages on the basis of an alleged constitutional violation and that the remedy will be implied when the only way to adequately remedy the violation is to allow for monetary damages. She also agreed with the majority's framework for recognizing a constitutional tort for monetary damages and with the holding that plaintiffs pleaded a valid constitutional tort for monetary damages in this case. She wrote separately because she would have gone further than the majority and expressly limited monetary damages for constitutional torts to claims arising from a violation of a right enumerated in Michigan's Declaration of Rights, Const 1963, art 1. The liberties set forth in the Declaration are fundamental and inalienable while the balance of the Constitution focuses on alienable rights and liberties that the people have entrusted to the state to allow for a democratic government to operate. Typically, a violation of those alienable rights would be poorly suited to vindication through a monetary-damages award against the state. For those reasons, Justice WELCH limited her concurrence with Part III of the majority opinion to the extent it could be interpreted as applying beyond a claim under the Declaration of Rights and she did not join footnote 13 of that opinion to the extent it declined to adopt such a limitation. The majority's "adequate-alternative-remedy requirement" substantially limits the state's liability for constitutional-tort claims because those claims are rare given that adequate alternative remedies to an implied monetary-

damages remedy exist in most cases. An adequate remedy need not make a plaintiff whole in every circumstance; and the Legislature may manage potential exposure by providing rights and remedies in legislation that are substantial enough to adequately secure and give meaning to the constitutional right. Unless monetary damages are necessary to secure and vindicate a violation of a constitutional right, a policy decision of the Legislature or the executive branch regarding how to remedy a violation of legal rights under a statutory scheme should not be second-guessed. The threshold question for judges is whether a remedy is adequate, not whether it is ideal or equally comprehensive. To that end, the question is not just whether monetary damages or other remedies are available by some other means, such as through a state or federal statute or through a cause of action under the common law; the question is also whether the existing remedy—injunctive relief, declaratory relief, more process, a refund, or whatever it is—will be adequate such that the constitutional right is preserved and not rendered ineffectual.

Justice VIVIANO, joined by Justice ZAHRA, dissenting, disagreed with the majority's conclusion that a party has the ability to sue the state for monetary damages on the basis of an alleged constitutional violation. Any reliance on *Bivens* to support the Court's holding was misplaced because the United States Supreme Court has only recognized a *Bivens*-style damages claim on two other occasions and those decisions pose separation-of-powers concerns because the Constitution grants to the Legislature the power to create causes of action, not the judiciary. Under Justice BOYLE's test in *Smith*, courts considered multiple factors when determining whether to infer a damages remedy for violations of the Constitution caused by a custom or policy. The separation-of-powers criticisms of *Bivens* apply equally to *Smith*. Courts violate the separation of powers when they create causes of action for money damages for constitutional violations; only the Legislature has authority to fashion remedies for constitutional wrongs, not the judiciary. The majority's recognition of monetary damages for a constitutional violation by the states obliterates the protections afforded by the separation of powers. To the extent the majority grounded its decision on the Court's common-law powers, the decision massively expanded constitutional-tort liability. The majority's test provides no guidance in that the Legislature's remedy for a constitutional violation will only be adequate if it is that which the Supreme Court would have come up with itself. In addition, the scope of the holding was uncertain because, while the opinion focuses on a provision in the Declaration of Rights, three justices left open the possibility that implied

causes of action for damages could be found outside the Declaration. Nothing in the text or history of Michigan's Constitution supports finding a general cause of action for damages based on constitutional violations; relevant here, the text of the Due Process Clause does not support a damages remedy. By allowing such claims, *Smith* was wrongly decided and the majority here compounded the error by broadening *Smith*. There is a distinction between a court invalidating unconstitutional governmental action by enjoining those violations and a court adopting judicially created doctrines that, in effect, usurp legislative authority by creating de facto statutory enactments to implement a constitutional provision. Thus, recognizing that a person may invoke a court's equitable powers to enjoin constitutional violations is not inconsistent with rejecting the inferring of causes of action for damages from the constitutional text. The majority's textual analysis amounts to the proposition that the very nature of a right implies a remedy, but the United States Supreme Court and this Court have recognized that not all areas of law provide for damages remedies for the violation of rights. The majority's suggestion that there is a historical practice of inferring damages remedies is also not on point because the cases relied on were ordinary tort actions in which the constitutional arguments were incidental to the cause of action and entitlement to damages. Justice VIVIANO would have held that the majority's expansion of *Smith* was wrong and that *Smith* should be overruled, putting an end to the Court's usurpation of the Legislature's authority to create causes of action for damages for constitutional violations. Nonetheless, he noted that had the majority simply applied Justice BOYLE's test, which three justices in the current majority recently noted was "persuasive," a damages remedy could not properly have been inferred given the facts in this case.

Justice CLEMENT, dissenting, disagreed with the majority's reconsideration and replacement of the test set forth in Justice BOYLE's partial concurrence in *Smith* because that action was not requested by plaintiffs. For the reasons stated in Part IV of Justice VIVIANO's dissent, Justice CLEMENT would have applied the *Smith* test to conclude that a damages remedy should not be inferred in this case.

CONSTITUTIONAL LAW — VIOLATIONS OF THE RIGHT TO DUE PROCESS — REMEDIES — CONSTITUTIONAL TORTS — AVAILABILITY OF MONETARY DAMAGES.

A claim for damages against the state arising from a violation of the Michigan Constitution may be recognized except in two specific circumstances: (1) when the Constitution has delegated to another branch of government the obligation to enforce the consti-

tutional right at issue or (2) when another branch of government has provided a remedy that the Supreme Court considers adequate; an alternative remedy is adequate when it is at least as protective of a particular constitutional right as a judicially recognized cause of action would be; the state can be responsible under a theory of respondeat superior for the actions of its agents whether or not the agents were acting under a state custom or policy at the time of the alleged tort; the language of Michigan's Due Process Clause does not confer authority on another branch of government to provide a remedy for a violation of that right, and courts may infer a money-damages remedy for a constitutional tort under that provision if another branch of government has not provided a remedy considered adequate by the Supreme Court (Const 1963, art 1, § 17).

Mark Granzotto, PC (by *Mark Granzotto*) and *Pitt, McGehee, Palmer & Rivers, PC* (by *Jennifer L. Lord*, *Michael L. Pitt*, and *Kevin M. Carlson*) for plaintiffs.

B. Eric Restuccia, Deputy Solicitor General, and *Jason Hawkins* and *Debbie K. Taylor*, Assistant Attorneys General, for defendant.

Amicus Curiae:

University of Michigan Workers' Rights Clinic (by *Rachael Kohl*) and *Gilda Z. Jacobs* for Michigan League for Public Policy.

Kelly Bidelman, *Greg Abler*, and *Linda Jordan* for Center for Civil Justice, Arc Michigan, Detroit Eviction Defense, Michigan Legal Services, and United Community Housing Coalition.

American Civil Liberties Union Fund of Michigan (by *Philip Mayor* and *Daniel S. Korobkin*) and National Lawyers Guild, Michigan-Detroit Chapter (by *Julie H. Hurwitz*) for The American Civil Liberties Union of Michigan and the National Lawyers Guild, Michigan-Detroit Chapter.

Law Offices of Robert June, PC (by *Robert B. June*) for the Michigan Association for Justice.

CAVANAGH, J. In this case, we are presented with the question of whether plaintiffs have alleged a cognizable state constitutional-tort claim allowing them to recover a judicially inferred damages remedy. Plaintiffs allege that defendant, Michigan's Unemployment Insurance Agency (the Agency), adjudicated allegations of fraud, seized plaintiffs' tax returns, and imposed penalties on plaintiffs without providing meaningful notice or an opportunity to be heard in violation of Michigan's constitutional right to due process, Const 1963, art 1, § 17. Among other remedies for this constitutional violation, plaintiffs seek monetary damages. Although we have never specifically held that monetary damages are available to remedy constitutional torts, we now hold that they are. Inherent in the judiciary's power is the ability to recognize remedies, including monetary damages, to compensate those aggrieved by the state, whether pursuant to an official policy or not, for violating the Michigan Constitution unless the Constitution has specifically delegated enforcement of the constitutional right at issue to the Legislature or the Legislature has enacted an adequate remedy for the constitutional violation. Because enforcement of Const 1963, art 1, § 17 has not been delegated to the Legislature and because no other adequate remedy exists to redress the alleged violations of plaintiffs' rights, we agree that plaintiffs have alleged a cognizable constitutional-tort claim for which they may recover money damages and we agree with the lower courts that defendant was properly denied summary disposition.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs Grant Bauserman and Teddy Broe are former recipients of unemployment compensation benefits who allege that the Agency unlawfully seized their property through use of the Michigan Data Automated System (MiDAS) without affording them due process of law. Their complaint alleges that MiDAS initiates an automated process that can result in recipients being disqualified from benefits and subjected to penalties and criminal prosecution, all without notice or an opportunity to be heard.

Grant Bauserman separated from employment with Eaton Aeroquip and then collected unemployment benefits from September 2013 to March 2014. On December 3, 2014, the Agency issued two notices of redetermination—one claiming that Mr. Bauserman had received unemployment benefits for which he was ineligible and another claiming that he had intentionally misled the Agency or concealed information from it. The Agency assessed penalties and interest and informed Mr. Bauserman that he owed $19,910. He timely protested the redetermination through an online appeal on the Agency's website, and that protest was forwarded to the Michigan Administrative Hearing System (MAHS) for a hearing. However, MAHS sent the matter back to the Agency, and on June 16, 2015, the Agency intercepted Mr. Bauserman's tax refund. Eventually, the Agency reviewed the information Mr. Bauserman submitted and concluded that its adjudication of fraud was incorrect—Mr. Bauserman was eligible for the unemployment benefits he had received, and he neither misled the Agency nor concealed information from it. On September 30, 2015, the Agency issued another redetermination, this one finding that the December 3, 2014 redeterminations were

"null and void." The Agency subsequently returned all monies that it had improperly seized from Mr. Bauserman.

Teddy Broe collected benefits in 2013, and the Agency issued a redetermination on July 15, 2014, finding Mr. Broe ineligible for benefits and assessing penalties. Mr. Broe did not initially protest, and the Agency assessed penalties and interest totaling more than $8,000. In April 2015, Mr. Broe wrote to the Agency, appealing the redetermination and explaining that he had not received the Agency's earlier communications because they were sent to his online account with the Agency and he was no longer accessing that account because he was no longer receiving benefits. The Agency intercepted his tax refunds in May 2015. The Agency initially denied the appeal as untimely but later reconsidered Mr. Broe's case. On November 4, 2015, the Agency issued a new redetermination in Mr. Broe's favor and subsequently returned all monies that had been improperly seized from Mr. Broe.

Mr. Bauserman filed a putative class action against the Agency on September 9, 2015, and he later amended the complaint to add Mr. Broe as a named plaintiff.[1] The complaint alleged that "Michigan's Unemployment fraud detection, collection, and seizure practices fail to comply with minimum due process requirements." (Emphasis omitted.) Mr. Bauserman cited 26 USC 6402(f)(3) (authorizing a state to collect unemployment compensation debts resulting from fraud from federal tax overpayments) and its several

[1] The amended complaint also added Karl Williams as a named plaintiff, but because Mr. Williams failed to comply with MCL 600.6431(3) (notice of claim), his claim was dismissed by this Court in a subsequent appeal discussed later in this opinion. *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 193; 931 NW2d 539 (2019).

requirements, including notice, 60 days to present evidence, and consideration of presented evidence. In addition, Mr. Bauserman cited adjudication standards found in MCL 421.32a, including notice, a reasonable time to supply information to the Agency, 30 days to claim a hearing before an administrative law judge, and a notice of appeal rights.

As stated by the Court of Appeals, plaintiffs alleged that "the Agency systemically, and by way of concerted and coordinated actions, unlawfully intercepted their state and federal tax refunds, garnished their wages, and forced them to repay unemployment benefits that they had lawfully received." *Bauserman v Unemployment Ins Agency (On Remand)*, 330 Mich App 545, 565; 950 NW2d 446 (2019). Additionally, they alleged, among other things, that MiDAS does not allow 60 days to present evidence and does not allow the Agency to consider presented evidence. Plaintiffs also alleged that the questionnaires sent by the Agency do not provide the basis for the Agency's suspicions or grounds for disqualification. Further, as a practical matter, many claimants never receive the questionnaires because they are sent only to the claimant's electronic account with the Agency, without any additional notice via United States mail or e-mail. Among the alleged harms asserted by plaintiffs were that the Agency "failed to repay to Class Members or to repay on a timely basis funds which were seized by the UIA or paid over to UIA by the Class Member to satisfy overpayments and penalty determinations which were reversed at a later time." Finally, plaintiffs alleged they were deprived of their property without due process of law in violation of Const 1963, art 1, § 17. The Agency moved for summary disposition on a number of grounds. Among them was that plaintiffs failed to state a constitutional-tort claim because other rem-

edies existed. The Court of Claims denied the Agency's motion on that ground. Prior appellate litigation centered on whether plaintiffs' claims accrued when the initial redeterminations were issued or when the Agency seized plaintiffs' tax refunds. We held that "the 'actionable harm' in a predeprivation due-process claim occurs when a plaintiff has been deprived of property, and therefore such a claim 'accrues' when a plaintiff has first incurred the deprivation of property." *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 186; 931 NW2d 539 (2019). We then remanded the case to the Court of Appeals to "consider the Agency's argument that it is entitled to summary disposition on the ground that plaintiffs failed to raise cognizable constitutional tort claims." *Id*. at 193 n 20.

On remand, the Court of Appeals started its analysis by reasoning that claims of this sort "originated" in *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971). *Bauserman (On Remand)*, 330 Mich App at 560. The Court of Appeals noted that in *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW 2d 749 (1987), our Court held that " '[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases,' " but that we did not provide any further guidance on when that claim for damages is available. *Bauserman (On Remand)*, 330 Mich App at 560.

The Court of Appeals followed its general practice with state constitutional torts by first asking whether " 'an official policy or custom caused a person to be deprived of [state] constitutional rights,' " *id*. at 561 (alteration in original), quoting *Carlton v Dep't of Corrections*, 215 Mich App 490, 505; 546 NW2d 671 (1996), and it then looked to Justice BOYLE's partial

concurrence in *Smith* to determine whether damages were available, *Bauserman (On Remand)*, 330 Mich App at 561-562, citing *Smith*, 428 Mich at 648-652 (BOYLE, J., concurring in part and dissenting in part). The Court of Appeals concluded that the alleged violations arose from actions taken by state actors pursuant to a government policy and that they could be "aptly characterized as an established practice of state government officials such that [they] amount[] to a custom supported by the force of law." *Bauserman (On Remand)*, 330 Mich App at 566. Weighing the factors offered by Justice BOYLE's partial concurrence, the Court of Appeals concluded that damages were available as a remedy for the due-process deprivations plaintiffs alleged. *Id*. at 576.

Defendant sought leave to appeal in this Court, and we scheduled oral argument on the application, instructing the parties to address "whether the appellees have alleged cognizable constitutional tort claims allowing them to recover a judicially inferred damages remedy." *Bauserman v Unemployment Ins Agency*, 506 Mich 965 (2020).

II. STANDARDS OF REVIEW

The decision before us for review is whether plaintiffs have failed to state a claim under MCR 2.116(C)(8). "A motion under MCR 2.116(C)(8) tests the *legal sufficiency* of a claim based on the factual allegations in the complaint." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). For purposes of this review, we accept all factual allegations in the complaint as true. *Id*. at 160. We review de novo a trial court's decisions on motions for summary disposition. *Id*. at 159. We also review de novo ques-

tions of constitutional law. *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017).

III. ANALYSIS

The recognition and redress of constitutional violations are quintessentially judicial functions, required of us by the Separation of Powers Clause. See Const 1963, art 3, § 2. Our Court maintains primacy in interpreting the Constitution. However, when the Constitution vests the Legislature with this authority and responsibility, our authority is proportionately lessened. Further, while the Legislature cannot trump the Constitution itself, the Legislature may implement a remedial scheme that provides a means of vindicating the constitutional right at a level equal to a remedy this Court could afford. In those circumstances, we would be unlikely to duplicate the Legislature's efforts. But absent either of those conditions, this Court retains the authority—indeed the duty—to vindicate the rights guaranteed by our Constitution. That includes recognizing causes of action seeking money damages. Therefore, money damages are an available remedy for constitutional torts unless (1) the Constitution has delegated to another branch of government the obligation to enforce the constitutional right at issue, see *Lewis v State*, 464 Mich 781, 787; 629 NW2d 868 (2001) (stating that a cause of action for damages cannot be implied by the Constitution when the text of the Constitution instead vests authority in the Legislature to determine the remedies available), or (2) another branch of government has provided a remedy that we consider adequate, see *Mays v Governor*, 506 Mich 157, 197-198; 954 NW2d 139 (2020) (plurality opinion by BERNSTEIN, J.) (concluding that there was no sufficient alternative remedy—except by bringing a

constitutional-tort claim—to recover money damages for the plaintiffs' claim of injury to bodily integrity).

A. *SMITH* AND *MAYS*

Though the question of whether violations of our Constitution are compensable through actions seeking monetary damages has been posed to us before, we have not previously found consensus. In *Smith* we produced several opinions, but our holdings were limited. Ultimately, four Justices agreed that governmental immunity was not a defense to allegations of constitutional torts and that damages may be recognized in appropriate cases. *Smith*, 428 Mich at 544.

In a concurring opinion, Justice BRICKLEY, joined by Justice RILEY, cataloged the ebb and flow of the United States Supreme Court's decisions regarding federal constitutional torts, starting with *Bivens*. *Id*. at 612-626 (BRICKLEY, J., concurring). He then opined that he would have declined to recognize a remedy for the plaintiffs in the *Smith* cases. *Id*. at 626-636. One plaintiff, Jack Smith, who had been confined in a state psychiatric hospital for nearly 50 years, sought relief under Const 1908, art 2, §§ 1 and 16 for the confinement. *Id*. at 551-552. The other plaintiff, Ray Will, was an employee of the state of Michigan who was denied promotion. *Id*. at 546-550. He sought relief under Const 1963, art 11, § 5 and art 1, §§ 2 and 17. *Id*. Justice BRICKLEY would have denied relief to plaintiff Smith, in part, because the Constitution he relied on was no longer in effect, and so plaintiff Smith was asking for a novel remedy only available to him. *Id*. at 626-632. Justice BRICKLEY also saw plaintiff Smith's argument as grounded in *Bivens* itself, and he found several ways to distinguish plaintiff Smith's facts from those in *Bivens*. *Id*. Plaintiff Will did not rely on *Bivens*

but on the existence of a " 'cumulative judicial remedy.' " *Id*. at 633-636 (citations omitted). Justice BRICKLEY did not address this argument because he considered it to be unpreserved. *Id*.

Also concurring, Justice BOYLE, joined by Justice M. CAVANAGH, agreed that plaintiff Will's argument was unpreserved. *Id*. at 637 (BOYLE, J., concurring in part and dissenting in part). But she would have remanded plaintiff Smith's case, writing separately to emphasize that allegations of state constitutional torts avoid governmental immunity. *Id*. at 637-638. She opined, "It is so basic as to require no citation that the constitution is the fundamental law to which all other laws must conform." *Id*. at 640. With regard to statutory governmental immunity, she noted that all statutes should be construed to avoid constitutional invalidity. *Id*. at 641. Given that understanding, she concluded, "The idea that our Legislature would indirectly seek to 'approve' acts by the state which violate the state constitution by cloaking such behavior with statutory immunity is too far-fetched to infer" from the statute. *Id*. Considering common-law sovereign immunity, she noted the concept had been abrogated in *Pittman v City of Taylor*, 398 Mich 41; 247 NW2d 512 (1976), but even absent the abrogation, "[t]he primacy of the state constitution would perforce eclipse the vitality of a claim of common-law sovereign immunity in a state court action for damages." *Smith*, 428 Mich at 641-642 (BOYLE, J., concurring in part and dissenting in part). Relying on "public policy concerns," she would have limited liability to instances in which the action of the state's agent was implementing a policy or custom. *Id*. at 642-644. She also thought the remedy of damages was generally available. *Id*. at 644-648. However, she thought whether to afford a remedy in any particular case might turn on several factors: "(1) the existence

and clarity of the constitutional violation itself; (2) the degree of specificity of the constitutional protection; (3) support for the propriety of a judicially inferred damages remedy in any text, history, and previous interpretations of the specific provision; (4) the availability of another remedy; and (5) various other factors militating for or against a judicially inferred damages remedy." *Mays*, 506 Mich at 196 (plurality opinion by BERNSTEIN, J.), citing *Smith*, 428 Mich at 648-652 (BOYLE, J. concurring in part and dissenting in part).

Justice ARCHER, joined by Justice LEVIN, started his analysis by reasoning that any intentional tort, whether constitutional in nature or not, is not barred by governmental immunity. *Smith*, 428 Mich at 657 (ARCHER, J., dissenting). He would not have limited the scope of cognizable constitutional torts to those occurring by virtue of governmental custom or policy. *Id*. at 658.

After *Smith*, the Court of Appeals repeatedly cited that fractured opinion for the proposition that immunity is not available to the state for violating rights guaranteed by the Michigan Constitution. See *Mays*, 506 Mich at 190-191 (plurality opinion by BERNSTEIN, J.) (collecting cases). We did not return to the question of what remedies are available for constitutional torts until *Mays*, when we evenly split over whether to recognize a damages remedy for the alleged constitutional violations there. See *Mays*, 506 Mich 157. Though the Court of Appeals has frequently cited Justice BOYLE's partial concurrence in *Smith*, we could not reach a consensus on what analysis should be controlling. See *Mays*, 506 Mich at 217 (MCCORMACK, C.J., concurring) ("If and when the appropriate time (and case) comes along, we can debate whether *Smith* was correctly decided and what rationale we would use

to justify the conclusion that monetary damages are available (or not) in constitutional-tort actions."); *Mays*, 506 Mich at 263 (VIVIANO, J., concurring in part and dissenting in part) ("I question whether *Smith* was correctly decided on this point, and I would be willing to reconsider *Smith* in an appropriate future case.). Now, we face the question once again.

B. CITIZENS RELY ON COURTS TO PROTECT AND VINDICATE CONSTITUTIONAL RIGHTS

Article 1 of our Constitution is titled "Declaration of Rights." Because it "guarantees the civil and political integrity [and] the freedom and independence of our citizens," the Declaration of Rights "is the bedrock upon which all else in the constitution may be built." 1 Official Record, Constitutional Convention 1961, p 106 (remarks of Governor John B. Swainson). In crafting our current Constitution, the Declaration of Rights was moved into the first article because it is so fundamental to representative government that it "sets up the basic legal guideposts for [its] implementation and enforcement . . . ." 1 Official Record, Constitutional Convention 1961, p 466.

One way to think of a right is in terms of the correlative duty it imposes on another to act or refrain from acting for the benefit of the right-holder. See Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919), pp 35-38. Thought of in this way, a right must have a remedy. If not, it is not a right at all but only "a voluntary obligation that a person can fulfill or not at his whim," or merely "a hope or a wish." Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 Hastings L J 665, 678 (1987). This understanding of rights is as old as our republic:

> It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation. [The Federalist No. 15 (Hamilton) (Cooke ed, 1961), p 95.][2]

Said another way, "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." *The Western Maid*, 257 US 419, 433; 42 S Ct 159; 66 L Ed 299 (1922). If our Constitution is to function, then the fundamental rights it guarantees must be enforceable. Our basic rights cannot be mere ethereal hopes if they are to serve as the bedrock of our government.

This Court has not only the authority, but also the primary responsibility of interpreting and enforcing our Constitution. " 'To adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department.' " *Johnson v*

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[2] Or, even older:

> Under the common law of England, where individual rights . . . were preserved by a fundamental document (*e.g.*, the Magna Carta), a violation of those rights generally could be remedied by a traditional action for damages. The violation of the constitutional right was viewed as a trespass, giving rise to a trespass action. [*Widgeon v Eastern Shore Hosp Ctr*, 300 Md 520, 525-527; 479 A2d 921 (1984), discussing *Wilkes v Wood*, 98 Eng Rep 489; Lofft's 1 (1763), *Huckle v Money*, 95 Eng Rep 768; 2 Wils 205 (1763), and *Entick v Carrington*, 19 How St Tr 1029 (1765).]

See also *Moresi v Louisiana*, 567 So 2d 1081, 1092 (La, 1990); Wurman, *Qualified Immunity and Statutory Construction*, 37 Seattle U L Rev 939, 987 (2014) ("[T]he common law expected officers to be mulcted in damages for their errors in judgment. Some courts explicitly stated that the law expected that officers would be grievously punished for such errors.").

Kramer Bros Freight Lines, Inc, 357 Mich 254, 258; 98 NW2d 586 (1959), quoting Cooley, Constitutional Limitations (7th ed), p 132. The judiciary "has the legitimate authority, in the exercise of the well-established duty of judicial review, to evaluate governmental action to determine if it is consistent with" the Constitution. *Sharp v Lansing*, 464 Mich 792, 802; 629 NW2d 873 (2001). This is a first principle, inherent in our tripartite separation of powers. A "major function[]" of the judiciary is to "guarantee[]" the rights promised in our Constitution. 2 Official Record, Constitutional Convention 1961, p 2196. If the rights guaranteed in our Constitution are to be more than words on paper, then they must be enforceable.[3] And if the rights guaranteed in our Constitution are to be enforceable, then enforcement must fall to us, absent an explicit constitutional provision limiting our authority in this regard.

We agree with the *Smith* majority in this regard: "A claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Smith*, 428 Mich at 544. And in doing so, both then in *Smith* and here today, we are not an outlier. State courts recognizing private causes of action for state constitutional violations is nothing new. See *Bull v Armstrong*, 254

[3] Justice VIVIANO quotes at length from *People ex rel Sutherland v Governor*, 29 Mich 320 (1874), for the proposition that " 'there are a great many' " cases involving rights without a remedy. There, we noted that, at times, a jury might reach a wrong verdict, or a judge might make an error, or the Legislature could seat someone who was not duly elected, or the Governor might refuse to pardon someone who had conclusively demonstrated that they were wrongfully convicted. *Id*. at 330. The fact that there may be nonjusticiable questions courts cannot decide and that the judicial process will, at times, reach incorrect results does not imply that courts are without authority to enforce the Constitution, and *Sutherland* said nothing of the kind.

Ala 390; 48 So 2d 467 (1950) (recognizing a private cause of action for an illegal warrantless search in violation of Alabama's constitution); *Mayes v Till*, 266 So 2d 578 (Miss, 1972) (recognizing a private cause of action for an illegal warrantless search in violation of Mississippi's constitution). By the time the United States Supreme Court announced its decision in *Bivens*, the foundation for state courts to recognize private causes of action for constitutional violations was already ingrained in the American conception of government. See *Widgeon*, 300 Md at 535 ("[T]here is no need to imply a new right of action because, under the common law, there already exists an action for damages to remedy violations of constitutional rights.").

Bivens was somewhat novel in that it recognized—for the first time—a cause of action against federal agents for violation of federal constitutional rights. But the Court was clear that the path it traveled had always been open, explicitly stating that courts had always had the authority to remedy violations of constitutional harms: "[I]t has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bivens*, 403 US at 392 (quotation marks and citation omitted). The *Bivens* Court did not think it was doing anything revolutionary but, rather, said the notion that constitutional violations could be redressed with monetary compensation "should hardly seem a surprising proposition." *Id*. at 395.

Since *Bivens*, sister courts in other states have likewise concluded that they bear the duty of vindicating the rights guaranteed in their constitutions. "It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of indi-

viduals is as old as the State." *Corum v Univ of North Carolina*, 330 NC 761, 783; 413 SE2d 276 (1992). "It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens." *Godfrey v Iowa*, 898 NW2d 844, 865 (Iowa, 2017). "The power of the Court to enforce rights recognized by the New Jersey Constitution, even in the complete absence of implementing legislation, is clear." *King v S Jersey Nat'l Bank*, 66 NJ 161, 177; 330 A2d 1 (1974), citing *Marbury v Madison*, 5 US (1 Cranch) 137, 163; 2 L Ed 60 (1803). See also *Gay Law Students Ass'n v Pacific Tel & Tel Co*, 24 Cal 3d 458, 475; 595 P2d 592; 156 Cal Rptr 14 (1979) (recognizing a cause of action for monetary damages for a violation of the state's Equal Protection Clause); *Newell v Elgin*, 34 Ill App 3d 719, 722-725; 340 NE2d 344 (1976) (recognizing a cause of action for monetary damages for a violation of the state's illegal-seizure protection); *Moresi v Louisiana*, 567 So 2d 1081; 1091-1093 (La, 1990) (recognizing a cause of action for monetary damages for a violation of the state's privacy protection); *Widgeon*, 300 Md at 525-534 (recognizing a cause of action for monetary damages for a violation of the state's search-and-seizure protection). But see *Godfrey*, 898 NW2d at 856-857 (collecting cases and describing courts as "nearly equally divided"). These courts frequently refer to principles relied on by the *Bivens* Court and to 4 Restatement Torts, 2d, § 874A, comment *a*, p 301.[4]

The *Bivens* Court explained how constitutional torts hold the potential for greater harm than private torts:

[4] 4 Restatement, p 301 states: "When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a

"An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Bivens*, 403 US at 392. Other courts have continued to make similar observations: "[T]here is a great distinction between wrongs committed by one private individual against another and wrongs committed under authority of the state." *Dorwart v Caraway*, 312 Mont 1, 16; 2002 MT 240; 58 P3d 128 (2002). The purpose of codifications of rights in the federal Constitution, our Constitution, and the constitutions of other states is to protect against these unique and dangerous encroachments. *Corum*, 330 NC at 782-783; see also *Godfrey*, 898 NW2d at 876-877; *Binette*, 244 Conn at 43. That danger is exemplified here. Plaintiffs allege that when they were rightfully eligible for unemployment benefits—meant to be a hand up during a financially difficult and fragile juncture—they were accused of fraud and assessed staggering penalties without notice or any meaningful opportunity to be heard.[5]

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suitable existing tort action or a new cause of action analogous to an existing tort action." Comment *a* specifies that this notion includes constitutional provisions.

[5] It has been estimated that, between 2013 and 2015, approximately 40,000 people in Michigan were wrongfully accused of unemployment fraud as a result of the lack of due process alleged by plaintiffs. De La Garza, *States' Automated Systems are Trapping Citizens in Bureaucratic Nightmares With Their Lives On the Line*, Time Magazine (May 28, 2020) <https://time.com/5840609/algorithm-unemployment/> (accessed March 4, 2022) [https://perma.cc/9THC-9HL3]. In addition, a study conducted by the Agency concluded that, during this same period, approximately 93% of the automated system's fraud determinations were incorrect. Felton, *Michigan Unemployment Agency Made 20,000 False Fraud Allegations — Report*, The Guardian (December 18, 2016) <https://www.theguardian.com/us-news/2016/dec/18/michigan-unemployment-agency-fraud-accusations> (accessed March 4, 2022) [https://perma.cc/4LEH-8KAZ].

To remedy these types of harms, the *Bivens* Court saw nothing extraordinary about the availability of monetary damages: "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 US at 395, citing *Nixon v Condon*, 286 US 73; 52 S Ct 484; 76 L Ed 984 (1932); *Nixon v Herndon*, 273 US 536, 540; 47 S Ct 446; 71 L Ed 759 (1927); *Swafford v Templeton*, 185 US 487; 22 S Ct 783; 46 L Ed 1005 (1902); *Wiley v Sinkler*, 179 US 58; 21 S Ct 17; 45 L Ed 84 (1900); Landynski, *Search and Seizure and the Supreme Court*, pp 28 *et seq*. (1966); Lasson, *History and Development of the Fourth Amendment to the United States Constitution*, pp 43 *et seq*. (1937); Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v Hood, 117 U Pa L Rev 1, 8-33 (1968); cf. *West v Cabell*, 153 US 78; 14 S Ct 752; 38 L Ed 643 (1894); *Lammon v Feusier*, 111 US 17; 4 S Ct 286; 28 L Ed 337 (1884). Rejecting alternate framings, the *Bivens* Court saw the question before it as a simple one—whether the petitioner was "entitled to redress his injury through a particular remedial mechanism normally available in the federal courts." *Bivens*, 403 US at 397. The answer was axiomatic: " 'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.' " *Id*., quoting *Marbury*, 5 US (1 Cranch) at 163. Other courts have shared that view. "The availability of damages at law is thus an ordinary remedy for violation of constitutional provisions, not some new-fangled innovation." *Godfrey*, 898 NW2d at 868. We share this view and make the unremarkable observation that damages are an available remedy for the state's constitutional violations. "This Court is ultimately responsible for enforcing our state's Consti-

tution, and remedies are how we do that." *Mays*, 506 Mich at 215 (MCCORMACK, C.J., concurring).

One final point about *Bivens*. Defendant argues that the United States Supreme Court's recent treatment of *Bivens* requires this Court to refrain from recognizing causes of action for constitutional torts. We disagree. This Court has already debated the continued vitality of *Bivens* and how federal constitutional torts differ from state constitutional torts. See *Mays*, 506 Mich at 214-224 (MCCORMACK, C.J., concurring); *Mays*, 506 Mich at 245-263 (VIVIANO, J., concurring in part and dissenting in part). Whatever the relative merits of those positions, they are beside the point. Our holding today does not rely on *Bivens* at all, but on the authorities that *Bivens* discussed and that so many other courts have discussed since then. *Bivens* is famous and often cited, and with good reason. It is an eloquent explanation of the judiciary's duty to enforce constitutional guarantees and its authority to use available remedies to that end. But *Bivens* is just that—a discussion of the authority, not the authority itself. The plaintiffs' cause of action is created by our state Constitution, not by any court.[6] Our holding today is grounded in the constitutional rights relied on by plaintiffs as well as our authority and duty to say what the law is. See *Marbury*, 5 US (1 Cranch) at 177. These authorities remain undisturbed.

Justice VIVIANO responds only in passing to the core idea that a right requires a remedy. He briefly and puzzlingly acknowledges *Marbury*, but his takeaway is

[6] See *Godfrey*, 898 NW2d at 866 ("As a rhetorical device, the defendants suggest that *Bivens* claims for Iowa constitutional violations amount to a 'new cause of action.' But we face an old problem, not a new problem. The old problem is whether courts have the power to provide an appropriate remedy for constitutional wrongs.").

that the Court could not enforce a remedy for William Marbury because it did not have jurisdiction. That is an accurate statement about *Marbury*, and if we similarly lacked jurisdiction in this matter, we would have no authority to enforce a remedy. Of course, we do have jurisdiction here.[7]

Further, Justice VIVIANO's belief would prove far too much. He believes that constitutional rights can exist without remedies and, if a remedy is to exist, the Constitution must explicitly provide it. But of the 27 sections of the Declaration of Rights, only a handful mention remedies at all.[8] Most of the guarantees of the Declaration of Rights are not enacted in statute, but we enforce them nonetheless through whatever remedy is appropriate for a violation. Justice VIVIANO distinguishes causes of action for constitutional torts because the legislative power " 'encompasses the power to create causes of action.' " *Post* at 731, quoting *Mays*, 506 Mich at 259 (VIVIANO, J., concurring in part and dissenting in part). Generally, enforcing constitutional rights through injunctive relief is uncontroversial, see, e.g., *Brown v Bd of Ed of Topeka*, 347 US 483, 486 n 1; 74 S Ct 686; 98 L Ed 873 (1954), and *Brown v Bd of Ed*

[7] If Justice VIVIANO means to suggest that *Marbury* is dicta on this point, he is technically correct. Nonetheless, *Marbury*'s recognition of the judiciary's authority to say what the law is has clearly been widely followed.

[8] Const 1963, art 1, § 2 delegates authority for enforcing the right to equal protection of the laws to the Legislature. Const 1963, art 1, § 11 addresses available remedies for a violation of the protection from unreasonable searches and seizures only in that it limits application of the exclusionary rule, though of course it cannot impact the exclusionary rule's enforcement of US Const, Am IV. Const 1963, art 1, § 15 provides a specific remedy in the event a criminal defendant is denied bail and trial has not commenced within 90 days. Const 1963, art 1, § 24 indicates the Legislature may enact its provisions. Const 1963, art 1, § 26 also addresses remedies.

of Topeka, 349 US 294; 75 S Ct 753; 99 L Ed 1083 (1955), despite the lack of an explicit constitutional authorization for such a cause of action. So the problem is not really that it is a legislative function to "create causes of action"—instead, the problem appears to be that the remedy is in the form of money damages. Justice VIVIANO doesn't offer any specific reason why this remedy requires explicit authorization while others, such as injunctive relief, do not, aside from his belief that "[t]he creation of that liability, dependent upon policy considerations that the judiciary is institutionally ill-suited to address, is a task that falls within the legislative sphere."

We agree with Justice VIVIANO, actually, that judges should not create liability based on policy considerations. We are doing nothing of the kind. The Constitution poses restrictions on the state for the protection of Michigan citizens, and if the state harms its citizens in violation of those prohibitions, that is what creates liability. Justice VIVIANO would err in the opposite direction; he would excuse the state's liability based on his own policy concern—that a violation of constitutional rights should not be redressed by money damages. The core principle that guides our reasoning is that a right must be enforceable; otherwise, it is not right at all but a mere hope. It merits repeating that the fundamental rights our Constitution guarantees are "the bedrock upon which all else in the constitution may be built." 1 Official Record, Constitutional Convention 1961, p 106 (remarks of Governor John B. Swainson). Without them, there is nothing.

C. LEGISLATIVE SILENCE DOES NOT DIVEST COURTS OF THEIR AUTHORITY OR RESPONSIBILITY

Even against this long history of courts enforcing constitutional protections by providing remedies for constitutional violations, the Agency argues that recognizing a cause of action is beyond our authority and that establishing a mechanism to redress the alleged violations of plaintiffs' rights falls to the Legislature. We disagree.

Under our Constitution, "the judicial power of the State is vested exclusively in one court of justice . . . ."[9] Const 1963, art 6, § 1. Unlike federal courts, which are limited to powers specifically enumerated in the United States Constitution, this Court retains all judicial power not ceded to the federal government. *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 362; 792 NW2d 686 (2010). Similarly, the legislative power of the state is vested in the Senate and House of Representatives—collectively, the Legislature. Const 1963, art 4, § 1. Each branch retains "the whole of such power . . . except as it may be restricted in the same instrument." *Washington-Detroit Theatre Co v Moore*, 249 Mich 673, 680; 229 NW 618 (1930). "The legislative power we understand to be the authority, under the Constitution, to make laws, and to alter and repeal them." Cooley, p 109.

What plaintiffs ask of us is not to make new law under the Constitution but, rather, to enforce the Constitution itself. As the United States Supreme Court has noted, "the judiciary has a particular responsibility to assure the vindication of constitutional in-

[9] This grant is limited only by the Const 1963, art 1, § 6 requirement that this Court's decisions shall be in writing and by Const 1963, art 5, § 2, which addresses the Independent Citizens Redistricting Commission.

terests . . . ." *Bivens*, 403 US at 407 (Harlan, J., concurring). In addressing the argument that vindication of constitutional rights should be left to the legislative branch, one of our sister courts reasoned, "It would be ironic indeed if the enforcement of individual rights and liberties in the Iowa Constitution, designed to ensure that basic rights and liberties were immune from majoritarian impulses, were dependent on legislative action for enforcement." *Godfrey*, 898 NW2d at 865. Similarly, "[t]he very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State." *Corum*, 330 NC at 783.

Relying on *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012), the Agency argues that the Legislature holds the authority to decide whether the state can be sued, and if so, the extent of any liability. The Agency notes that under Const 1963, art 3, § 2, no person exercising the power of one branch shall exercise the power belonging to another branch. The Agency also criticizes Justice BOYLE's partial concurrence in *Smith* for discussing policy concerns while inferring a damages remedy. The Agency asserts these considerations are better left to the Legislature.

The fatal flaw in these arguments is that they assume their own conclusions. Our Constitution provides for a separation of powers generally, and specifically in Const 1963, art 3, § 2. But that observation does nothing to define the boundaries of the authority of the branches. *McCahan* dealt with the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. The issue there was interpretation of the notice requirement found in the GTLA. *McCahan* and our other cases dealing with the GTLA did not involve constitu-

tional torts but, instead, dealt with conventional torts. The scope of the Legislature's authority to regulate tort liability created by statute has no bearing on whether the Legislature has authority to restrict rights codified in the Constitution, let alone whether those rights remain fallow without legislative enactment. These authorities discuss the Legislature's authority *within* its purview, but they do not explore the boundaries of that purview.

There are instances in which the Constitution specifically tasks the Legislature with implementing the rights it affords. An example is Const 1963, art 1, § 2, which concludes by stating, "The legislature shall implement this section by appropriate legislation." Therefore, the Constitution delegates the construction of the remedy for violation of Const 1963, art 1, § 2 to the Legislature. We have said as much before:

> On its face, the implementation power of Const 1963, art 1, § 2 is given to the Legislature. Because of this, for this Court to implement Const 1963, art 1, § 2 by allowing, for example, money damages, would be to arrogate this power given expressly to the Legislature to this Court. Under no recognizable theory of disciplined jurisprudence do we have such power. [*Lewis v State*, 464 Mich 781, 787; 629 NW2d 868 (2001).]

But in the absence of such a specific delegation, constitutional rights must still be enforceable. As we have discussed, interpreting the Constitution and determining the scope of the rights it affords is the core of our function as the judicial branch. We know "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 US (1 Cranch) at 177. Interestingly, while criticizing Justice BOYLE on the one hand for considering public policy in her analysis, the Agency admits that we must analyze

" 'competing policies, goals, and priorities[.]' " (Quoting *Carlson v Green*, 446 US 14, 36; 100 S Ct 1468; 64 L Ed 2d 15 (1980) (Rehnquist, J., dissenting).) As to the scope of the state's liabilities, we agree that weighing policy considerations to pick and choose which harms the state should be liable for and to what extent is not within our purview. But neither is it within the purview of the Legislature. That consideration has been completed, and those choices are contained within the Constitution.[10] The state is prohibited from violating the rights the Constitution guarantees. If it does so, it is liable for the harm it causes.[11]

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[10] To be sure, adhering to the Constitution places a burden on state government. In recognition of that fact, our Constitution appears to reflect policy considerations. For example, Const 1963, art 1, § 2 provides that "[n]o person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin," but also that "[t]he legislature shall implement this section by appropriate legislation." Const 1963, art 1, § 11 protects against government searches and seizures in much the same way as US Const, Am IV. However, Const 1963, art 1, § 11 limits application of the exclusionary rule in criminal proceedings, making a different choice than under federal law. Const 1963, art 1, § 14 provides for the right to a jury trial, but allows for 10 out of 12 jurors to reach a verdict in a civil case. Other rights are protected without qualification. Our role is not to evaluate the choices reflected in the Constitution. Our role is to respect and enforce them.

[11] See *In re Town Hwy No 20*, 191 Vt 231, 248-249; 2012 VT 17; 45 A3d 54 (2012) ("Thus, the rights enumerated within our Constitution provide no less authority in supporting a cause of action than the rights set out in our statutes or in this Court's precedent, presuming those constitutional rights are found to be self-executing. Indeed, '[t]o deprive individuals of a means by which to vindicate their constitutional rights would negate the will of the people in ratifying the constitution, and neither this Court nor the Legislature has the power to do so.' ") (alteration in original), quoting *Shields v Gerhart*, 163 Vt 219, 223; 658 A 2d 924 (1995).

But the Agency's position is weaker even than if there were some legislative action in play. As discussed, the Legislature cannot curtail a substantive constitutional right or limit the remedies available to vindicate that right. But the Agency urges us to conclude that *legislative silence* on the issue of remedies for a due-process violation under Const 1963, art 1, § 17 somehow signals the ratifiers' intent to preclude any mechanism of enforcement. Under this view, constitutional guarantees that the Legislature has not addressed would be reduced from rights to mere hopes, or as Justice Holmes said, to "ghosts that are seen in the law . . . ." *The Western Maid*, 257 US at 433. This is not our view. See *King v S Jersey Nat'l Bank*, 66 NJ 161, 177; 330 A 2d 1 (1974) ("Just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence, and the judicial obligation to protect the fundamental rights of individuals is as old as this country."). If the Legislature has already provided an adequate mechanism to remedy a constitutional tort, this Court is not required to duplicate the effort. However, we emphasize that the Legislature's alternative must be at least as protective of a particular constitutional right as a judicially recognized cause of action and must include any remedy necessary to address the harm caused. To be adequate, the legislative remedy should be at least as protective of constitutional rights as a judicially recognized remedy would be.

D. THE CONTINUED VIABILITY OF JUSTICE BOYLE'S PARTIAL CONCURRENCE IN *SMITH*

While we agree with the *Smith* majority that a claim for damages against the state arising from a violation of the Michigan Constitution may be recognized in appropriate cases, *Smith*, 428 Mich at 544, we part

ways with Justice BOYLE as to how to determine an "appropriate case." As already discussed, in light of this Court's inherent judicial authority and respect for the separation of powers, we believe that a cause of action exists except in two specific circumstances: (1) when the Constitution has delegated to another branch of government the obligation to enforce the constitutional right at issue or (2) when another branch of government has provided a remedy that we consider adequate. While Justice BOYLE also recognized these two exceptions, her partial concurrence suggests that she would have also recognized additional exceptions. Justice BOYLE would presumably have declined to recognize a claim for damages where the existence and clarity of the constitutional violation at issue is unclear and where the degree of specificity of the constitutional protection is unclear. *Id*. at 652 (BOYLE, J., concurring in part and dissenting in part). But while these concerns may caution against imposing liability on the state for violation of a particular constitutional provision under particular factual situations, they speak to whether a right exists or has been violated, not to whether there is a constitutional-damages remedy for that violation. Justice BOYLE would also "consider the text, history, and previous interpretations of the specific provision for guidance on the propriety of a judicially inferred damage remedy." *Id*. at 650. But, as discussed previously, the only concern for the "propriety" of recognizing a damages action should be derived from this Court's inherent judicial authority and the language of the Constitution itself—such as when the Constitution specifically delegates to another branch of government the obligation to enforce the constitutional right. Otherwise, this Court should not be in the business of determining the "propriety" of recognizing a constitutional-damages

claim. Likewise, Justice BOYLE's consideration of "various other factors, dependent upon the specific facts and circumstances of a given case," *id*. at 651, is unworkably vague. On this point we agree with the Agency that policy concerns about whether and when to recognize a constitutional-tort remedy are better left to other branches of government. But when the Constitution itself has not delegated to the other branches the authority to weigh those policy concerns, or when the other branches have not stepped in to afford an adequate alternative remedy, our inherent judicial authority requires us to afford a remedy for *all* constitutional violations, not just those that we think are wise or justified.

One final, but important, point of disagreement with Justice BOYLE's partial concurrence in *Smith*: we do not limit the standard of liability in a constitutional-damages claim to a direct standard of liability. Justice BOYLE opined that, consistent with *Monell v New York City Dep't of Social Servs*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978), the state's liability for constitutional violations should arise only when the state is acting pursuant to a custom or policy that violates the Constitution. In other words, the state cannot be held vicariously liable for the constitutional violations of its employees or agents. *Smith*, 428 Mich at 642-643 (BOYLE, J., concurring in part and dissenting in part). But, in *Monell*, the United States Supreme Court was faced with the question of whether, and when, an entity, such as a municipality, may be held liable under a specific statutory provision, 42 USC 1983, that imposes liability only on "persons." *Monell*, 436 US at 690-691. The Court's adoption of the direct custom or policy theory and rejection of a respondeat superior theory of liability under the statute was, in large part, based on the intent of Congress in adopting the specific

statute at issue, the Civil Rights Act of 1871. *Id*. at 665-689. Whatever the merit of the policy concerns considered by Congress in adopting the statute and considered by the Supreme Court in deciding the standard of liability under that statute, we are not in a position to vindicate those policy concerns by incorporating the same reasoning into damages remedies under Michigan's Constitution. While we respect, and may even share, some of Justice BOYLE's "prudential concerns" favoring a direct standard of liability over respondeat superior liability, our obligation is to interpret the Constitution. Weighing policy concerns is the work of other branches in crafting, if they choose, a different, albeit adequate, remedy for constitutional violations.[12] Absent clear language in the Constitution or a legislatively crafted remedy, we hold that people who have been deprived of a constitutional right deserve to seek redress through the courts, regardless of whether their harm was inflicted pursuant to state custom or policy.[13]

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[12] The oft-cited prudential concerns favoring direct liability over respondeat superior liability are not beyond debate. For example, some Courts and legal scholars have opined that imposing direct liability would better deter future constitutional violations. *Smith*, 428 Mich at 643-644 (BOYLE, J., concurring in part and dissenting in part), citing Note, *Rethinking sovereign immunity after* Bivens, 57 NYU L R 597, 637 (1982). But others believe that respondeat superior liability affords equal, if not better, opportunities to prevent future harm because it incentivizes the state to train, supervise, and discipline its employees and agents to avoid violations. See *Brown v New York*, 89 NY2d 172, 194; 674 NE2d 1129 (1996).

[13] Justice VIVIANO worries our decision "represents a massive and amorphous expansion of constitutional tort liability." Of course, there is nothing new about suing the state for monetary damages. That has been happening since *Smith*, though the Court of Appeals has generally employed Justice BOYLE's analysis. Whatever the difference in outcomes between her analysis and ours, it simply is not our role to place guardrails on constitutional rights based on judicial policy preferences.

IV. APPLICATION

Plaintiffs allege that the Agency violated their due-process rights by seizing their property without providing them with adequate notice and an opportunity to be heard. Plaintiffs allege that the Agency systematically and unlawfully intercepted their state and federal tax refunds, garnished their wages, and forced them to repay unemployment benefits that they had lawfully received. Plaintiffs allege that the Agency took these actions (1) without providing proper notice or hearing, (2) without allowing plaintiffs to present evidence, and (3) by using a computerized system to detect and determine fraud cases that does not comport with due process. These allegations, if proven, are sufficient to sustain a constitutional-tort claim for a violation of the Due Process Clause of the Michigan Constitution, Const 1963, art 1, § 17, which provides as follows:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all

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Justice VIVIANO worries that our decision poses " 'dangers to liberty,' " but his is the view which would leave fundamental rights merely recognized, but not redressed. (Citation omitted.) That is an odd way of thinking about liberty.

Justice VIVIANO mentions liability for cities and villages as well as individuals who operate public utilities. But our holding is that the *state* is liable for harms it commits in violation of the Constitution; whether other entities, such as municipal governments or individual government actors, can be liable for constitutional torts is not before us, and we decline to address that question in what would be dictum. Justice VIVIANO also worries about Const 1963, art 9, § 41, which establishes the Michigan game and fish protection trust fund, and whether violations of this provision would be grounds for money damages and if so, to whom; on a similar note, Justice WELCH asserts we should limit our holding to violations of the Declaration of Rights. Again, we decline to opine on hypothetical cases not before this Court.

> individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Nothing in the language of this provision, or any other constitutional provision, confers authority on another branch of government to provide a remedy for violation of this right. Accordingly, the first exception to recognizing a damages action is not met here. In addition, the Legislature has not enacted a statutory remedy that adequately compensates a plaintiff for violation of this due-process right, so the second exception is likewise not present. While the Agency argues that plaintiffs have a remedy in the form of an appeal under the Michigan Employment Security Act, MCL 421.1 *et seq*., plaintiffs are not challenging the administration of the act and this isn't a "super appeal" from a benefits determination.[14] Rather, this is a tort claim challenging the Agency's use of MiDAS to deprive plaintiffs of property without due process of law. There is no remedy available to vindicate their substantive rights other than an action under the Michigan Constitution. Administrative agencies don't have the power to determine constitutional questions or afford consequential damages. See *Dickerson v Warden, Marquette Prison*, 99 Mich App 630, 641-642; 298 NW2d 841 (1980). And the state's sovereign immunity, guaranteed by the Eleventh Amendment of the United States Constitution, precludes plaintiffs from suing the state in federal court to remedy a violation of either the Michigan Constitution, *Pennhurst State Sch and Hosp v Halder-*

[14] Regardless, for some in the plaintiff class such as Mr. Broe, the time to appeal the Agency's decisions expired before plaintiffs were aware of the existence of a possible cause of action *because of* the alleged due-process violations.

man, 465 US 89, 121; 104 S Ct 900; 79 L Ed 2d 67 (1984) ("[A] claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment."), or a parallel provision of the federal Constitution, *Seminole Tribe of Florida v Florida*, 517 US 44, 55-56; 116 S Ct 1114; 134 L Ed 2d 252 (1996). Because enforcement of Const 1963, art 1, § 17 has not been delegated to the Legislature and because no other adequate remedy exists to vindicate the alleged violations of plaintiffs' rights, we agree that plaintiffs have alleged a cognizable constitutional-tort claim for which they may recover monetary damages.

V. CONCLUSION

Plaintiffs seek redress of the alleged deprivation of their property without notice or an opportunity to be heard in violation of Const 1963, art 1, § 17. This Court bears the authority and ultimate responsibility to enforce our state's Constitution and to ensure that rights have remedies. When the language of the Constitution itself does not delegate that responsibility to another branch of government and when the Legislature has not enacted an adequate alternate remedy for the constitutional violation, we will recognize and enforce a monetary-damages remedy. We agree that plaintiffs have alleged a cognizable constitutional-tort claim for which they may recover money damages, and we agree with the lower courts that the Agency was properly denied summary disposition. We remand the case to the Court of Claims for further proceedings not inconsistent with this opinion.

MCCORMACK, C.J., and BERNSTEIN and WELCH, JJ., concurred with CAVANAGH, J.

WELCH, J. (*concurring*). Today, a majority of this Court confirms that a party has the ability to directly sue the state for monetary damages on the basis of an alleged violation of our Constitution. We have previously recognized these claims and that a remedy for monetary damages exists in appropriate cases. *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987). When the only way to adequately remedy a constitutional violation is to allow for monetary damages, then such a remedy will be implied.[1] The majority opinion adopts a framework that would allow recognition of monetary damages against the state for the violation of *any* constitutional right if (1) the constitu-

[1] Coined by Professor Marshall S. Shapo in his article *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 Nw U L Rev 277 (1965), the term "constitutional tort" has evaded a precise definition. See, e.g., Wells, *Marshall Shapo's Constitutional Tort Fifty-Five Years Later*, Nw U L Rev Colloquy (2020), p 257 (describing constitutional torts as "suits for damages for constitutional violations committed by government officials or the governments themselves"), available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1299&context=nulr_online> (accessed July 18, 2022) [https://perma.cc/QR5H-J83K]; Donoghue & Edelstein, *Life After* Brown*: The Future of State Constitutional Tort Actions in New York*, 42 NYL Sch L Rev 447, 449 n 10 (1998) (describing a " 'state constitutional tort' to mean any direct civil action for the violation of a state constitutional right, with the caveat that state civil rights litigation, like its federal counterpart, does not fit neatly into the area of tort law.").

Generally speaking, the term has been described in academic literature as a direct private civil cause of action to redress the violation of a state constitutional right by a government actor, regardless of the remedy. The default remedies to cure the constitutional violations in such civil actions are often injunctive or declaratory relief, unless some other remedy is provided in a statute or the constitution itself. The Court's decision today concerns a narrower subclass of constitutional torts for which a monetary-damages remedy will be implied because no other adequate alternative common-law, statutory, or administrative remedy exists, and it sets forth the general framework for determining when allowing such a remedy is appropriate.

tional right is self-executing, unless the Constitution delegates to a different branch of government discretion in implementing that right, and (2) there is not an adequate alternative remedy. While I agree with the framework and with the holding that plaintiffs pleaded a valid constitutional tort for monetary damages in this matter, I write separately for two reasons. First, I would go further than my colleagues and expressly limit the Court's recognition of monetary damages for constitutional torts to claims arising from a violation of a right enumerated in Michigan's Declaration of Rights, Const 1963, art 1. Accordingly, while I join the majority opinion, I limit my concurrence with Part III of the majority opinion to the extent it could be interpreted to apply beyond a claim under the Declaration of Rights, and I do not join footnote 13 of that opinion to the extent that it declines to adopt such a limitation. Second, the majority's "adequate alternative remedy" requirement limits the "expansion of liability for the state and its taxpayers" that Justice VIVIANO foretells in his dissent. In other words, constitutional-tort claims are, and will continue to be, rare given that adequate alternative remedies to an implied monetary-damages remedy exist in most cases.

I. CONSTITUTIONAL TORTS AND THE DECLARATION OF RIGHTS

In Part III of its opinion, the majority has set forth a framework, with which I agree, for recognizing a constitutional tort for monetary damages. I would, however, go further than my colleagues and expressly limit our recognition of constitutional-tort actions for monetary damages to claims based on a violation of the fundamental liberties enumerated in Michigan's Declaration of Rights, Const 1963, art 1. My colleagues in

the majority do not consider such a limitation because they "decline to opine on hypothetical cases not before us." *Ante* at 709 n 13. But given that the claim in this matter arises under the Declaration of Rights, I believe addressing this limitation is appropriate.

Our state Constitution has long contained a distinct Bill or Declaration of Rights.[2] Const 1963, art 1; Const 1908, art 2; Const 1835, art 1. Michigan's Declaration of Rights sets forth basic, fundamental individual liberties that are secured to each person in the state. Additionally, we have previously recognized that "[t]he Michigan Declaration of Rights, like the federal Bill of Rights, is 'drawn to restrict governmental conduct and to provide protection from governmental infringement and excesses . . . .'" *Sitz v Dep't of State Police*, 443 Mich 744, 760; 506 NW2d 209 (1993), quoting *Woodland v Citizens Lobby*, 423 Mich 188, 204; 378 NW2d 337 (1985). The majority opinion implicitly acknowledges this through its quotation of statements made by Governor John B. Swainson at the constitutional convention of 1961, but a fuller quotation of the Governor's statement is helpful:

> Another of your heavy responsibilities will be review of our constitutional declaration of rights. As that part of our constitution that guarantees the civil and political integrity, the freedom and independence of our citizens, the bill of rights is the bedrock upon which all else in the consti-

[2] This fact sets our Constitution apart from its federal counterpart because the federal Bill of Rights, proposed by our nation's first congress in 1789, was a series of amendments of the original federal Constitution. See, e.g., National Archives and Records Administration, *The Bill of Rights: How Did it Happen?* <https://www.archives.gov/founding-docs/bill-of-rights/how-did-it-happen> (accessed July 13, 2022) [https://perma.cc/GPK7-2NUU]; National Archives and Records Administration, *The Bill of Rights: A Transcription* <https://www.archives.gov/founding-docs/bill-of-rights-transcript> (accessed July 13, 2022) [https://perma.cc/T5XM-66QT].

> tution may be built. [1 Official Record, Constitutional Convention 1961, p 106 (remarks of Governor John B. Swainson).]

Governor Swainson made similar statements in a letter he provided to the committee examining and proposing amendments of the Declaration of Rights:

> "The drafting of a declaration of rights that will incorporate the distilled wisdom of the past and provide for the protection of individual rights emerging from the social and economic ferment of the twentieth century could very well be the most important and lasting contribution that this convention can make to the preservation of the democratic ideal.
>
> Other provisions of the fundamental law of the state affect some of us in our relation to state government and the services it provides for us. But the rights guaranteed by the declaration of rights affect all of us.
>
> Action by the state to buttress the protection of the individual against the possible tyrannies of bureaucracy, the exploitation, discrimination, invasion of privacy, and unequal access to justice will give strong support to the revitalization of our state.
>
> * * *
>
> In a society that is becoming more highly organized in groups, the proper expression of these group interests and activities must be harmonized with the urgent necessity to reassert the doctrine that the essential feature of democracy remains the statutes of the individual." [1 Official Record, Constitutional Convention 1961, pp 400-401 (remarks of Governor John B. Swainson).]

Professor James K. Pollock, chairman of the committee examining the Declaration of Rights, noted the fundamentals underlying a bill of rights in a statement made on Bill of Rights Day. Pollock explained, "The basic theory underlying the early bills of rights is a

belief in the rights of individual men and in rights existing in the law of nature independent of states or their laws, as set forth especially in Locke's Second Treatise on Government (1690)." 1 Official Record, Constitutional Convention 1961, p 403 (remarks of James K. Pollock). Pollock noted that some rights and liberties are so fundamental and individualized that they must be considered "inalienable" in the sense that their execution and protection cannot be fully entrusted to the state. *Id*. In contrast, he noted that other rights and liberties, such as those associated with creating the operational " 'frame' or form of government," have long been considered "alienable" to the extent that they can be entrusted to the state "under proper safeguards for due compensation in the form of just and effective government[.]" *Id*. A bill of rights, Pollock explained, is intended to enumerate the "inalienable rights of the people which they cannot delegate to their government and upon which the latter is explicitly forbidden ever to infringe." *Id*.

When the proposed amendments of the Declaration of Rights were presented to the full body of the convention, the committee recommended movement of the Declaration of Rights from Article 2 to Article 1. Pollock explained why:

> In the committee's opinion[,] the liberties of the people are so fundamental to the Michigan constitution and to free representative government generally that the declaration of rights which establishes the fundamental principles of liberty and sets up the basic legal guideposts for their implementation and enforcement, should appear as the first article in the new constitution. In retaining or altering any present provisions, the committee has carefully considered the exact language in question, as well as committee intent, with the purpose of reducing as far as

> possible the necessity of judicial construction. [1 Official Record, Constitutional Convention 1961, p 466 (remarks of James K. Pollock).]

The substance of the Declaration of Rights was vigorously debated over many weeks at the constitutional convention, but the core purpose and importance of having a declaration of rights was widely agreed upon.

The notion that monetary recovery is available for the violation of inalienable fundamental liberties set forth in our Constitution aligns with the robust public statements and debate at the constitutional convention of 1961. An untenable situation would arise if the state could violate an individual's fundamental, inalienable rights without the individual having a legal pathway to an adequate remedy. Our fundamental and inalienable liberties would hardly be fundamental at all without such a remedy.

In light of these considerations, I wholeheartedly agree with the majority that the liberties enumerated in the Declaration of Rights are fundamental, and "[w]ithout them, there is nothing." *Ante* at 700. But not everything in our Constitution creates a right that is clearly individualized or inalienable. While Part IV of the majority opinion applies the newly adopted legal framework to a due process claim, the legal analysis in Part III of the opinion is broad enough that it could apply to any alleged violation of any provision of our Constitution, despite the caveats contained in footnote 13. I do not endorse such a broad ruling, even if implicit, given existing law and the arguments that have been presented in this case.

Beyond Article 1, much of the balance of our Constitution focuses on the operational mechanics for state and local government, elections, taxation, and public employment, as well as other more technical details, as

Justice VIVIANO's dissent acknowledges. These technical details are the alienable rights and liberties described by Pollock at the constitutional convention of 1961. While the Declaration of Rights must remain a protective backdrop, the degree of individualization of other alienable rights is lessened once the people have entrusted the state with administration of these alienable rights and liberties for the sake of allowing a democratic government to operate. Generally speaking, the violation of nonindividualized, alienable rights that have been entrusted to the state appear poorly suited to vindication through an award of monetary damages against the state. At least one other state Supreme Court appears to have likewise limited monetary-damage remedies for constitutional-tort claims arising under its state's declaration of rights. See *Corum v Univ of N Carolina*, 330 NC 761, 783-786; 413 SE2d 276 (1992).

The constitutional claim before the Court today is premised on a due process violation. The same was true of the constitutional claims at issue in *Smith* and *Mays v Governor*, 506 Mich 157; 954 NW2d 139 (2020). Michigan's Due Process Clause is contained in the Declaration of Rights. Const 1963, art 1, § 17. For the reasons discussed in Part III of the majority opinion, the violation of other rights set forth in the Declaration might also give rise to a facially valid claim seeking monetary compensation for a constitutional tort. But application of the framework in Part III of the majority opinion is not clearly limited to violations of the Due Process Clause or even the Declaration of Rights. Rather, even with the limitations acknowledged in footnote 13, the majority's analysis could plausibly be read to apply to any violation of any provision of the Michigan Constitution. While the majority has not broadly held that the analysis in Part III applies to all

violations of Michigan's Constitution, it also has declined to address whether there is any limitation on the application of the Part III framework.

This Court has never given comprehensive consideration to whether a monetary-damages remedy should be recognized for the violation of any right or liberty outside of the Declaration of Rights. In light of the history I have set forth and the cases this Court has considered in the past, I am doubtful that a claim for monetary damages should be recognized in such circumstances, even if all other criteria of the framework the majority adopts today have been satisfied.

It is worth repeating: implying a monetary-damages remedy for constitutional torts is reserved as a "narrow remedy," *Jones v Powell*, 462 Mich 329, 337; 612 NW2d 423 (2000), and when necessary, as an ultimate stopgap measure to vindicate the constitutional right. I believe a violation of an individualized liberty contained in the Declaration of Rights provides a pathway for an action for monetary damages under some circumstances, but I do not believe the same can be assumed for the rest of our Constitution. Accordingly, while I agree with the analysis in Part III, I limit my concurrence to allowing a monetary-damages remedy only for violations of the Declaration of Rights, Const 1963, art 1, and I do not join footnote 13 of the majority opinion to the extent that it declines to adopt such a limitation.

II. ADEQUATE ALTERNATIVE REMEDIES

Contrary to Justice VIVIANO's view, I believe that the majority's adequate-alternative-remedy criteria for setting forth a constitutional-tort claim will substantially limit the liability faced by the state. Under the test adopted by the majority today, if there is an

adequate alternative remedy that vindicates the violation of a fundamental constitutional right, then monetary damages will not be allowed for violation of that constitutional right. I write separately to emphasize that an adequate remedy need not necessarily make a plaintiff "whole" in every circumstance, and that this limitation provides more protection to the state's coffers than Justice VIVIANO suggests.

Rather, the question is also whether the existing remedy—injunctive relief, declaratory relief, more process, a refund, or whatever it is—will be adequate such that the constitutional right is preserved and not rendered ineffectual. See, e.g., *Lum v Koles*, 314 P3d 546, 556-557 (Alas, 2013) ("The alternative remedies do not need to provide the same level of protection, 'may include federal remedies,' 'need not be an exact match,' and are alternatives even if no longer procedurally available.") (citation omitted). Just as our state courts are well-equipped to determine whether a state constitutional violation has occurred, *In re Apportionment of State Legislature–1982*, 413 Mich 96, 114; 321 NW2d 565 (1982), they are also well-equipped to determine whether adequate alternative remedies exist.

The Legislature will generally be able to manage its potential exposure by providing rights and remedies in legislation so long as those remedies are substantial enough to adequately secure and give meaning to the constitutional right. When there is a legislative scheme at issue, other state supreme courts have deferred to the other branches of government. See, e.g., *Spackman ex rel Spackman v Bd of Ed of Box Elder Co Sch Dist*, 16 P3d 533, 539; 2000 UT 87 (2000) (urging "caution in light of the myriad policy considerations involved in a decision to award damages against a governmental agency and/or its employees for a consti-

tutional violation" and "deference to existing remedies out of respect for separation of powers' principles"); *Binnette v Sabo*, 244 Conn 23, 42-43; 710 A2d 688 (1998) (recognizing the separation-of-powers principle and "its requirement for judicial deference to legislative resolution of conflicting considerations of public policy") (quotation marks and citation omitted). Although recognizing it "has the authority to fashion a common law remedy for the violation of a particular constitutional right," the New Hampshire Supreme Court added that it "will avoid such an extraordinary exercise where established remedies—be they statutory, common law, or administrative—are adequate." *Marquay v Eno*, 139 NH 708, 721; 662 A2d 272 (1995); see also *Dick Fischer Dev No 2, Inc v Dep't of Admin*, 838 P2d 263, 268 (Alas, 1992) (stating same); *Shields v Gerhart*, 163 Vt 219, 234-235; 658 A2d 924 (1995) ("Where the Legislature has provided a remedy, although it may not be as effective for the plaintiff as money damages, we will ordinarily defer to the statutory remedy and refuse to supplement it.").

These cases are persuasive. There is an ongoing relationship between the roles of the different branches of government that deserves respect. Unless monetary damages are necessary to secure and vindicate a violation of a constitutional right, it is inappropriate to second-guess policy-type decisions of the Legislature or the executive branch regarding how to remedy violations of legal rights under a statutory scheme. The threshold question for judges is whether a remedy is adequate, not whether it is ideal or equally comprehensive. In practice, it appears that courts in other states have held that adequate alternative rem-

edies preclude a constitutional remedy for monetary damages under many circumstances.[3]

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[3] See, e.g., *Fields v Mellinger*, 244 W Va 126, 129-136; 851 SE2d 789 (2020) (declining to recognize a constitutional tort for money damages on the basis of alleged employment discrimination because there were adequate alternative remedies under common-law actions and state and federal statutes); *Salminen v Morrison & Frampton, PLLP*, 377 Mont 244, 255; 2014 MT 323; 339 P3d 602 (2014) ("Since the Salminens have a basis in law for a claim to redress this allegation, they need not proceed under the Constitution."); *Lum*, 314 P3d at 556-557 (holding that there were adequate alternative remedies because the plaintiff "could have brought a common-law trespass claim or a federal civil rights action under 42 U.S.C. § 1983"); *Boatright v Glynn Co Sch Dist*, 315 Ga App 468, 471; 726 SE2d 591 (2012) (rejecting the plaintiff's constitutional-tort claim on the basis that the plaintiff's prior request for mandamus relief and claims asserted under Ga Code Ann 20-2-940 would have provided adequate state remedies had plaintiff not dropped the claims); *St Luke Hosp, Inc v Straub*, 354 SW3d 529, 537-538 (Ky, 2011) (noting that traditional common-law tort actions were available and provided adequate alternative remedies for the alleged violation of the defendant's rights under the state constitution); *Khater v Sullivan*, 160 NH 372, 374; 999 A2d 377 (2010) (holding that the plaintiffs had adequate alternative statutory remedies through the appeal process for zoning and land-use decisions); *Giraldo v Dep't of Corrections & Rehabilitation*, 168 Cal App 4th 231, 255-256; 85 Cal Rptr 3d 371 (2008) (holding that adequate alternative remedies existed for the asserted cruel-and-unusual-punishment claim under the state constitution because the plaintiff could have filed a claim under 42 USC 1983); *Sunburst Sch Dist No 2 v Texaco, Inc*, 338 Mont 259, 279-280; 2007 MT 183; 165 P3d 1079 (2007) (holding that the recent adoption of Restatement Torts, 2d, § 929 to allow for the recovery of restoration damages meant that the district court had "erred in instructing the jury on the constitutional tort theory where . . . adequate remedies exist[ed] under statutory or common law"); *Lowell v Hayes*, 117 P3d 745, 754 (Alas, 2005) (holding that the existence of a viable defamation claim was an adequate alternative remedy and noting that "the inadequacy of alternative remedies for alleged constitutional violations cannot be measured *per se* by the dismissal or defeat of those remedies"); *Degrassi v Cook*, 29 Cal 4th 333, 342-343; 58 P3d 360 (2002) (holding that a timely action for injunctive relief, if meritorious, would have adequately remedied the complained of conduct); *Lyles v New York*, 194 Misc 2d 32, 36-37; 752 NYS2d 523 (2002) (holding that adequate remedies could have been obtained through various common-law tort theories and that

This case concerns an alleged procedural due process violation that allegedly caused substantial financial loss for the plaintiffs beyond what was garnished and later returned with no established legal path to recovery. In most cases, I fully expect that the remedy for a violation of procedural due process will be more process.[4] The way to remedy procedural due process violations has historically been through additional process afforded in equity by courts, not monetary damages. Unless a well-trained lawyer is going to supervise every single instance of official action that could affect a private interest, there are bound to be procedural due process violations (even in the form of a mistake). Unsurprisingly, other state supreme courts have likewise been hesitant to recognize a constitutional tort with an attendant monetary-damages remedy for procedural due process violations. See, e.g.,

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there was no need, therefore, to imply a constitutional-tort remedy for money damages); *Martinez v Schenectady*, 97 NY2d 78, 83-84; 761 NE2d 560 (2001) (holding that a tort claim for money damages was unavailable because reversal of the plaintiff's prior conviction provided an adequate remedy); *Marquay*, 139 NH at 722 (holding that common-law tort and statutory causes of action provided adequate remedies even if not as " 'complete' as would be an additional constitutional tort"); *Davis v Town of Southern Pines*, 116 NC App 663, 675-676; 449 SE2d 240 (1994) (holding that plaintiff's "constitutional right not to be unlawfully imprisoned and deprived of her liberty [was] adequately protected by her common law claim of false imprisonment" and that she could therefore not bring a constitutional-tort claim); *Rockhouse Mountain Prop Owners Ass'n, Inc v Town of Conway*, 127 NH 593, 598-599; 503 A2d 1385 (1986) (holding that alternative adequate remedies existed for the plaintiff's equal protection claim because its membership had a statutory right to seek de novo review of the decision not to construct and maintain roads to their homes).

[4] The Utah Supreme Court has stated that "procedural due process claims would appear to be particularly amenable to redress through equitable means" exactly because "a court can generally require the offending party to redo correctly the 'procedure' that allegedly lacked the mandated safeguards." *Spackman*, 16 P3d at 539 n 11.

Spackman, 16 P3d at 539; *Carlsbad Aquafarm, Inc v State Dep't of Health Servs*, 83 Cal App 4th 809, 821, 822; 100 Cal Rptr 2d 87 (2000) (recognizing a litigant complaining of lack of procedural due process "had an alternative remedy" because it "could have immediately petitioned the superior court for a writ of mandate ordering [the defendant] to provide it with due process" and that it was not the "role of the judiciary to create a damages action merely to provide a more 'complete' remedy"). However, in light of the remarkable and extraordinary allegations of systemic due process violations in this case, I agree with the Court of Appeals and my colleagues in the majority that additional process would be an inadequate remedy and that allowing for monetary damages is justified in this case.

III. CONCLUSION

For the reasons already discussed, I concur with the majority that a claim against the state for monetary damages can be recognized for certain constitutional violations and with the holding that a claim for monetary damages is appropriate in this case. While I agree with the legal framework and analysis in Part III of the majority opinion, I qualify my concurrence with the majority opinion in the manner previously discussed. Finally, while I appreciate Justice VIVIANO's concerns, I believe the requirement that no adequate alternative remedy exist before a monetary-damages remedy can be implied will ensure that recognition of such a remedy for constitutional-tort claims will remain relatively rare.

VIVIANO, J. (*dissenting*). Our Constitution establishes the structure of our government, its powers and

limits, and the rights of the people.[1] After today's decision, the Constitution will also provide individuals with a cause of action for money damages when their constitutional rights are violated if the Legislature has not provided a remedy that a majority of this Court deems "adequate." This represents an expansion of liability for the state and its taxpayers, without any legal grounding. In fashioning this new cause of action for monetary damages, the Court wields legislative power, unjustified by our common-law authority or the text and history of the Constitution itself. I would instead hold that this Court has no power to create these new causes of action and would overrule our caselaw suggesting otherwise.

I. *SMITH*, *BIVENS*, AND THE SEPARATION OF POWERS

I believe that it is a violation of the separation of powers for courts to create causes of action for money damages for constitutional violations. The fashioning of remedies for constitutional wrongs is the work of the legislative branch, not the courts. While we have authority over the common law, it is a gross abuse of that authority to create causes of action for damages in these circumstances.

A. CASELAW

Today, for the first time in Michigan's history, a majority of this Court has held that a plaintiff has properly alleged a claim for money damages to redress a violation of Michigan's 1963 Constitution. In the handful of our cases addressing this general subject, we have recognized the possibility that violations of

[1] Friedman, *A History of American Law* (New York: Simon & Schuster, 2005), p 74.

the Constitution could result in a cause of action for monetary damages, but we have never before found such a cause of action. Our initial decision establishing that such claims exist came in the hopelessly fractured memorandum opinion in *Smith v Dep't of Pub Health*.[2] The Court issued a brief memorandum opinion signed by all six participating justices; that opinion simply listed six propositions that at least four of the participating justices agreed upon, two of which were:

> 5) Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action.
>
> 6) A claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases.[3]

"The *Smith* opinion was silent as to why a majority of the Court had agreed on these tenets."[4] As my partial dissent in *Mays v Governor*[5] explained, the Court's memorandum opinion was followed by four separate opinions written or joined by the participating justices. Justice BOYLE set forth the test that, until today, was applied by the lower courts and this Court.[6] Under her test, courts should analyze the following factors when

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[2] *Smith v Dep't of Pub Health*, 428 Mich 540; 410 NW2d 749 (1987).

[3] *Id*. at 544, 545.

[4] *Mays v Governor*, 506 Mich 157, 188; 954 NW2d 139 (2020) (plurality opinion by BERNSTEIN, J.).

[5] *Id*. at 246 & n 52 (VIVIANO, J., concurring in part and dissenting in part).

[6] See *id*. at 196 (plurality opinion by BERNSTEIN, J.) ("[W]e agree with the Court of Claims and the Court of Appeals that the multifactor test elaborated in Justice BOYLE's separate opinion in *Smith* provides a framework for assessing the damages inquiry.").

determining whether to infer a damages remedy for violations of the Constitution caused by a custom or policy:

> (1) the existence and clarity of the constitutional violation itself, (2) the degree of specificity of the constitutional protection, (3) support for the propriety of a judicially inferred damages remedy in any "text, history, and previous interpretations of the specific provision," (4) "the availability of another remedy," and (5) "various other factors" militating against a judicially inferred damages remedy.[7]

In neither of the two consolidated appeals we addressed in *Smith* did the Court infer a damages claim: in one appeal, we determined that the plaintiff had failed to preserve the argument, and in the other appeal, we remanded for a determination of whether a constitutional violation occurred and, if so, "whether it is one for which a damage remedy is proper."[8]

We have addressed the subject of inferred damages claims in only three other cases. In *Jones v Powell*, we characterized *Smith* as a "narrow remedy."[9] In that case, the plaintiff sued the city of Detroit as well as the Detroit police officers who had stormed her house and searched it because they falsely believed a fleeing suspect had entered the house. We affirmed the Court of Appeals' ruling "that our decision in *Smith* provides no support for inferring a damage remedy for a violation of the Michigan Constitution in an action against a municipality or an individual government employee" because those plaintiffs had adequate alternative rem-

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[7] *Id*. at 247 (VIVIANO, J., concurring in part and dissenting in part), quoting *Smith*, 428 Mich at 648-652 (BOYLE, J., concurring in part and dissenting in part).

[8] *Smith*, 428 Mich at 545.

[9] *Jones v Powell*, 462 Mich 329, 337; 612 NW2d 423 (2000).

edies under federal law.[10] In *Lewis v Michigan*, we declined to infer a cause of action under the Equal Protection Clause of our Constitution, Const 1963, art 1, § 2, because that provision expressly states it will be implemented by the Legislature.[11] Finally, in *Mays*, only a plurality of the Court supported inferring a damages claim under Justice BOYLE's test for due-process claims for violation of the right to bodily integrity.[12]

The Court's caselaw is clearly undergirded by the United States Supreme Court's decision in *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*.[13] In *Bivens*, the Supreme Court concluded that the plaintiff had stated a cause of action for money damages for violation of the Fourth Amendment.[14] But as I have explained, *Bivens* offers a shaky foundation for our caselaw, and the Supreme Court has recognized *Bivens*-style damages claims on only two other occasions.[15] From the outset, and continuing today, "*Bivens* was criticized . . . as posing separation-of-powers concerns" because the creation of damages remedies involves inherently policy-based considerations that fall

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[10] *Id*. at 331, 335, 337.

[11] *Lewis v Michigan*, 464 Mich 781, 782, 787; 629 NW2d 868 (2001).

[12] *Mays*, 506 Mich at 195-200 (plurality opinion by BERNSTEIN, J.).

[13] *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971); see also *Mays*, 506 Mich at 251-263 (VIVIANO, J., concurring in part and dissenting in part) (discussing *Bivens*).

[14] *Bivens*, 403 US at 397.

[15] *Mays*, 506 Mich at 257 (VIVIANO, J., concurring in part and dissenting in part), citing *Davis v Passman*, 442 US 228; 99 S Ct 2264; 60 L Ed 2d 846 (1979), and *Carlson v Green*, 446 US 14; 100 S Ct 1468; 64 L Ed 2d 15 (1980).

within the Legislature's purview, not the judiciary's.[16] As the United States Supreme Court stated just this year, "Now long past 'the heady days in which this Court assumed common-law powers to create causes of action,' . . . we have come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power . . . .' "[17] "At bottom," the Court continued, "creating a cause of action is a legislative endeavor."[18] The Court appears to have limited *Bivens* and the two other cases allowing damages to their exact factual circumstances, and multiple justices have called for

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[16] *Mays*, 506 Mich at 253-255 (VIVIANO, J., concurring in part and dissenting in part) (noting that Congress, rather than the courts, would most often be the branch to establish damages remedies because the "issue ' "involves a host of considerations that must be weighed and appraised" ' " and thus "should be committed to ' "those who write the laws" ' rather than ' "those who interpret them" ' "), quoting *Ziglar v Abbasi*, 582 US 120, 135-136; 137 S Ct 1843; 198 L Ed 2d 290 (2017), and *Carlson*, 446 US at 37 (Rehnquist, J., dissenting) ("[C]ongressional authority here may all too easily be undermined when the judiciary, under the guise of exercising its authority to fashion appropriate relief, creates expansive damages remedies that have not been authorized by Congress."); *Bivens*, 403 US at 411-412 (Burger, C.J., dissenting) ("We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.").

[17] *Egbert v Boule*, 596 US ___, ___; 142 S Ct 1793; ___ L Ed 2d ___ (2022); slip op at 6.

[18] *Id*. at ___; slip op at 6. See also *id*. at ___ (Gorsuch, J., concurring); slip op at 1 ("Our Constitution's separation of powers prohibits federal courts from assuming legislative authority. As the Court today acknowledges, *Bivens* . . . crossed that line by 'impl[ying]' a new set of private rights and liabilities Congress never ordained.") (alteration in original); *id*. at ___ (Gorsuch, J., concurring); slip op at 2 ("To create a new cause of action is to assign new private rights and liabilities—a power that is in every meaningful sense an act of legislation.").

overruling this line of caselaw.[19] The Court will now refuse to create a cause of action for money damages if "there is any reason to think that Congress might be better equipped to create a damages remedy."[20]

B. SEPARATION OF POWERS

I continue to believe that "[t]he critiques of *Bivens* apply equally to *Smith*," which "poses the same separation-of-powers concerns that *Bivens* does."[21] I cannot see how a damages

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[19] As discussed in *Mays*, the United States Supreme Court recently observed:

> We have stated that expansion of *Bivens* is "a 'disfavored' judicial activity," and have gone so far as to observe that if "the Court's three *Bivens* cases [had] been . . . decided today," it is doubtful that we would have reached the same result. And for almost 40 years, we have consistently rebuffed requests to add to the claims allowed under *Bivens*. [*Mays*, 506 Mich at 257 (VIVIANO, J., concurring in part and dissenting in part) (alteration in original), quoting *Hernández v Mesa*, 589 US ___, ___; 140 S Ct 735, 742-743; 206 L Ed 2d 29 (2020).]

See also *Egbert*, 596 US at ___ (opinion of the Court); slip op at 17 (noting same). Justices Clarence Thomas and Neil Gorsuch have called for overruling *Bivens*. See *id*. at ___ (Gorsuch, J., concurring); slip op at 3 ("I would only take the next step and acknowledge explicitly what the Court leaves barely implicit" and overrule *Bivens*.); *Hernández*, 589 US at ___; 140 S Ct at 750 (Thomas, J., concurring) ("I write separately because, in my view, the time has come to consider discarding the *Bivens* doctrine altogether. The foundation for *Bivens*—the practice of creating implied causes of action in the statutory context—has already been abandoned. And the Court has consistently refused to extend the *Bivens* doctrine for nearly 40 years, even going so far as to suggest that *Bivens* and its progeny were wrongly decided.").

[20] *Egbert*, 596 US at ___ (opinion of the Court); slip op at 7.

[21] *Mays*, 506 Mich at 260 (VIVIANO, J., concurring in part and dissenting in part).

> remedy is required when the text of neither the United States nor the Michigan Constitution mentions it. Rather, both Constitutions vest their respective legislative branches with the legislative power. This power encompasses the power to create causes of action. While there may be a narrow category of cases for which there is no state tort law cause of action and for which damages appear to be the only effective remedy, I am skeptical that these practical concerns justify allowing the courts to exercise the legislative power by implying causes of action when the Legislature has not seen fit to create a statutory cause of action.[22]

The constitutional separation of powers protects against the threat posed by unrestrained judicial lawmaking. "Lawmaking, the framers of the federal Constitution believed, should be difficult because it poses dangers to liberty; thus, federal statutes require passage by two legislative bodies and approval by the executive to become law."[23] "Our own Constitution, of course, reflects these same requirements."[24] Indeed, our Constitution contains express protection of the separation of powers not contained even in the federal Constitution.[25] "[T]hese hedges against hasty lawmaking and the separation of powers . . . were . . . meant to 'respect[] the people's sovereign choice to vest the legislative power' in one branch alone and to 'safe-

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[22] *Id*. at 259 (citations omitted).

[23] *In re Certified Questions from United States District Court, Western District of Mich*, 506 Mich 332, 415; 958 NW2d 1 (2020) (VIVIANO, J., concurring in part and dissenting in part), citing *Gundy v United States*, 588 US ___, ___; 139 S Ct 2116, 2131; 204 L Ed 2d 522 (2019) (Gorsuch, J., dissenting).

[24] *In re Certified Question*, 506 Mich at 415 (VIVIANO, J., concurring in part and dissenting in part), citing Const 1963, art 4, §§ 24 and 33.

[25] See 1963 Const., art 3, § 2 ("No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.").

guard[] a structure designed to protect their liberties, minority rights, fair notice, and the rule of law.' "[26] These protections are obliterated when the judiciary takes it upon itself to craft monetary damages for constitutional violations. The creation of that liability, dependent upon policy considerations that the judiciary is institutionally ill-suited to address, is a task that falls within the legislative sphere.[27]

Some have suggested, however, that state courts, unlike federal courts, are suited to the task of creating causes of action under our common-law powers, which federal courts lack.[28] In declining to extend *Bivens*, the

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[26] *In re Certified Question*, 506 Mich at 416 (VIVIANO, J., concurring in part and dissenting in part) (alteration in original), quoting *Gundy*, 588 US at ___; 139 S Ct at 2135 (Gorsuch, J., dissenting).

[27] See, e.g., *Egbert*, 596 US at ___ (opinion of the Court); slip op at 6 (noting the " 'range of policy considerations' " required, including economic concerns, costs, and effects on governmental operations) (citation omitted). The Legislature is better positioned to address these issues, including the argument that damages remedies for constitutional violations have little deterrent effect (and might even have a perverse incentive effect) on governmental actors because those actors do not internalize costs the same way that private actors do. See Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U Chi L Rev 345, 345-348, 367-373, 402-406 (2000).

[28] See Bowers, *The Implied Cause of Action for Damages Under the Idaho Constitution*, 56 Idaho L Rev 339, 350 (2020) ("The most important distinction between state and federal courts with regard to *Bivens* actions . . . is the differing scope of jurisdiction in state and federal courts. Judicial implication of damages remedies may pose knotty questions in Article III courts of limited jurisdiction, but it is widely accepted that 'state courts remain common-law generalists with equitable and inherent authority to create law, shape policy, and devise remedies.' ") (citations omitted).

Although there is some ambiguity on this point in the majority opinion, the majority does not appear to rely on this rationale, instead purporting to find the right to a damages remedy as inherent in the Constitution itself. See note 39 of this opinion (discussing the majority's justifications for its holding). Nonetheless, because no such right exists

Supreme Court has noted that it does not have common-law authority.[29] This is taken by some as a signal that a common-law court, such as ours, has a free hand to fashion tort-based causes of action for monetary damages. The cause of action would be separate from the constitutional provision in the sense that the tort would not arise from or be required by the state Constitution itself. It would, instead, be a pure act of judicial lawmaking. One scholar, concluding that *Bivens* could not be justified as an exercise of constitutional interpretation, thought that decision was an exercise of "preemptive lawmaking" in the mold of the common law.[30]

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in the Constitution (as explained below), the majority's action must ultimately rest on the judicial creation of a freestanding tort. It is therefore necessary to examine our power in this regard. Numerous common-law courts have considered their power to create torts for constitutional violations independent from any such cause of action arising from the constitutional text. See, e.g., *Spackman ex rel Spackman v Bd of Ed of Box Elder Co Sch Dist*, 16 P3d 533, 537-538; 2000 UT 87 (2000) (explaining that "[i]n the absence of applicable constitutional or statutory authority" for a right to damages for constitutional violations, "Utah courts employ the common law," and "a Utah court's ability to award damages for violation of a self-executing constitutional provision rests on the common law"); cf. *Cantrell v Morris*, 849 NE2d 488, 505-507 (Ind, 2006) (recognizing that a damage remedy might "arise[] under the state Constitution itself or under state common law tort doctrines" but finding "little practical significance" between the two modes and holding that any damages remedy would be limited by statutory immunities for governmental actors); *Beaumont v Bouillion*, 896 SW2d 143, 150 (Tex, 1995) (rejecting the argument that "we may look to the Constitution to define the element of duty for a Texas common law cause of action").

[29] See *Hernández*, 589 US at ___; 140 S Ct at 742 ("With the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress . . . .").

[30] See Merrill, *The Common Law Powers of Federal Courts*, 52 Univ Chi L Rev 1, 51-52 (1985) ("By definition, the remedy in question is not authorized by the text itself. . . . Thus, as a general matter, it is unlikely

Putting it in those stark terms underscores the activism inherent in the enterprise. And this view fundamentally misunderstands our common-law powers. As explained more fully later in this opinion, we certainly do not claim that power when it comes to statutes, and there is no history supporting the creation of such torts for violations of the Constitution. It goes well beyond our role as the principal steward of the common law:

> Acting in [our capacity as the principal steward of Michigan's common law], we have on occasion allowed for the development of the common law as circumstances and considerations of public policy have required. See, e.g., *Berger* [*v Weber*, 411 Mich 1; 303 NW2d 424 (1981)]. But as Justice YOUNG has recently observed, our common-law jurisprudence has been guided by a number of prudential principles. See Young, *A judicial traditionalist confronts the common law*, 8 Texas Rev L & Pol 299, 305-310 (2004). Among them has been our attempt to "avoid capricious departures from bedrock legal rules as such tectonic shifts might produce unforeseen and undesirable consequences," *id*. at 307[.][31]

We went on to explain that the judiciary has an "obligation to exercise caution and to defer to the Legislature when called upon to make a new and potentially societally dislocating change to the com-

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that an examination of the structure and history of the enactment will yield evidence of a specific intent to create such a remedy. . . . But for the most part, the techniques of conventional interpretation will not authorize judicial creation of remedies beyond those expressly provided by Congress. At this point, however, the doctrine of preemptive lawmaking comes into play. Although at first blush it may seem odd to apply the concept of preemptive lawmaking in order to *create* additional remedies, the underlying rationale is essentially the same in this context as it is when a court finds it necessary to preempt or supplement state substantive rules in order to preserve federal statutory policies.") (citations and paragraph structure omitted).

[31] *Henry v Dow Chem Co*, 473 Mich 63, 83; 701 NW2d 684 (2005).

mon law" and that separation-of-powers concerns support this cautious approach.[32] Indeed, the very concept of the common law defies innovation given that it is defined as "custom."[33]

To the extent the majority's decision today is grounded on the Court's common-law powers, it dangerously aggrandizes those powers. The decision represents a massive and amorphous expansion of constitutional tort liability. Under the majority's decision, unless the Constitution provides otherwise, or the Legislature has established a remedy that *we* deem adequate, damages will lie for a constitutional violation. How will we know when the Legislature's alternative remedy is "adequate"? When it is "at least as protective of a particular constitutional right as a judicially recognized cause of action," and it "must include any remedy necessary to address the harm caused." *Ante* at 705. In other words, the Legislature's remedy will be adequate if it is that which we would have come up with ourselves. This leaves no guidance whatsoever.[34]

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[32] *Id*. at 89.

[33] Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (Chicago: University of Chicago Press, 1969), pp 73-74 ("Indeed, all the virtues of tradition seemed to be inherent in the very definition of the English common law because, after all, the common law was rooted in custom. The definition of the common law as custom, at the same time that it allowed Blackstone to attribute to the law the virtues of those early times in which English law had originated, permitted him to find in the law the accumulated wisdom of all the ages since. And who would dare to set his private stock of wisdom against the accrued capital of wisdom of all the past? . . . 'Custom, which is the life of the common law,' derived much of its validity from the presumption in favour of the products of experience.") (citation omitted).

[34] Justice WELCH characterizes the majority's adequate-alternative-remedy requirement as limited, suggesting that it will not require the

More importantly, what is the scope of the Court's holding—will the violation of any provision of the Constitution result in damages, or only the violation of certain provisions? Although the opinion appears to focus on the provisions in the Declaration of Rights, the opinion also presents its holding in sweeping terms, stating that "when the Constitution itself has not delegated to the other branches the authority to weigh those policy concerns, or when the other branches have not stepped in to afford an adequate alternative remedy, our inherent judicial authority requires us to afford a remedy for *all* constitutional violations . . . ." *Ante* at 707.

While only three justices appear to leave open the possibility that implied causes of action for damages could be found outside the Constitution's Declaration of Rights, it is worth explaining why such a view cannot (and should not) garner majority support. Our Constitution, unlike the federal Constitution, contains a host of more technical details that have now become potential tripwires for money-damages claims, including many that would seem to bear little relation to individual rights. Cities and villages, for example, cannot acquire certain public utilities unless the transaction is first approved by the voters.[35] Individuals and entities that operate public utilities cannot use various public places to run wire and other utility facilities without first obtaining a franchise from the pertinent local government.[36] Our Constitution establishes a

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Legislature to provide for monetary relief "in every circumstance[.]" Whether this proves true remains to be seen; the majority opinion offers no such assurances.

[35] Const 1963, art 7, § 25.

[36] Const 1963, art 7, § 29. The majority opinion claims that these examples of provisions on municipalities are irrelevant because the

"game and fish protection trust fund" and establishes how it shall be financed and managed.[37] Are violations of these provisions grounds for money damages? And if so, to whom? These ambiguities are present in more central provisions as well. For example, our Constitution requires that the Independent Citizens Redistricting Commission adopt redistricting plans with districts of equal population.[38] How would money damages remedy a violation of this provision?

The Court's decision today portends a staggering extension of liability that is alien to the incremental and customs-based nature of the common law. The decision cannot be justified as a proper use of common-law authority. Accordingly, I believe that the creation of money-damages claims for constitutional violations is a legislative function. It is therefore a violation of the separation of powers for the Court to step in and create such claims.

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opinion is limited to the potential liability of the *state*, not municipalities. But the opinion fails to offer any principled reason for interpreting other provisions as allowing damages remedies, but not these. That is, if the damages remedy is truly just an interpretation of the Constitution, the opinion cites no language or principle that would limit the remedy to claims against the state. To the extent the opinion rests upon the "rights"-giving provisions of the Constitution, it never expressly limits its reasoning to those provisions. Rather, three of the four justices in the majority decline to decide whether the holding applies outside of violations of the Declaration of Rights or other possible rights in the Constitution. Even if the holding is eventually limited to violations of constitutional "rights," those three justices never explain how a court is to determine whether a provision grants a right for purposes of the majority's holding. For example, does a resident have a "right" to vote on whether a city can acquire public utilities? See Const 1963, art 7, § 25. Their attempt to clarify and limit their holding by pure ipse dixit is bound to create confusion.

[37] Const 1963, art 9, § 41.

[38] Const 1963, art 4, § 6(13)(a).

II. CONSTITUTIONAL TORTS AS CONSTITUTIONAL INTERPRETATION

Perhaps because of the stunning sweep of today's holding, and concerns with the separation of powers, the majority purports to ground its decision in the Constitution itself, suggesting that the remedy crafted today is constitutionally required.[39] A cause of action established by the text would arguably avoid the separation-of-powers concerns noted above. But the majority never bothers with any textual analysis and only gestures vaguely at historical practices. Neither text nor history suggest any hidden causes of action for

[39] I read the majority opinion as attempting to ground its holding in the Constitution itself rather than the Court's authority over the common law. Somewhat confusingly, however, the majority at times suggests that its holding rests on inherent judicial power, implying that the damages remedies created today are creatures of the common law (or some other ambiguous source) rather than requirements arising from the constitutional text itself. Compare *ante* at 681 ("Inherent in the judiciary's power is the ability to recognize remedies, including monetary damages, to compensate those aggrieved by the state . . . for violating the Michigan Constitution . . . ."), *ante* at 707 ("But when the Constitution itself has not delegated to the other branches the authority to weigh . . . policy concerns, or when the other branches have not stepped in to afford an adequate alternative remedy, our inherent judicial authority requires us to afford a remedy for *all* constitutional violations . . . ."), and *ante* at 687 ("[T]his Court retains the authority—indeed the duty—to vindicate the rights guaranteed by our Constitution."), with *ante* at 698 ("Our holding today is grounded in the constitutional rights relied on by plaintiffs as well as our authority and duty to say what the law is."), and *ante* at 701 ("What plaintiffs ask of us is not to make new law under the Constitution but, rather, to enforce the Constitution itself."). One would hope that with such a momentous holding, the majority would take greater pains to locate and specify the grounds for its holding rather than serving up vague platitudes. In any case, for the reasons addressed in this dissent, the majority errs no matter which basis its opinion ultimately employs.

constitutional violations generally, nor do they reveal a cause of action for the provision at issue here, the Due Process Clause.

A. INTERPRETING THE CONSTITUTIONAL TEXT

Some courts and scholars have asserted that looking to the Constitution itself is the proper approach to constitutional torts. The Supreme Court has acknowledged that *Bivens* simply extended the then-regnant interpretive practice of inferring causes of action from statutes.[40] As another example, the Oregon Supreme Court looked for any "textual or historical basis" in that state's bill of rights "for implying a right to damages for constitutional violations," finding no such basis.[41] Our decision in *Lewis* was likewise grounded in the text: because the constitutional provision at issue

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[40] *Hernández*, 589 US at ___; 140 S Ct at 741; see also *Katzberg v Regents of Univ of California*, 29 Cal 4th 300, 314; 58 P3d 339 (2002) ("[M]ost California decisions issued during the past two decades . . . have viewed the determinative question as whether an action for damages exists in (or can be inferred from) the constitutional provision at issue. Accordingly, most of the recent California decisions expressly focus their analysis upon whether the provision at issue was *intended*, either expressly or impliedly, to afford relief in damages."). Some who disagree that *Bivens* can be justified by constitutional interpretation have nonetheless noted that *Bivens* purported to ground its decision as an interpretation of the Constitution. Monaghan, *Forward: Constitutional Common Law*, 89 Harv L Rev 1, 24 (1975) ("The majority opinion [in *Bivens*] apparently derives the right to damages from the fourth amendment itself. But, unless the Court views a damage action as an indispensable remedial dimension of the underlying guarantee, it is not constitutional interpretation, but common law.") (citations omitted).

[41] *Hunter v Eugene*, 309 Or 298, 303; 787 P2d 881 (1990); see also *Bouillion*, 896 SW2d at 148-149 (examining the text and history of the provisions in deciding that there was no cause of action for damages when the state constitutional rights of speech and assembly were violated).

entrusted its implementation to the Legislature, the Court would not infer a damages remedy.[42] The Restatement likewise seems to locate the activity of implying damages in the interpretive sphere.[43]

But to infer causes of action for money damages from the constitutional text requires a contortion of interpretive principles. This contortion was commonplace when *Bivens* was decided, and the Court extended the practice to the constitutional sphere. At

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[42] *Lewis*, 464 Mich at 786.

[43] See Restatement Torts, 2d, § 874A, p 301 ("When a legislative provision [which is defined to include the Constitution] protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action."). Although the Restatement suggests that the action is a tort, the comments indicate that the process of inferring a civil remedy is tied to interpretation. The Restatement centers the analysis on discovering legislative intent, even though the effectuation of that intent might be a court-created tort cause of action. Restatement, § 874A, comments *c* and *d*, p 302 ("If the court determines that the legislative body did actually intend for civil liability to be imposed or not imposed, whether the intent is explicit or implicit, then the court should treat the situation as if it had expressly so provided. . . . If this was the intent of the legislative body, a study of the text of the provision, including the title and preamble, if any, will often disclose the fact. Tracing the legislative history may sometimes prove helpful. Some courts give careful attention to this source, while others decline to allow it to be considered at all. . . . If the court has reached the conclusion that the legislative body did actually have the intent either to establish a civil remedy to protect and enforce the right or to limit the relief to that expressly provided for in the legislative provision, the issue is settled, and the court is warranted in declaring that it is complying with the legislative intent.") (paragraph structure omitted); but see *Katzberg*, 29 Cal 4th at 325 (suggesting that the Restatement calls for the "exercise [of] . . . authority over the common law" to, "in appropriate circumstances, recognize a tort action for damages to remedy a constitutional violation").

that time, the United States Supreme Court generally read private causes of action into statutes.[44] The understanding was that this approach effectuated the legislative purpose behind a statute.[45] But the Court has "abandoned" that view,[46] and the touchstone of the present test for implied causes of action has been whether the text and structure of a statute displayed the legislature's intent to create such a cause of action.[47] Therefore, a private cause of action should only be implied from the fair import of the statute's text.[48] A judicially created private remedy in a statute that does not provide for such a remedy "would be a major addition to the statute," akin to an amendment.[49] The

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[44] *Mays*, 506 Mich at 256 (VIVIANO, J., concurring in part and dissenting in part) (" '*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition.' "), quoting *Correctional Servs Corp v Malesko*, 534 US 61, 75; 122 S Ct 515; 151 L Ed 2d 456 (2001) (Scalia, J., concurring).

[45] *Alexander v Sandoval*, 532 US 275, 287; 121 S Ct 1511; 149 L Ed 2d 517 (2001), discussing *J I Case Co v Borak*, 377 US 426, 433; 84 S Ct 1555; 12 L Ed 2d 423 (1964); see also *Cort v Ash*, 422 US 66, 78; 95 S Ct 2080; 45 L Ed 2d (1975) (positing various factors in deciding whether to infer a cause of action, including whether the legislation sought to benefit or protect a discrete class and whether the private remedy furthers the statute's purposes).

[46] *Alexander*, 532 US at 287.

[47] See *id*. at 288 ("We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI.").

[48] Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), pp 316-317.

[49] *Id*.

present approach has been labeled the "presumption against implied right of action" canon of interpretation.[50]

Our caselaw charts a similar course.[51] At one time, we followed the Restatement view and inferred causes of action to further legislative purposes.[52] But we have since adopted the view that implied causes of action must arise, if at all, from the statutory text itself and not from vague perceptions of legislative objectives.[53] In a 2005 opinion, we noted that the United States Supreme Court had "become increasingly reluctant to imply a private cause of action" and had instead focused on the "central inquiry [of] whether Congress intended to create, either expressly or by implication, a private cause of action."[54] And, in fact, we said that the United States Supreme Court had apparently moved to "a completely textual analysis in determining whether a private remedy exists under a particular

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[50] *Id*. at 313. See also *Callahan v Fed Bureau of Prisons*, 965 F3d 520, 523 (CA 6, 2020) ("What started out as a presumption in favor of implied rights of action has become a firm presumption against them.").

[51] See generally *Mays*, 506 Mich at 260 n 89 (VIVIANO, J., concurring in part and dissenting in part) (discussing the caselaw).

[52] See *Gardner v Wood*, 429 Mich 290, 301; 414 NW2d 706 (1987) ("Where a penal statute is silent concerning whether a violation of its provisions should give rise to a civil remedy, courts will infer a civil remedy for the violation 'to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind.' "), quoting Prosser & Keeton, Torts (5th ed), § 36, p 222.

[53] See *Myers v Portage*, 304 Mich App 637, 643 n 12; 848 NW2d 200 (2014) (discussing this Court's changing caselaw).

[54] *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 497, 498; 697 NW2d 871 (2005) (quotation marks and citation omitted).

statute."[55] We likewise indicated that the criterion for implied causes of action was the statutory text.[56]

Nothing in the text of our state Constitution generally allows damages remedies for constitutional violations. Like the federal Constitution, our Constitution does not generally refer to remedies.[57] This distinguishes our Constitution from those that contain a remedies clause that expressly entitles individuals to a remedy for violations of those constitutions.[58] It is noteworthy that even with such a constitutional provision, at least one state has rejected inferring causes of action for damages.[59] Nothing in the text of the

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[55] *Id*. at 499.

[56] *Id*. at 500 (interpreting a federal statute); see also *Lash v Traverse City*, 479 Mich 180, 193; 735 NW2d 628 (2007) (noting that in a case involving the government as a defendant, we would not recognize a cause of action without express provision by the Legislature).

[57] See Fallon, Jr. & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv L Rev 1731, 1779 (1991) ("The Constitution generally makes no reference to remedies."); cf. Hill, *Constitutional Remedies*, 69 Colum L Rev 1109, 1132 (1969) ("It may fairly be assumed that the founding fathers did not contemplate a new species of constitutional tort."). Of course, there are some exceptions. For example, "[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." Const 1963, art 10, § 2; see also US Const, Am V ("[N]or shall private property be taken for public use, without just compensation.").

[58] See, e.g., Minn Const, art 1, § 8 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws."); see also Phillips, *The Constitutional Right to a Remedy*, 78 NYU L Rev 1309, 1310 (2003) (noting that the remedies clause "expressly or implicitly appears in forty state constitutions").

[59] See Tex Const, art 1, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation,

provision at issue here, the Due Process Clause, supports a damages remedy: "No person shall . . . be deprived of life, liberty or property, without due process of law."[60]

Plaintiffs and the majority try to invoke the 1961 constitutional convention records for support, but they point to nothing very useful. The closest they come is that the convention considered—but did not add—the line that "[t]his provision [i.e., the Declaration of Rights] shall not be construed to enable the denial to any citizen of any direct and immediate legal remedy in the courts of this state."[61] This is a far cry from the proposition that the *drafters intended* for damages remedies to be available, if such an argument from unstated intentions were even relevant. This language was eventually reflected in the section on the civil rights commission: "Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state."[62] Thus, to the extent the language even appears in the Constitution, it involves only a specific section not relevant here. If anything, to the extent that the language was considered but not placed in the Declaration of Rights, that would seem to weigh in favor of concluding that the convention rejected the notion that the Declaration would keep undiminished the ability of individuals to access the

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shall have remedy by due course of law."); *Bouillion*, 896 SW2d at 147 (declining to find an implied private right of action for damages under various provisions of the state constitution).

[60] Const 1963, art 1, § 17.

[61] 2 Official Record, Constitutional Convention 1961, p 1946.

[62] Const 1963, art 5, § 29.

courts to obtain monetary damages for violations of their constitutional rights.[63]

Finally, it is not at all clear that the language is referring to money damages for constitutional violations. *Bivens* had not yet been decided at the time of the convention, and we had no history of providing damages for constitutional violations at that time. There is no reason to believe that the convention delegates and the ratifying public had the clairvoyance to anticipate the coming caselaw creating those damages remedies. And even if they had, they left no marks on the Constitution itself approving such remedies.[64]

The majority's textual analysis instead amounts to the proposition that the very nature of a right implies a remedy. This proposition does have some intuitive

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[63] Cf. *In re MCI Telecom Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999) ("Where the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected.").

[64] Another textual argument some have made to support damages remedies is that such remedies flow from the fact that a constitutional provision is self-executing. See *Brown v New York*, 89 NY2d 172, 186; 674 NE2d 1129 (1996) ("A civil damage remedy cannot be implied for a violation of the State constitutional provision unless the provision is self-executing . . . ."); Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S Cal L Rev 289, 292 (1995) (arguing that *Bivens* could be justified by the self-executing nature of constitutional provisions). A self-executing provision is one that " 'supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced,' " *Detroit v Oakland Circuit Judge*, 237 Mich 446, 451-452; 212 NW 207 (1927) (citation omitted), such that "it takes effect immediately, without the necessity for supplementary or enabling legislation," *Brown*, 89 NY2d at 186. But as the Vermont Supreme Court has explained, "The fact that the constitutional provision is self-executing means only that the rights contained therein do not need further legislative action to become operative. It does not necessarily mean that monetary damages is the proper remedy for a violation." *Shields v Gerhart*, 163 Vt 219, 227-228; 658 A2d 924 (1995).

pull and a distinguished provenance. In *Marbury v Madison*, Chief Justice Marshall proclaimed that the "government of law, and not of men," will "cease . . . if the laws furnish no remedy for the violation of a vested legal right."[65] But it is equally clear that a government of laws requires that those remedies be established and enforced by the proper legal process. That is why, in *Marbury*, despite finding that William Marbury's rights had been violated, the Court left him without a remedy: Congress had not properly granted the Court jurisdiction to hear the case in the first place, and thus no remedy could be crafted or enforced for the violation of Marbury's rights.[66]

The United States Supreme Court has elsewhere recognized that not all areas of law provide for damages remedies for rights violations: "Our implied-

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[65] *Marbury v Madison*, 5 US (1 Cranch) 137, 163; 2 L Ed 60 (1803).

[66] *Id*. at 180; see also *Nixon v Fitzgerald*, 457 US 731, 755 n 37; 102 S Ct 2690; 73 L Ed 2d 349 (1982) ("Yet *Marbury* does not establish that the individual's protection must come in the form of a particular remedy. Marbury, it should be remembered, *lost* his case in the Supreme Court. The Court turned him away with the suggestion that he should have gone elsewhere with his claim."); *Colegrove v Green*, 328 US 549, 556; 66 S Ct 1198; 90 L Ed 1432 (1946) (opinion by Frankfurter, J.) ("The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial actions."); Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 Calif L Rev 933, 970-971 (2019) ("Critics routinely pillory the Supreme Court's retreat from *Bivens* . . . as [a] betrayal[] of *Marbury*'s promise of an individually effective remedy for every violation of an individual right. But *Marbury*, as properly interpreted in the context of our tradition, made no such promise. The Supreme Court awarded no remedy to William Marbury. It is not clear that any other court would have done so either.") (citations omitted).

rights-of-action cases identify another area of the law in which there is not a damages remedy for every legal wrong."[67]

We, too, have explained that not all rights are vindicated in court:

> But it is said that this conclusion will leave parties who have rights, in many cases, without remedy. Practically, there are a great many such cases, but theoretically, there are none at all. All wrongs, certainly, are not redressed by the judicial department. A party may be deprived of a right by a wrong verdict, or an erroneous ruling of a judge, and though the error may be manifest to all others than those who are to decide upon his rights, he will be without redress. A person lawfully chosen to the legislature may have his seat given by the house to another, and be thus wronged without remedy. A just claim against the State may be rejected by the board of auditors, and neither the governor nor the courts can give relief. A convicted person may conclusively demonstrate his innocence to the governor, and still be denied a pardon. In which one of these cases could the denial of redress by the proper tribunal constitute any ground for interference by any other authority? The law must leave the final decision upon every claim and every controversy somewhere, and when that decision has been made, it must be accepted as correct.[68]

This also reflects the limited scope of the common-law principle *ubi jus, ibi remedium*—" 'the principle that where one's right is invaded or destroyed, the law gives

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[67] *Nixon*, 457 US at 754 n 37; see also *Webster v Doe*, 486 US 592, 613; 108 S Ct 2047; 100 L Ed 2d 632 (1988) (Scalia, J., dissenting) ("[I]t is simply untenable that there must be a judicial remedy for every constitutional violation."); *New Law*, 104 Harv L Rev at 1786 ("But the existence of constitutional rights without individually effective remedies is a fact of our legal tradition, with which any theory having descriptive pretensions must come to terms.").

[68] *People ex rel Sutherland v Governor*, 29 Mich 320, 330-331 (1874).

a remedy to protect it or damages for its loss.' "[69] One scholar has observed that, at the time of the country's founding and in the early nineteenth century (when Michigan was formed), this principle was more of a "platitude" than "black letter legal doctrine" because "a plaintiff had a cause of action at law or in equity only if judicial relief was available through a particular form of proceeding."[70] Writs available to plaintiffs were not invented to meet each new wrong.[71]

And historically—at least until the twentieth century—individuals generally looked to the legislative branch for protection and fulfillment of rights.[72] One court, for example, noted that the Second Amendment,

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[69] *People v Kabongo*, 507 Mich 78, 135; 968 NW2d 264 (2021) (opinion by ZAHRA, J.), quoting *Oxford Dictionary of Law* (8th ed).

[70] Bellia, Jr., *Article III and the Cause of Action*, 89 Iowa L Rev 777, 784 (2004).

[71] *Id*. at 786 ("Notwithstanding the oft-recited platitude *ubi jus, ibi remedium*, if no form of action afforded judicial relief, there was no remedy regardless of whether it could be said that there was a right.").

[72] See Dinan, *Keeping the People's Liberties: Legislators, Citizens, and Judges as Guardians of Rights* (University Press of Kansas, 1998), p xi (noting, in a study of Michigan and a handful of other states, that "[d]uring a republican regime, which had its origins in the initial state constitutions and predominated throughout the nineteenth century, rights were secured primarily through representative institutions and the political process, particularly through the passage of legislative statutes" and that "[n]ot until the middle of the twentieth century can we identify the emergence of a judicialist regime"); Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill and London: The University of North Carolina Press, 1998), pp 301-302 ("Reform-minded Americans were thus committed to equity as a basis of law, but by resting their plans on legislative enactment they at the same time denied the judicial discretion that made equitable interpretations necessary and possible. . . . Not the courts but only the legislatures could redress the grievances of the people, said a New Jerseyite in 1781, 'because they are the representatives of the people.' . . . Legislatures

> like similar provisions in our own Declaration of Rights, declares a great general right, leaving it for other more specific constitutional provision or to legislation to provide for the preservation and practical security of such right, and for influencing and governing the judgment and conscience of all legislators and magistrates, who are thus required to recognize and respect such rights.[73]

Consequently, I find nothing in the text of the Constitution that would remotely justify the creation of a cause of action for money damages in these circumstances.

B. HISTORICAL PRACTICE

The majority also suggests that there is a historical practice of inferring causes of action in the Constitution and allowing damages remedies.[74] Some courts and scholars have pointed to 19th century caselaw and, even further back, to English common-law cases as support.[75] But these cases were run-of-the-mill tort

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should be the sole source of law."); but see Wood, *Power and Liberty: Constitutionalism in the American Revolution* (New York: Oxford University Press, 2021), ch 6 (noting the fear of judicial power but explaining that it began to be seen as a check upon the legislature in constitutional matters).

[73] *Opinion of Justices*, 80 Mass 614, 620 (1859).

[74] The text-and-history approach is increasingly used as the appropriate method for constitutional interpretation. See, e.g., *Dobbs v Jackson Women's Health Org*, 597 US 215, 234; 142 S Ct 2228; 213 L Ed 2d 545 (2022) (beginning with the constitutional text before turning to history and tradition); *New York State Rifle & Pistol Ass'n, Inc v Bruen*, 597 US 1, 19; 142 S Ct 2111; 213 L Ed 2d 387 (2022) (adopting "a test rooted in the Second Amendment's text, as informed by history").

[75] See generally *Widgeon v Eastern Shore Hosp Ctr*, 300 Md 520; 479 A2d 921 (1984) (discussing the early English cases); Woolhandler & Collins, *Was* Bivens *Necessary?*, 96 Notre Dame L Rev 1893, 1920 (2021) ("*Bivens* was supported by the Framers' expectations that trespass

actions in which the constitutional arguments were incidental to the cause of action and entitlement to damages. These cases were common-law trespass actions in which the governmental defendant attempted to defend his or her actions by claiming that those actions were legally justified. The constitutional issue would arise to "negate a defendant's plea of legal justification."[76] In many cases, the governmental official would claim immunity for his or her action under federal law—the Constitution—but would lose that immunity if the official's action was unconstitutional.[77]

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actions against officials would be a means of implementing the Constitution."); Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 Notre Dame L Rev 1869, 1871 (2021) (noting the " 'long history' of challenging completed unconstitutional conduct by federal officers, including the robust regime of judge-made damages actions that persisted well into the twentieth century in both state and federal courts") (citation and emphasis omitted); Vladeck, *The Disingenuous Demise and Death of* Bivens, 2019-2020 Cato Sup Ct Rev 263, 267-268 (2020) (noting the early United States Supreme Court caselaw); Baker, *The Minnesota Constitution as a Sword: The Evolving Private Cause of Action*, 20 Wm Mitchell L Rev 313, 322 (1994) ("Other states have grounded the right to sue for constitutional violations in the common law of England.").

[76] *Was* Bivens *Necessary?*, 96 Notre Dame L Rev at 1897; see also Amar, *Of Sovereignty and Federalism*, 96 Yale L J 1425, 1506-1507 (1987) ("The structure of these pre-*Bivens* cases was quite simple: The ultimate issue before the court concerned the federal Constitution, but standing was conferred by the vertically-pendent state law cause of action. Plaintiff would sue defendant federal officer in trespass; defendant would claim federal empowerment that trumped the state law of trespass under the principles of the supremacy clause; and plaintiff, by way of reply, would play an even higher supremacy clause trump: Any federal empowerment was ultra vires and void because of Fourth Amendment limitations on federal power itself. If, but only if, plaintiff could in fact prove that the Fourth Amendment had been violated, defendant's shield of federal power would dissolve, and he would stand as a naked tortfeasor.").

[77] See *Butz v Economou*, 438 US 478, 490-491; 98 S Ct 2894; 57 L Ed 2d 895 (1978) ("As these cases demonstrate, a federal official was

Plaintiffs point to such a case from our Court, *Bishop v Vandercook*, as evidence that we have long recognized constitutional torts.[78] But *Bishop* was a traditional common-law action. In *Bishop*, the Governor had issued an order sending state troops to help crack down on bootleggers who were "lawless and

protected for action tortious under state law only if his acts were authorized by controlling federal law. 'To make out his defence he must show that his authority was sufficient in law to protect him.' . . . Since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense."); Kian, *The Path of the Constitution: The Original System of Remedies, How it Changed, and How the Court Responded*, 87 NYU L Rev 132, 135 (2012) ("Those who suffered a violation of their rights were able to bring suit, in common law or equity, against the responsible agent. . . . [I]f that agent did something unconstitutional, he would have no legally cognizable defense for violating the plaintiff's rights."); *New Law*, 104 Harv L Rev at 1781 ("Sovereign immunity and related doctrines generally barred direct suits against the government. In many cases, a plaintiff denied relief from the sovereign could seek alternative redress from the official through whom the government had acted; a tradition arose under which an official who pleaded a defense of official authority would be 'stripped' of that shield when his conduct violated the Constitution, and hence held liable like a private tortfeasor."); *Constitutional Remedies*, 69 Colum L Rev at 1122-1123 ("In mitigation of the rigors of the doctrine of sovereign immunity, the view developed that the governmental officer acting under a void statute, or outside the bounds of a valid statute, may be regarded as stripped of his official character, and answerable, like any private citizen, for conduct which, when attributable to a private citizen, would be an offense against person or property.").

Some of the cases commonly cited by proponents of *Bivens*, such as *Little v Barreme*, 6 US (2 Cranch) 170; 2 L Ed 243 (1804), were trespass actions in which the defense did not implicate any constitutional issues. See generally *The Path of the Constitution*, 87 NYU L Rev at 147 (noting that *Little* did not involve constitutional rights but simply "affirmed a dynamic" that the "government could not exercise power not delegated to it"). It is difficult to see how such a case could stand for the proposition that the founders expected that damages remedies would be available through tort actions when a federal officer violated the Constitution.

[78] *Bishop v Vandercook*, 228 Mich 299; 200 NW 278 (1924).

viciously inclined drivers of automobiles[.]"[79] A few months later, with troops in place, the Governor authorized them to place a log across Dixie Highway to stop travelers.[80] He required that warnings be given and precautions be taken to allow " 'good citizens' " to get through.[81] The plaintiff was driving down the road at 50 to 60 mph. The troopers used flashlights to signal for him to stop. When he did not, they "fired a signal." Other troopers placed the log across the highway and then used flashlights and red lanterns to signal the driver to stop, but without success. The plaintiff crashed into the log, and liquor was subsequently found in his car.[82]

The plaintiff brought a *tort* action to recover damages for harm to the car and personal injuries and won a money verdict.[83] The claim was that the defendants' actions "constituted a purposeful and wilful trespass."[84] Thus, from the start, *Bishop* is not the same as *Smith*: *Bishop* was never an action under the Constitution. In fact, the Constitution barely factors into the case aside from the stray line of dicta that plaintiffs have seized upon. Instead, the issue was whether the defendants could claim immunity because they were acting under direction of the Governor.[85] Specifically, they cited a statute that allowed troops to be dispatched to aid civil authorities—the command officer was to "be subject to the general direction of the sheriff

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[79] *Id.* at 303 (quotation marks omitted).

[80] *Id.*

[81] *Id.*

[82] *Id.* at 304.

[83] *Id.* at 305.

[84] *Id.*

[85] *Id.*

or other civil officer who shall require his aid."[86] While serving, "troops shall always be amenable to the civil authorities as represented by the governor, and shall be privileged from prosecution by the civil authorities, except by direct order of the governor, for any acts or offenses alleged to have been committed while on such service."[87]

The sum of the Court's holding was the rejection of the defendants' "contention that the State troops in time of peace, and in actual service in aid of civil authority, are privileged from civil accountability for wrongs committed, except by direct order of the governor."[88] We read the statute as simply "stay[ing] interference by the civil authorities, but . . . not clos[ing] the courts to persons wronged by military lawlessness."[89] In our analysis, we stated that "[n]o legislative enactment can confer power upon the chief executive of the State to render the military immune from civil responsibility for wrongs done to citizens in time of peace, or grant to the military security beyond that accorded the civil officers in whose aid they act."[90]

The Court also mentioned that the Constitution subordinated the military to civilian authority and could be used only to aid that authority.[91] The Court then made the statement used by plaintiffs here:

> The emphatic provision of the Constitution (Art. 2, § 6) of the State, that: "the military shall in all cases and at all

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[86] *Id*. at 305, quoting 1917 PA 53, § 41 (quotation marks omitted).

[87] *Vandercook*, 228 Mich at 305-306, quoting 1917 PA 53, § 41 (quotation marks omitted).

[88] *Vandercook*, 228 Mich at 306.

[89] *Id*.

[90] *Id*. at 308.

[91] *Id*. at 309-310.

> times be in strict subordination to the civil power," is not an empty phrase, but the wisdom of the ages expressed in a succinct mandate. Any transgression of this fundamental law by military officers renders them liable to respond in damages for injury done no matter how high the command to so act can be traced. *Mitchell v. Harmony*, 13 How. (U. S.) 115; *Bates v. Clark*, 95 U. S. 204.[92]

Immediately following this statement, the Court concluded that the acts at issue were not authorized by the Governor.[93] The Court made clear the holding was simply that the defendants could be liable under tort law.[94]

Bishop therefore does not stand for the proposition that monetary damages can be claimed in actions arising under the Constitution. In proper context, the line plaintiffs rely on merely meant that the military officers could be liable for damages in a common-law tort action if their actions exceeded civil authority. The source of the liability did not flow from the Constitution—it does not arise from the provision subordinating the military. Rather, the military officers could be liable based on tort law, just like anyone else. The only difference was the potential defense that military members might raise of following orders.

This conclusion is further confirmed by the sources *Bishop* cited: *Mitchell v Harmony*[95] and *Bates v Clark*.[96] Both cases concerned actions for "trespass." In the former, a merchant trailing United States troops during the Mexican-American War was ordered to remain

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[92] *Id*. at 310.

[93] *Id*.

[94] *Id*. at 314-315.

[95] *Mitchell v Harmony*, 54 US (13 How) 115; 14 L Ed 75 (1851).

[96] *Bates v Clark*, 95 US 204; 24 L Ed 471 (1877).

with the troops—his request to depart from the army was denied.[97] Subsequently, the plaintiff's items were captured by the Mexican army and he sued the federal army officer who had earlier detained him.[98] The Court held that the officer could be liable.[99] In *Bates*, the plaintiff's whiskey was confiscated by military officers and the Court held that the "officers can no more protect themselves than civilians in time of peace by orders emanating from a source which is itself without authority."[100] A statute allowed military officers to seize liquor in Indian country, but the plaintiffs were not in Indian country when their liquor was seized. The Court observed that the officers' good-faith belief that the plaintiffs were in Indian country might excuse them from punitive damages but that it would not preclude the action itself.[101] In citing these cases, *Bishop* was not establishing a rule allowing damages for violations of the Constitution—neither case involved the Constitution at all. And not surprisingly, *Bishop* itself has, as far as I can tell, never been cited for that proposition either.

The earlier English common-law cases are even further from the mark. In *Wilkes v Wood*, for example, the plaintiff sued for trespass when a government officer entered the plaintiff's house, broke his locks, and seized his papers.[102] As the court said, the "present cause chiefly turned upon the general question, whether a Secretary of State has a power to force

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[97] *Mitchell*, 54 US at 129.

[98] *Id*. at 129-130.

[99] *Id*. at 135.

[100] *Bates*, 95 US at 209.

[101] *Id*.

[102] *Wilkes v Wood*, 98 Eng Rep 489, 489 (King's Bench, 1763).

persons houses, break open their locks, seize their papers, &c. upon a bare suspicion of a libel by a general warrant, without name of the person charged."[103] Under neither the English constitution nor statutory law was there "legal authority . . . to justify the action."[104] Although the court emphasized the dangers of allowing the government to have such authority, it is clear that the case was a typical trespass action that the plaintiff could have brought against any private individual—the only difference being that the defendant could defend based on alleged legal authority for his actions.[105] And, of course, another critical distinction between these cases and *Bivens* and *Smith* is that they were decided under the unwritten and amorphous British constitution.[106] The significance of the written constitution, created in our states and then the na-

[103] *Id*. at 490.

[104] *Id*.

[105] See also *Huckle v Money*, 95 Eng Rep 768, 768-769 (King's Bench, 1763) (representing essentially the same situation); *Widgeon*, 300 Md at 527 ("Again, in *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765), the plaintiff brought *a trespass action* against the King's messengers for unjustifiably entering his house and seizing his books and papers, and the jury awarded damages to the plaintiff. Lord Camden, after a lengthy historical review, upheld the damage award on the ground that the warrant to seize the papers was 'illegal and void . . . .' ") (emphasis added).

[106] Norton, *Governing Britain: Parliament, Ministers and Our Ambiguous Constitution* (Manchester: Manchester University Press, 2020), pp 7, 10-11 (noting that the British constitution's "history and form give rise to ambiguities and uncertainties" and that the British constitution can refer to "a body of laws (statutes and common law), conventions and practices that have developed over time").

tional government, represented something profoundly new, the significance of which had to be worked out over time.[107]

It has been recognized, therefore, that these types of cases do not stand for the proposition that courts have historically implied causes of action in the constitutional text. The cause of action in these cases arose from the common law.[108] And those actions were never understood to be coterminous with constitutional provisions, i.e., a common-law action might or might not adequately redress a constitutional violation.[109] In addition, the framers of the state and federal Constitutions would have also recognized that the legislature

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[107] See Wood, *Power and Liberty: Constitutionalism in the American Revolution* (New York: Oxford Univ Press, 2021), pp 49-50 ("Although Americans were convinced that constitutions were decidedly different from legislation, the distinction was not easy to maintain. They hadn't yet imagined what a constitution meant."); Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (Cambridge: Belknap Press of Harvard University Press, 2018), pp 3, 5 ("When the Constitution was born, it was unclear what kind of thing it was. . . . When it first appeared, the new Constitution was a completely unprecedented kind of object; as a result, describing and interpreting it was an entirely novel exercise.") (paragraph structure omitted).

[108] The Supreme Court of Texas reached a similar conclusion with regard to caselaw in that state, which had previously recognized a false-imprisonment claim for monetary damages against a government officer. *Bouillion*, 896 SW2d at 150, discussing *Gold v Campbell*, 54 Tex Civ App 269; 117 SW 463 (1909). "However," the court stated, "the cause of action alleged in *Gold* was the traditional common law tort of false imprisonment, not a tort for the violation of constitutional rights. *Gold* did not create a new cause of action; rather, it recognized that an officer who acts outside the scope of his authority is amenable to suit under a traditional common law cause of action." *Id*. Therefore, the court "disapprove[d] of any interpretation of *Gold* that concludes it authorized a constitutional tort cause of action." *Id*.

[109] See *Constitutional Remedies*, 69 Colum L Rev at 1121 (1969) ("Some conduct violative of the Constitution is not of a kind that would be actionable at common law.").

could repeal the common law.[110] Consequently, it is hard to see how their mere expectation of the availability of such common-law actions could be interpreted as a constitutional requirement that such actions exist.[111] Even so, the expected applications of constitutional text, not reflected in the text itself, are usually entitled to little or no interpretive weight.[112]

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[110] See Const 1963, art 3, § 7 ("The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."); Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Athens: University of Georgia Press, 1994), p 90 (noting the development of written constitutions in this period and stating "the power to modify or even entirely repeal the common law[] now fell explicitly within the jurisdiction of the legislature"); see generally Redish, *Constitutional Remedies as Constitutional Law*, 62 BC L Rev 1865, 1868 (2021) ("Many have concluded that constitutional remedies present a sub-constitutional issue, and are therefore fully within the power of Congress to regulate as it sees fit.").

[111] Some have nonetheless made that argument. See Vázquez, Bivens *and the* Ancien Regime, 96 Notre Dame L Rev 1923, 1929 (2020) ("This history is not relevant because it supports an analogous federal judicial power to *create* damage remedies in a common-law fashion. Rather, this history is important because it reflects the understanding when the Constitution was ratified, and subsisting long thereafter, that damages were an appropriate remedy for constitutional violations by federal (and state) officials."); *The Path of the Constitution*, 87 NYU L Rev at 134 (noting the original expectation that "the Constitution was to be implemented through remedies available for violations of common law rights").

[112] See McGinnis & Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 Const Comment 371, 378 (2008) (noting that while expected applications can provide some evidence of original meaning, "[t]he original meaning of the words would not normally be defined by the expected applications, but instead by the meaning that people at the time would understand the words to have"). In this regard it is noteworthy, as some have argued, that these expectations might have been stymied over time as common-law actions against governmental officers became increasingly more difficult because of trends such as officer immunity and practical challenges such as parsimonious

C. CONCLUSION

For these reasons, nothing in the text or history of our Constitution supports finding a general cause of action for damages based on constitutional violations or a specific cause of action for such damages regarding the provision at issue here, the Due Process Clause. Consequently, in allowing such claims, I believe that *Smith* was wrongly decided and that the majority compounds this error today by broadening *Smith*.

Seeking to avoid this conclusion, the majority notes that lawsuits can be filed to enjoin violations of the Constitution—I agree—and thus the majority contends that my complaint is not with implying a cause of action but with the relief being granted, i.e., money damages.[113] This Court has already addressed the substance of this argument:

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views of damages. *The Path of the Constitution*, 87 NYU L Rev at 149-161. But even to the extent the framers conceived of common-law remedies as a manner for vindicating constitutional rights, these changes were baked into the system because the common law has always been subject to change. Certainly, constriction of common-law actions against officers does not justify the judicial creation of constitutional-damages actions simply so that the prospects facing plaintiffs today approximate those plaintiffs experienced at the founding. Such an ends-driven approach is anathema to the rule of law. 1 Story, Commentaries on the Constitution of the United States (4th ed), §§ 425, 426, pp 313, 314 ("A power, given in general terms, is not to be restricted to particular cases merely because it may be susceptible of abuse, and if abused may lead to mischievous consequences. . . . [A] rule of equal importance is not to enlarge the construction of a given power beyond the fair scope of its terms merely because the restriction is inconvenient, impolitic, or even mischievous.") (paragraph structure omitted).

[113] In this regard, even, my position is essentially the same one staked out by the United States Supreme Court, which allows enforcement of the Constitution through suits for injunctions but has severely constricted the availability of implied causes of actions for damages. See,

> There is obviously a distinction between a judicial decree *invalidating* unconstitutional governmental action and the adoption of judicially created doctrines that effectively serve as de facto statutory enactments to implement Const 1963, art 1, § 2. The former is classic judicial review recognized as a core judicial function since, at least, the decision in *Marbury v Madison*, 5 US (1 Cranch) 137; 2 L Ed 60 (1803). The latter is an improper usurpation of legislative authority. To fail to heed this limitation on judicial power would be to fail "to maintain the separation between the Judiciary and the other branches." [*Lewis*, 464 Mich at 788-789 (citation omitted).]

A suit for an injunction seeks to prevent or end a constitutional violation; a cause of action for money damages seeks to remedy past constitutional violations. The former have been available from the start of constitutional litigation, whereas the latter are a creature of the twentieth-century judiciary.

Critically, the injunctive remedy arises from an equitable action seeking to invoke a court's equitable powers rather than from a legal cause of action grounded in the constitutional text.[114] As the Supreme Court has noted, "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England."[115] For that reason, the Court held that a suit for an injunctive remedy to enforce a constitutional provision—the Supremacy Clause in

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e.g., *Ziglar*, 582 US at 144 (noting the availability of injunctive relief for constitutional violations).

[114] See 13A Wright & Miller, Federal Practice and Procedure (Apr 2022 update), § 3531.6 ("Rather than infer a cause of action directly from a constitutional provision, courts may resort to finding a cause of action in equity for injunctive relief . . . .").

[115] *Armstrong v Exceptional Child Ctr, Inc*, 575 US 320, 327; 135 S Ct 1378; 191 L Ed 2d 471 (2015).

that case—did not "rest[] upon an implied right of action contained in the" constitutional text.[116] Accordingly, recognition of the ability to invoke a court's equitable powers to prevent or restrain constitutional violations is not inconsistent with a rejection of inferring causes of action for damages from the constitutional text.

III. STARE DECISIS

Given this analysis, I believe not only that the majority's expansion of *Smith* is wrong but also that *Smith* itself should be overruled. In addition to concluding a precedent was wrongly decided—which I have established above with regard to *Smith*—we must examine three other factors before overruling it: (1) whether the rule has proved not to be practically workable, (2) whether reliance interests in the rule would lead to hardships if the rule were overruled, and (3) "whether changes in the law or facts no longer justify the questioned decision."[117]

With regard to the first factor, *Smith* defies practicable workability. Critically, until the majority's thunderbolt today, a majority of the Court has never even agreed on a test for discerning when causes of action can be inferred. And although the Court of Appeals, and a plurality of this Court in *Mays*, may have applied Justice BOYLE's multifactor approach, that approach is

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[116] *Id.*; see also *Fed Defenders of NY, Inc v Fed Bureau of Prisons*, 954 F3d 118, 133-134 (CA 2, 2020) (noting, in the context of Sixth Amendment claims, the "narrow but well-drawn line of precedent establishing that a plaintiff may invoke the court's equitable powers to enjoining a defendant from violating constitutional provisions that do not, themselves, grant any legal rights to private plaintiffs").

[117] *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 584; 702 NW2d 539 (2005).

awash in policy considerations that leave parties and courts no clear guidance on whether a cause of action will be inferred in any given case. Most clearly, the open-ended final factor—allowing consideration of "various other factors"—gives courts permission to consider anything they would like to create a cause of action.[118]

With regard to the second factor, any reliance interests must be greatly diminished by the fact that a majority of this Court has never inferred a cause of action for money damages under *Smith*—not even in *Smith* itself. As the United States Supreme Court recently explained in the criminal law context, "Continuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts. Moreover, no one can reasonably rely on an exception that is non-existent in practice, so no reliance interests can be affected by forthrightly acknowledging reality."[119] In addition, the general rule of allowing monetary damages is diffuse enough—in that it applies to all relevant constitutional rights—that it is difficult to see what institutions have formed or behavior has changed in reliance upon it. That is, the possibility of obtaining damages for constitutional violations does not seem to have led individuals to enter into relationships or associations or engage in any activities that would be disrupted by overruling *Smith*.

Finally, the third factor also weighs in favor of overruling *Smith*. As discussed, there was no prec-

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[118] *Smith*, 428 Mich at 648-652 (BOYLE, J., concurring in part and dissenting in part).

[119] *Edwards v Vannoy*, 593 US ___, ___; 141 S Ct 1547, 1560; 209 L Ed 2d 651 (2021).

edent from this state supporting *Smith*. To the extent it could claim any supporting authority, that authority—*Bivens*—has since been severely undercut. A damages claim will not be inferred in federal court if "there is *any* reason to think that Congress *might* be better equipped to create a damages remedy."[120] Courts will rarely, if ever, be better placed than a legislature to create damages remedies.[121]

Accordingly, I would overrule *Smith* and put an end to our usurpation of the Legislature's authority to create causes of action for damages for constitutional violations.

IV. APPLICATION OF *SMITH*

As a last consideration, it is worth addressing how this case would have been resolved if the majority had simply applied Justice BOYLE's test. Just two terms ago, three justices in the current majority noted that this test was "persuasive."[122] The majority opinion in this case provides nothing of substance to explain why the test has somehow become less persuasive. The majority nonetheless casts it aside, perhaps because applying it here would not yield a cause of action.

The first question under the test is whether a custom or policy caused the constitutional violation.[123]

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[120] *Egbert*, 596 US at ___ (opinion of the Court); slip op at 7 (emphasis added).

[121] *Id*. at ___ (Gorsuch, J., concurring); slip op at 2 ("When might a court *ever* be 'better equipped' than the people's elected representatives to weigh the 'costs and benefits' of creating a cause of action? It seems to me that to ask the question is to answer it.") (paragraph structure omitted).

[122] *Mays*, 506 Mich at 188 (plurality opinion by BERNSTEIN, J.).

[123] *Smith*, 428 Mich at 642-643 (BOYLE, J., concurring in part and dissenting in part).

Defendant, the Unemployment Insurance Agency, argues there was no custom or policy because nothing required it to intercept tax refunds or garnish wages—it simply employed software that identified potential fraud. I will assume for present purposes that this requirement is satisfied because, even if it was, the agency would still prevail on the other factors. First, I will address "the degree of specificity of the constitutional protection[.]"[124] While the Due Process Clause, as interpreted by the courts, covers a broad swath of territory, the general procedural components of the clause are clear.[125] But how those requirements apply in any given case is a different matter. As the Court of Appeals recognized in the present case, "due process is flexible and the procedural protections that it offers may vary depending on the circumstances . . . ."[126] Indeed, Justice BOYLE herself indicated that the Due Process Clause does not offer sufficiently clear protection.[127] Thus, the clarity of the constitutional provision does not support a damages remedy.

I do not find the "existence and clarity of the constitutional violation itself" to be sufficient to support plaintiffs' argument in this case.[128] Plaintiffs received notices in the form of letters, which detailed how to

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[124] *Mays*, 506 Mich at 196 (plurality opinion by BERNSTEIN, J.).

[125] Orth, *Due Process of Law: A Brief History* (Lawrence: University Press of Kansas, 2003), p 88 (noting that the United States Supreme Court had "spelled out exactly what [due process's hearing requirement] means").

[126] *Bauserman v Unemployment Ins Agency (On Remand)*, 330 Mich App 545, 569; 950 NW2d 446 (2019).

[127] See *Smith*, 428 Mich at 651 (BOYLE, J., concurring in part dissenting in part) ("These search and seizure protections are, however, relatively clear-cut in comparison to the Due Process and Equal Protection Clauses.").

[128] *Mays*, 506 Mich at 196 (plurality opinion by BERNSTEIN, J.).

appeal; both plaintiffs here had the opportunity to and did, in fact, file an appeal. Plaintiffs' amended complaint stated that the lack of due process was in the use of the automated decision-making system because it determined guilt without meaningful notice or opportunity to be heard before imposition of the penalties. If the penalties were truly imposed before notice and a hearing, then this might state a due-process claim. But it is not clear that this is the case here. In general, the automated system makes the initial determination, but the amended complaint acknowledged that notice was sent. The problem, according to the amended complaint, was that the notice was practically useless because it was sent through the online unemployment system, which former recipients of unemployment benefits were unlikely to check. As the agency's brief notes, however, plaintiffs here elected to receive notices through the online account. The amended complaint also states that plaintiffs wrote to defendant and submitted online appeals, although they never received a response. Of course, if it is true that they never received a response, then perhaps there was a due-process violation. But plaintiffs received numerous notices and had a number of opportunities to object to the agency's action.

The next factor is the "support for the propriety of a judicially inferred damages remedy in any text, history, and previous interpretations of the specific provision[.]"[129] As discussed above, nothing in the text or history of the Due Process Clause supports a damages remedy. With regard to precedent, we have never inferred damages remedies for procedural due-process violations. And the United States Supreme Court likewise has never "extended a Bivens remedy to an

[129] *Id*.

alleged substantive or procedural due process violation of the Fifth Amendment by a federal official."[130]

The next consideration is "the availability of another remedy[.]"[131] In this regard, the United States Supreme Court's decision in *Schweiker v Chilicky* is instructive.[132] In that case, the Court rejected a *Bivens* claim involving the federal Due Process Clause.[133] The plaintiffs were individuals whose Social Security disability benefits were terminated—most of the plaintiffs appealed and were restored benefits with full retroactivity, while the remaining plaintiff filed a new application, was granted benefits, and received almost all the unpaid benefits for the period he had been denied benefits.[134] As here, the plaintiffs' due-process claims centered on the allegedly unconstitutional procedures by which the agencies wrongfully terminated their benefits.[135] In rejecting the claim, the Court noted the comprehensive review procedures available to the plaintiffs through the relevant legislation. The process enabled claimants to appeal wrongful terminations with new evidence and arguments along the way, ending in judicial review (which could include review of constitutional claims).[136]

The point of contention in *Schweiker* was that the review process enacted by Congress did not provide for money damages when unconstitutional conduct led to

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[130] *Doe v United States*, 381 F Supp 3d 573, 612 (MD NC, 2019).

[131] *Mays*, 506 Mich at 196 (plurality opinion by BERNSTEIN, J).

[132] *Schweiker v Chilicky*, 487 US 412; 108 S Ct 2460; 101 L Ed 2d 370 (1988).

[133] *Id*. at 414.

[134] *Id*. at 417.

[135] *Id*. at 418.

[136] *Id*. at 424.

the wrongful denial of benefits.[137] Looking to its case-law, the Court explained that Congress's failure to provide for " 'complete relief' " was not a reason to infer a damages remedy.[138] The bare fact that some injuries would go unredressed was not determinative because Congress had created an elaborate system. "[T]he presence of alleged unconstitutional conduct that is not *separately* remedied under the statutory scheme" did not "imply that the statute has provided 'no remedy' for the constitutional wrong at issue."[139] Imposing personal liability for acts within that system would no doubt disrupt Congress's balancing of interests.[140] Moreover, the harm for which the plaintiffs sought damages—"consequential damages for hardships resulting from an allegedly unconstitutional denial of a statutory right"—could not "be separated from the harm resulting from the denial of the statutory right."[141] Summing up, the Court stated:

> We agree that suffering months of delay in receiving the income on which one has depended for the very necessities of life cannot be fully remedied by the "belated restoration of back benefits." The trauma to respondents, and thousands of others like them, must surely have gone beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens. Nor would we care to "trivialize" the nature of the wrongs alleged in this case. Congress, however, has addressed the problems created by state agencies' wrongful termination of disabil-

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[137] *Id*.

[138] *Id*. at 425, quoting *Bush v Lucas*, 462 US 367, 388; 103 S Ct 2404; 76 L Ed 2d 648 (1983) (noting that the question of whether to infer a remedy "obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff").

[139] *Schweiker*, 487 US at 427-428.

[140] *Id*. at 425.

[141] *Id*. at 428.

> ity benefits. Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program. . . . Congress has discharged that responsibility to the extent that it affects the case before us, and we see no legal basis that would allow us to revise its decision.[142]

The Court of Appeals in the present case distinguished *Schweiker* on the unpersuasive ground that it "did not involve highly egregious facts such as those alleged in the instant case."[143] In particular, the Court of Appeals noted that the plaintiffs in *Schweiker* were simply denied benefits whereas plaintiffs here had their own property taken. This distinction, even if true, is irrelevant. The egregiousness of the conduct is not a factor that this Court or the United States Supreme Court has ever considered or endorsed. Moreover, it is unclear whether the Court of Appeals was correct: are disability claimants who depended on government benefits to survive in a better position to weather the termination of those benefits than the plaintiffs here are in to withstand garnishments and collection actions? It is certainly possible that the disabled plaintiffs in *Schweiker* were even more deeply affected by the wrongful denial of benefits than plaintiffs in this case.

As in *Schweiker*, the procedures available to plaintiffs in the present case were extensive. Unemployment claimants can protest any determination made with regard to recoupment of overpayments.[144] If a

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[142] *Id*. at 428-429.

[143] *Bauserman (On Remand)*, 330 Mich App at 575.

[144] *Dep't of Licensing & Regulatory Affairs / Unemployment Ins Agency v Lucente*, 508 Mich 209, 223-225; 973 NW2d 90 (2021), discussing MCL 421.32a(1).

protest is made—or the claimant asks for a hearing before an administrative law judge—the agency will review its decision and can affirm, modify, or reverse it, or send the protest for an administrative hearing.[145] "The Agency can also review a prior determination *in the absence of a protest* so long as it does so within" a certain period.[146] Even if the protest is not filed within the required period, the agency can still review the earlier determination.[147] "A claimant or employer who disagrees with a redetermination [by the agency] can appeal the decision to an administrative law judge . . . ."[148] That judge "shall decide the rights of the interested parties" and render a decision with findings of fact and supporting rationales.[149] After this decision, claimants have yet another opportunity to prevail within the agency by appealing to the Michigan Compensation Appellate Commission.[150] From there, the claimant can appeal in the circuit court and can seek further appellate review of any decision rendered by the court.[151]

This elaborate scheme provides ample opportunities for the agency to correct any mistakes internally before judicial review is invoked. It is at least as extensive as the Social Security disability review process discussed in *Schweiker*. Indeed, the agency here used this redetermination process to undo its erroneous decisions

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[145] MCL 421.32a(1).

[146] *Lucente*, 508 Mich at 224-225.

[147] See *id*., discussing MCL 421.32a.

[148] *Lucente*, 508 Mich at 225, citing MCL 421.32a(1) and (3).

[149] MCL 421.33(1).

[150] *Lucente*, 508 Mich at 225-226, citing MCL 421.34.

[151] MCL 421.38.

within just a few months of plaintiffs' challenges.[152] The Court of Appeals here required far more than the United States Supreme Court ever has when deciding that the statutory framework in this case failed to provide a suitable alternative remedy because it did not allow for monetary damages or a way to raise constitutional due-process challenges. Under *Schweiker* and the caselaw discussed there, it does not matter if the alternative remedy is incomplete and fails to provide monetary damages. Moreover, the agency judges handling Social Security disability reviews also lack the power to adjudicate constitutional challenges.[153] For these reasons, I believe that the alternative remedies here were adequate.

With regard to Justice BOYLE's last factor, I see no other "factors" relevant to this case that would justify a damages remedy. I therefore believe that a damages remedy cannot properly be inferred under this test. Perhaps this clear result explains why the majority adopts a brand new test under which money damages will almost always be available.

V. CONCLUSION

The Court's holding today lacks any basis in our common-law powers or the constitutional text. It represents a gross overreach given that the judicial branch has now seized legislative power to fashion

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[152] *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 175-176; 931 NW2d 539 (2019).

[153] See *Carr v Saul*, 593 US ___, ___; 141 S Ct 1352, 1361-1362; 209 L Ed 2d 376 (2021) (noting and agreeing with internal Social Security guidance explaining that administrative law judges (ALJs) lacked the power to rule on a constitutional challenge); *Culclasure v Comm'r of Social Security Admin*, 375 F Supp 3d 559, 569 (ED Penn, 2019) (noting that ALJs were powerless to decide the constitutional question raised in the case).

remedies for all manner of constitutional violations. The Constitution, our foundational document and source of law, has been transformed into a wellspring of potential new claims against the state and its political subdivisions. And under today's ruling, the Legislature is largely powerless to act: it can create remedies for constitutional violations but unless we bless them as "adequate"—whatever that means to the members of the Court serving at that time—we will superimpose our own preferred remedies. A deluge of cases and a swelling of taxpayer liability will surely ensue. I dissent.

ZAHRA, J., concurred with VIVIANO, J.

CLEMENT, J. (*dissenting*). Because plaintiffs do not ask us to reconsider the test Justice BOYLE set out in her partial concurrence in *Smith v Dep't of Pub Health*, 428 Mich 540; 410 NW2d 749 (1987), and replace it with a more lenient test, I would simply apply that test to their claims. For the reasons stated in Part IV of Justice VIVIANO's dissent, under that test, I do not believe that we should infer a damages remedy in the instant case. Therefore, I dissent.

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Summary Disposition February 2, 2022:

PEOPLE v HADOUS, No. 150672; Court of Appeals No. 314060. By order of May 25, 2018, the application for leave to appeal the October 28, 2014 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Tucker* (Docket No. 152798) and *People v Snyder* (Docket No. 153696). On order of the Court, *Tucker* having been dismissed on September 5, 2018, 503 Mich 854 (2018), and *Snyder* having been decided on October 8, 2021, 508 Mich 948 (2021), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals, VACATE the June 29, 2012 order of the Wayne Circuit Court denying the defendant's request for removal from the sex offender registry, and REMAND this case to the trial court for reconsideration in light of *People v Betts*, 507 Mich 527 (2021). The motion to lift abeyance is DENIED as moot.

PEOPLE v BOSCA, No. 151610; reported below: 310 Mich App 1. By order of May 25, 2018, the application for leave to appeal the March 26, 2015 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Tucker* (Docket No. 152798) and *People v Snyder* (Docket No. 153696). On order of the Court, *Tucker* having been dismissed on September 5, 2018, 503 Mich 854 (2018), and *Snyder* having been decided on October 8, 2021, 508 Mich 948 (2021), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE Part XIII of the Court of Appeals judgment and we REMAND this case to the Macomb Circuit Court for further proceedings consistent with *People v Betts*, 507 Mich 527 (2021). The crime for which the defendant was required to register under the Sex Offenders Registration Act, MCL 28.721 *et seq*.—unlawful imprisonment—was made a "listed offense" by 2011 PA 17. The retroactive application of 2011 PA 17 to the defendant, which became effective after he committed the unlawful imprisonment offense in this case, violates the federal and state constitutional prohibitions on *ex post facto* laws. *Betts*, *supra*. In light of this determination, the defendant's remaining challenges to 2011 PA 17 are moot. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motion to remand for resentencing is DENIED as moot.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v PERNA, No. 151679; Court of Appeals No. 325132. By order of May 25, 2018, the application for leave to appeal the April 3, 2015 order of the Court of Appeals was held in abeyance pending the decisions in

People v Tucker (Docket No. 152798) and *People v Snyder* (Docket No. 153696). On order of the Court, *Tucker* having been dismissed on September 5, 2018, 503 Mich 854 (2018), and *Snyder* having been decided on October 8, 2021, 508 Mich 948 (2021), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration in light of *People v Betts*, 507 Mich 527 (2021), and direct that it hold this case in abeyance pending its decision in *People v Klinesmith* (Docket No. 158813), which we remanded to the Court of Appeals by order of February 2, 2022. After *Klinesmith* is decided, the Court of Appeals shall reconsider this case in light of *Klinesmith*. The Court of Appeals shall also address the prosecution's concession in this Court that the defendant is entitled to an adjustment to the amount of restitution ordered. See *People v McKinley*, 496 Mich 410 (2014). We do not retain jurisdiction.

PEOPLE V MALONE, No. 154033; Court of Appeals No. 331903. By order of May 25, 2018, the application for leave to appeal the May 4, 2016 order of the Court of Appeals was held in abeyance pending the decisions in *People v Tucker* (Docket No. 152798) and *People v Snyder* (Docket No. 153696). On order of the Court, *Tucker* having been dismissed on September 5, 2018, 503 Mich 854 (2018), and *Snyder* having been decided on October 8, 2021, 508 Mich 948 (2021), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration in light of *People v Betts*, 507 Mich 527 (2021), and direct that it hold this case in abeyance pending its decision in *In re Daniel, Minor* (Docket No. 156925), which we remanded to the Court of Appeals by order of February 2, 2022. After *In re Daniel, Minor* is decided, the Court of Appeals shall reconsider this case in light of *In re Daniel, Minor*. We do not retain jurisdiction.

In re MICAH MELCHIZEDEK DANIEL, No. 156925; Court of Appeals No. 334057. By order of September 12, 2018, the application for leave to appeal the September 12, 2017 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Betts* (Docket No. 148981) and *People v Snyder* (Docket No. 153696). On order of the Court, *Betts* having been decided on July 27, 2021, 507 Mich 527 (2021), and *Snyder* having been decided on October 8, 2021, 508 Mich 948 (2021), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part III of the judgment of the Court of Appeals and we REMAND this case to the Court of Appeals for reconsideration in light of *Betts*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

PEOPLE V FABELA, No. 158146; Court of Appeals No. 337365. By order of July 29, 2019, the application for leave to appeal the June 26, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Betts* (Docket No. 148981). On order of the Court, *Betts* having been decided on July 27, 2021, 507 Mich 527 (2021), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of

granting leave to appeal, we VACATE Part II.A. of the Court of Appeals judgment and we REMAND this case to the Court of Appeals for reconsideration in light of *Betts*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v HOLLAND, No. 158733; Court of Appeals No. 345483. By order of September 30, 2019, the application for leave to appeal the October 24, 2018 order of the Court of Appeals was held in abeyance pending the decision in *People v Betts* (Docket No. 148981). On order of the Court, *Betts* having been decided on July 27, 2021, 507 Mich 527 (2021), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration in light of *Betts*. We do not retain jurisdiction.

PEOPLE v KLINESMITH, No. 158813; Court of Appeals No. 340938. By order of July 29, 2019, the application for leave to appeal the November 15, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Betts* (Docket No. 148981). On order of the Court, *Betts* having been decided on July 27, 2021, 507 Mich 527 (2021), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to the Court of Appeals for reconsideration in light of *Betts*. The Court of Appeals shall specifically address whether the rationale of *People v Tucker*, 312 Mich App 645 (2015), regarding the "recapture" provision of MCL 28.723(1)(e) remains valid in light of *Betts*. We do not retain jurisdiction.

PEOPLE v ALMADRAHI, No. 160099; Court of Appeals No. 347883. On order of the Court, the application for leave to appeal the June 20, 2019 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the February 11, 2019 order of the Wayne Circuit Court denying the defendant's petition for removal from the sex offender registry under MCL 28.721 *et seq*. The retroactive application of 2011 PA 17 to the defendant, well after the 1996 conviction that required him to register, violates the federal and state constitutional prohibitions on *ex post facto* laws. *People v Betts*, 507 Mich 527 (2021). We REMAND this case to the Wayne Circuit Court for further proceedings consistent with *Betts*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

ZAHRA, J., did not participate due to a familial relationship with counsel of record.

PEOPLE v LAY, No. 162112; Court of Appeals No. 353085. On order of the Court, the application for leave to appeal the August 20, 2020 order of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration in light of *People v Betts*, 507 Mich 527 (2021), and direct that it hold this case in abeyance pending its decision

in *In re Daniel, Minor* (Docket No. 156925), which we remanded to the Court of Appeals by order of February 2, 2022. After *In re Daniel, Minor* is decided, the Court of Appeals shall reconsider this case in light of *In re Daniel, Minor*. We do not retain jurisdiction.

PEOPLE v RICE, No. 162761; Court of Appeals No. 355609. By order of October 8, 2021, the prosecuting attorney was directed to answer the application for leave to appeal the February 4, 2021 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Wayne Circuit Court for reconsideration of the defendant's claims that trial counsel rendered constitutionally ineffective assistance for failing to interview and call at trial a res gestae witness, and that appellate counsel rendered constitutionally ineffective assistance for failing to obtain an affidavit from the witness in support of a motion to remand. Because the defendant has produced an affidavit from the witness, which he argues is new evidence that would make a different result probable on retrial, the trial court was not precluded from considering the defendant's claims under MCR 6.508(D)(2). In all other respects, leave to appeal is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v FREDERICK CORDS, No. 163540; Court of Appeals No. 357246. On order of the Court, the application for leave to appeal the July 20, 2021 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

VIVIANO, J., would deny leave to appeal.

PEOPLE v CLAUDELL TURNER, No. 163634; Court of Appeals No. 357699. On order of the Court, the application for leave to appeal the August 18, 2021 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied February 2, 2022:

PEOPLE v KEVIN SMITH, No. 161752; Court of Appeals No. 334692. By order of March 30, 2021, the application for leave to appeal the March 19, 2020 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Uribe* (Docket No. 159194). On order of the Court, the case having been decided on August 13, 2021, 508 Mich 898 (2021), the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

We note, however, that the Court of Appeals majority erred when it stated that this Court's remand order "vacates our prior judgment, but not our prior opinion." This Court's orders do not differentiate between a Court of Appeals "judgment" and "opinion." See MCR 7.215(E)(1)

("When the Court of Appeals disposes of an original action or an appeal, whether taken as of right, by leave granted, or by order in lieu of leave being granted, its opinion or order is its judgment."). In any event, because the Court of Appeals majority opinion can be fairly read as reaffirming its rulings on all issues raised by the defendant on direct appeal, he has not been denied an appellate ruling on any issue as a result of the majority's misinterpretation of our remand order.

PEOPLE v RIEGER, No. 162250; Court of Appeals No. 354321.

PEOPLE v WHITNEY, No. 162649; Court of Appeals No. 352685.

AYOTTE v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 163075; reported below: 337 Mich App 29.

PEOPLE v FREDERICK CORDS, No. 163114; Court of Appeals No. 355748.

PEOPLE v MCMILLIAN, No. 163256; Court of Appeals No. 350665.

PEOPLE v DANIELS-NORRIS, Nos. 163410 and 163411; Court of Appeals Nos. 351221 and 351222.

BARTALSKY v OSBORN, No. 163432; reported below: 337 Mich App 378.

SCHIRMER v ROBERT, No. 163446; Court of Appeals No. 347378.

DAVIS v MONTCALM COUNTY COMMUNITY MENTAL HEALTH AUTHORITY, No. 163616; Court of Appeals No. 354049.

DAVIS v MONTCALM COUNTY COMMUNITY MENTAL HEALTH AUTHORITY, No. 163624; Court of Appeals No. 354049.

Summary Disposition February 4, 2022:

WELLS v STATE FARM FIRE & CASUALTY COMPANY, No. 161911; Court of Appeals No. 348135. On January 13, 2022, the Court heard oral argument on the application for leave to appeal the July 16, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE Part II of the Court of Appeals opinion, VACATE the remainder of the opinion, and REMAND this case to that court for further proceedings.

The Court of Appeals acknowledged in Part II of its opinion that the parties had raised in the trial court, and pursued on appeal, the issue of "the applicability [of defendant's] homeowners policy exclusion for bodily injury arising out of the ownership, maintenance, or use of a motor vehicle owned or operated by or rented or loaned to any insured."[1] The Court of Appeals proceeded to hold that this issue was "not properly

[1] *Wells Estate v State Farm Fire & Cas Co*, unpublished per curiam opinion of the Court of Appeals, issued July 16, 2020 (Docket No. 348135), p 11 (quotation marks omitted).

preserved for appeal because [it] was not decided by the trial court."[2] This was error because the issue was preserved.[3] "Michigan generally follows the 'raise or waive' rule of appellate review."[4] Therefore, a litigant "preserve[s] an issue for appellate review by raising it in the trial court."[5] In other words, issue-preservation requirements in Michigan only prohibit raising an issue for the first time *on appeal*.[6] But defendant raised this motor-vehicle-exclusion issue in the trial court, and because it did, the issue is preserved despite the trial court's failure to rule on it.[7]

On remand, the Court of Appeals shall consider whether the motor-vehicle-exclusion provision in defendant's policy applies to deny coverage. If the court determines that the motor-vehicle-exclusion provision does apply, then it need not address whether plaintiff pled a covered accident under the policy. But if the court determines that the motor-vehicle-exclusion provision does not apply, then the court should reconsider whether plaintiff pled a covered accident under the policy. We do not retain jurisdiction.

ZAHRA, J. (*concurring*). I concur with the Court's order remanding this case to the Court of Appeals for it to consider the properly preserved issue of the applicability of the motor-vehicle-exclusion provision of

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[2] *Id.*, citing *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386 (2010).

[3] On direct appeal, the Court of Appeals had the discretion to address this preserved issue. See *Tingley v Kortz*, 262 Mich App 583, 588 (2004).

[4] *Walters v Nadell*, 481 Mich 377, 387 (2008) (citation omitted).

[5] *Id.* See also *Napier v Jacobs*, 429 Mich 222, 227 (1987) ("A general rule of trial practice is that failure to timely raise an issue waives review of that issue on appeal."); *Guider v Smith*, 431 Mich 559, 577 (1988) ("Finding no manifest injustice, we decline to depart from our traditional rule that a party waives claims not properly presented for review.").

[6] See *Walters*, 481 Mich at 387 (explaining that "generally a failure to timely raise an issue waives review of that issue on appeal") (quotation marks and citation omitted). See also *Hess v West Bloomfield Twp*, 439 Mich 550, 557 n 6 (1992) (holding that an "issue was not preserved for review by this Court because it was not raised in the trial court"); *Spencer v Black*, 232 Mich 675, 676 (1925) (holding that an issue raised for the first time on appeal was not properly before this Court).

[7] See *Klooster v Charlevoix*, 488 Mich 289, 310 (2011) (counseling that "a party 'should not be punished for the omission of the trial court' "), quoting *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183 (1994). Accord *Glasker-Davis v Auvenshine*, 333 Mich App 222, 227 (2020).

defendant's homeowners insurance policy. I write separately to highlight certain documents that ought to guide the panel on remand.

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(8), which required the court to "accept all factual allegations as true, deciding the motion on the pleadings alone."[8] In this case, there is no dispute that defendant's policy and the consent judgment entered by the trial court in plaintiff's underlying action against the insureds are both part of the pleadings; indeed, plaintiff's counsel conceded that very point at oral argument before this Court. I urge the Court of Appeals to closely consider these documents, which may prove critical to resolving the question presented on remand.

Oral Argument Ordered on the Application for Leave to Appeal February 4, 2022:

KANDIL-ELSAYED v F & E OIL, INC, No. 162907; Court of Appeals No. 350220. The appellant shall file a supplemental brief addressing: (1) whether there was a question of fact concerning whether the parking lot constituted an effectively unavoidable condition; (2) whether *Lugo v Ameritech Corp, Inc*, 464 Mich 512 (2001), is consistent with Michigan's comparative negligence framework; and if not, (3) which approach this Court should adopt for analyzing premises liability cases under a comparative negligence framework. The appellant's brief shall be filed by March 28, 2022, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

STIRLING v COUNTY OF LEELANAU, No. 162961; reported below: 336 Mich App 575. The appellant shall file a supplemental brief addressing whether the Court of Appeals erred by holding that the primary exemption claimed by the appellant's wife for a residence in Utah was based upon a "substantially similar" exemption as the Michigan principal residence exemption, MCL 211.7cc. The appellant's brief shall be filed by April 25, 2022, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The

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[8] *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160 (2019). Accord *Maiden v Rozwood*, 461 Mich 109, 119-120 (1999) ("When deciding a motion brought under [MCR 2.116(C)(8)], a court considers only the pleadings."), citing MCR 2.116(G)(5) ("Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9).").

appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Taxation Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

DANHOFF v FAHIM, No. 163120; Court of Appeals No. 352648. On order of the Court, the application for leave to appeal the May 6, 2021 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1).

The appellants shall file a supplemental brief addressing: (1) whether this Court's decisions in *Edry v Adelman*, 486 Mich 634 (2010), and *Elher v Misra*, 499 Mich 11 (2016), correctly describe the role of supporting literature in determining the admissibility of expert witness testimony on the standard of care in a medical malpractice case; (2) if not, what a plaintiff must demonstrate to support an expert's standard-of-care opinion; and (3) whether the appellants' standard-of-care expert met the standards for determining the reliability of expert testimony and was thus qualified to testify as an expert witness under MRE 702 and MCL 600.2955 or whether a *Daubert* hearing was necessary before making that decision. See *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993). The appellants' brief shall be filed by April 25, 2022, with no extensions except upon a showing of good cause. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellants' brief. A reply, if any, must be filed by the appellants within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied February 4, 2022:

CLOFT v NEWDOW, No. 163500; Court of Appeals No. 356531.

VIVIANO, J., (*dissenting*). I dissent from the denial order for the reasons stated in *Touma v McLaren Port Huron*, 508 Mich 976 (2021) (VIVIANO, J., dissenting).

Summary Disposition February 11, 2022:

In re BOURBEAU, No. 163731; Court of Appeals No. 356222. On order of the Court, the application for leave to appeal the October 14, 2021 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to that court for a new appeal. On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Oakland Circuit Court

and direct that court to appoint counsel to represent the respondent in the Court of Appeals. The record in this case reveals that the respondent's counsel provided ineffective assistance by failing to cite to the record to support the claims being asserted, citing incorrect legal standards in support of those claims, and failing to raise potentially meritorious claims. As noted by the Court of Appeals throughout its opinion, the brief filed by the respondent's counsel made numerous cursory assertions with no argument or citations to the record, and abandoned claims raised in the trial court. A right to counsel necessarily includes the right to competent counsel. See *In re Trowbridge*, 155 Mich App 785, 786 (1986); *In re Osborn (On Remand, After Remand)*, 237 Mich App 597, 606 (1999). The respondent did not receive competent appellate counsel and is thus entitled to a new appeal. We do not retain jurisdiction.

Reconsideration Denied February 16, 2022:

DETROIT CAUCUS v INDEPENDENT CITIZENS REDISTRICTING COMMISSION, No. 163926.

ZAHRA, VIVIANO, and BERNSTEIN, JJ., would grant the motion for reconsideration.

Summary Disposition February 25, 2022:

HERNANDEZ v CITY OF ADRIAN, No. 163936; Court of Appeals No. 358763. On order of the Court, the motion for immediate consideration of the motion for stay is GRANTED. The application for leave to appeal the December 22, 2021 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. The motion for stay pending appeal is DENIED without prejudice to the filing of such a motion in the Court of Appeals.

Leave to Appeal Denied March 4, 2022:

PEOPLE v MOORE, No. 163136; Court of Appeals No. 350397.

CAVANAGH, J. (*dissenting*). I dissent from the order denying leave in this case because the identification procedure used by the police was unnecessarily suggestive and its reliability is unclear.

This case stems from an armed robbery of a store in Hamtramck. Three men robbed the store with two employees inside. The robbers physically assaulted the employees and wielded a gun. The robbers fled after obtaining cash from the store's safe. Employees called 911, and the police picked up defendant and another man soon thereafter. The initial description was of one man wearing all gray, two men wearing all black, all of them aged 19 to 20 years old, all of them wearing masks, and all of them Black men. The initial description did not include any conspicuous features.

Within approximately 15 minutes after the robbery, the police took the employees to the site where defendant and the other man were being held to make an identification. The suspects were handcuffed during the identification procedure, and the witnesses were together when viewing the suspects from a police car. Defendant was being detained by a uniformed officer during the procedure, and the suspects were shown to the witnesses one at a time. One witness acknowledged that the suspects' clothing did not match her initial description and said that she thought they had switched clothing. The witness testified that the robbers came into the store unmasked, but she acknowledged that she did not say that in the 911 call. When asked about what defendant was wearing in the store, the witness was unsure, but she emphasized that she tended to focus on people's faces: "I look at people in their face. I don't really try to look at their clothing. I look at people in their face."

Defendants moved to suppress the identification and for an evidentiary hearing pursuant to *United States v Wade*, 388 US 218 (1967). The trial court granted the hearing but ultimately denied the motion. Defense counsel emphasized that this procedure was defective because the witnesses were together during the identification and because defendant was handcuffed. The trial court seemed to assume without deciding that the procedure was unnecessarily suggestive but found that it was nevertheless reliable. Its explanation was somewhat perfunctory. In finding that the witnesses had ample opportunity to view the suspect, the court explained, "And there is considerable, credible evidence, in this case, that both of the witnesses did have an opportunity to observe each of the defendants in this case, at the time of the crime, and within, somewhere between ten and fifteen or sixteen minutes thereafter." In finding that the witnesses had an ample degree of attention during the crime, the court reasoned, "And again, there was substantial and credible testimony that each of the witnesses had the opportunity to see, each of the defendants, at the time of the crime." In finding that the witness's prior description was accurate, the court reasoned, "[T]he description of the defendants, . . . [a]t the time of the 9-1-1 call, is consistent with subsequent identifications, and with the testimony of the witnesses, during the evidentiary hearing." And in finding that the witnesses had a high level of certainty, the court noted that one witness claimed 100 percent certainty. Finally, the court noted that the identification occurred approximately 15 minutes after the robbery. But the court then said that "any discrepancy between . . . a witness's initial description of the defendant's actual appearance, is relevant, as to the weight of the evidence, but not its admissibility." The court also said that "both witnesses made separate identifications of each of the defendants[.]" Finally, the court emphasized that the record suggested that the witnesses did not know where the police were taking them or why they were being taken when the police escorted the witnesses to the spot where defendant and the other suspect were being detained: "The record does show no influence by the Police, per the testimony of the witnesses."

The Court of Appeals affirmed the trial court's decision and opined:

> [G]enerally . . . 'on-the-scene' pretrial identifications are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance. Thus, the on-the-scene identification could be considered necessary. [*People v Moore*, unpublished per curiam opinion of the Court of Appeals, issued November 19, 2020 (Docket No. 350397), p 4 (quotation marks omitted).]

The Court of Appeals then stated that the trial court's reliability analysis "clearly and specifically addressed" the relevant factors. *Id*. The Court of Appeals emphasized that the witnesses testified that they did not speak to each other and that the police did not suggest to them that defendant was among the men who robbed them.

All of this evidences a persistent misunderstanding of the problem of suggestive identification procedures. Introduction of identifications tainted by unnecessarily suggestive procedures violates due-process protections. *Moore v Illinois*, 434 US 220 (1977). Exclusion of an identification is required when "(1) the identification procedure was suggestive, (2) the suggestive nature of the procedure was unnecessary, and (3) the identification was unreliable." *People v Sammons*, 505 Mich 31, 41 (2020), citing *Perry v New Hampshire*, 565 US 228 (2012).

Both lower courts seemed to acknowledge that this procedure was suggestive, as they must. This was a showup, and "[t]he inherently suggestive nature of showups has long been beyond debate." *Sammons*, 505 Mich at 41. However, it appears that factual errors may have led the lower courts to consider this particular showup *less* suggestive than it really was. For instance, the trial court stated that "both witnesses made separate identifications of each of the defendants[.]" That is incorrect. The undisputed testimony was that the witnesses were together in a car during the procedure. The trial court also emphasized that the witnesses said that they did not talk to each other prior to the procedure. However unlikely that may be, assuming it was true, it would not have mattered much here. The witnesses were *together* during the identification, so unless they simultaneously made positive identifications, one would have seen the other make a positive identification. The trial court noted that the police did not tell the witnesses where they were being taken and found that "[t]he record does show no influence by the Police, per the testimony of the witnesses." Assuming that the police did not tell the witnesses where the witnesses were being taken,[1] the trial court was incorrect that this record showed "no influence by the Police . . . ." This was a showup and was suggestive by its very nature. A showup " 'conveys a clear message that the police

[1] It seems unlikely that the police would not have told the witnesses where they were being taken or why. These witnesses were approximately 15 minutes removed from being the victims of a violent robbery and assault, and setting up a surprise confrontation with their possible attackers seems like an unlikely move for the police to make.

suspect *this* man.' " *Sammons*, 505 Mich at 43, quoting *Ex parte Frazier*, 729 So 2d 253, 255 (Ala, 1998). Although the trial court seemed to acknowledge that the procedure was suggestive, the court did not accurately acknowledge the extent of its suggestive nature.

The trial court seemed to acknowledge that this showup was also unnecessary. The Court of Appeals stated that identification procedures such as a showup are reasonable practices and "could be considered necessary." *Moore*, unpub op at 4. There is nothing on this record to indicate any amount of necessity. The suspects were already in custody, and the witnesses were safe and available. While it might have been more expeditious to dispense with a fair procedure, neither the trial court, the Court of Appeals, nor the prosecution has offered any reason to explain why a fair procedure could not have taken place. To the extent that identifications can be made through a fair procedure, sooner is always better than later. But it should go without saying that "the police must avoid employing suggestive identification procedures whenever possible." *People v Johnson*, 506 Mich 969, 971 (2020) (CAVANAGH, J., concurring).

Although this procedure was unnecessarily suggestive, it still could have been admissible if "the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances . . . ." *Perry*, 565 US at 232. In evaluating reliability, we consider (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. *Sammons*, 505 Mich at 50-51 (quotation marks and citation omitted). As an initial matter, I disagree with the Court of Appeals that the trial court's analysis was either "clear" or "specific." For the first three factors, the trial court essentially just restated the factor and indicated that the evidence supported a finding of reliability. In terms of the first two factors, the witnesses said that the criminals wore masks at least part of the time, violently assaulted them, and wielded a gun. Perhaps the proximity of the witnesses to the criminals outweighs these considerations, but an analysis that completely ignores them is not complete. The trial court stated that the prior description was accurate but that one witness suggested that the criminals stopped to switch clothing in the 15 minutes after they left. Both witnesses also failed to mention that defendant had the "*%*" symbol tattooed between his eyes. Given the idiosyncratic nature of this characteristic, its absence from the description is notable. One witness indicated that she believed that the criminals were approximately 19 or 20 years old, which was a wide miss from defendant, who was in his thirties. Also, the trial court stated that any discrepancy between the initial description and defendant's actual appearance would go to weight rather than admissibility, which is incorrect. The witnesses may well have indicated a high level of certainty about their identifications, but given the overwhelming suggestiveness of the procedure, it is not clear how much weight this factor should be given. The identification was certainly prompt, but again, given the overwhelming suggestiveness of the

procedure and the lack of other indicia of reliability, the reliability of the identification as a whole seems questionable at best.

That the police conducted this suggestive procedure without any necessity is troubling. More troubling is that this suggestive procedure does not seem to be an isolated event. See *Sammons*, 505 Mich at 38 ("The detective sergeant testified there was nothing out of the ordinary about conducting a showup this way."); *Johnson*, 506 Mich at 971 (CAVANAGH, J., concurring) (stating that "not only did the police administer an unnecessary showup, but they employed some type of form for the occasion, which seems to indicate that showups were routinely used"). The United States Supreme Court declined to employ a per se rule of exclusion for unnecessarily suggestive identification procedures, predicting that "[t]he police will guard against unnecessarily suggestive procedures under the totality [of the circumstances] rule, as well as the *per se* one, for fear that their actions will lead to the exclusion of identifications as unreliable." *Manson v Brathwaite*, 432 US 98, 112 (1977). In *Johnson* I observed that "[t]he police appear not to have been correctly incentivized either in *Sammons* or here." *Johnson*, 506 Mich at 971 (CAVANAGH, J., concurring). The same seems to be true here. Other jurisdictions have charted different courses than the constitutional floor set by *Manson*. See *Sammons*, 505 Mich at 50 n 13. Once again, we have not been asked to reach that question in this case.

ZAHRA, J., did not participate due to a familial relationship with counsel of record.

OPEL-BURNS v OPEL-BURNS, No. 163816; Court of Appeals No. 357251.

In re OPEL-BURNS, No. 163906; Court of Appeals No. 357250.

Summary Disposition March 8, 2022:

PEOPLE v DELEON, No. 163380; Court of Appeals No. 353296. On order of the Court, the application for leave to appeal the June 10, 2021 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to that court for reconsideration. The Court of Appeals shall specifically address whether or how the procedural bars of MCR 6.508(D)(2) and (3)(a) affect the outcome of this case. We do not retain jurisdiction.

PEOPLE v ECHEGOYEN, No. 163414; Court of Appeals No. 349301. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to the Court of Appeals for plenary consideration of the defendant's appeal.

PEOPLE v ROWE, No. 163485; Court of Appeals No. 357021. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the Oakland Circuit Court's February 24, 2021 order denying the defendant's motion for relief from judgment and we REMAND this case to that court for reissuance of the defendant's judgment of conviction and

sentence. See MCR 6.428. The parties agree that the defendant's appellate attorneys allowed the time limits for appellate review to expire without seeking direct review of the defendant's plea-based convictions or filing a motion to withdraw that met the requirements of *Anders v California*, 386 US 738, 744 (1967). Accordingly, the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477 (2000); *Peguero v United States*, 526 US 23, 28 (1999).

We further ORDER the Oakland Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant on appeal. We do not retain jurisdiction.

WOOD V CITY OF DETROIT, Nos. 163674 and 163765; Court of Appeals Nos. 353611 and 353653. On order of the Court, the application for leave to appeal the August 12, 2021 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part III of the Court of Appeals judgment, and we REMAND this case to the Court of Appeals for reconsideration in light of *Rott v Rott*, 508 Mich 274 (2021) (decided July 30, 2021, Docket No. 161051). The application for leave to appeal as cross-appellant is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V BADER, No. 163778; Court of Appeals No. 356938. On order of the Court, the application for leave to appeal the September 28, 2021 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration of the defendant's challenges to his bindover under MCR 7.205 in light of the concern articulated in *People v Yost*, 468 Mich 122, 124 n 2 (2003). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V JAMAL DAVIS, No. 163814; Court of Appeals No. 358545. On order of the Court, the application for leave to appeal the October 25, 2021 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE that part of the judgment of sentence regarding the attorney fee award, and we REMAND this case to the Wayne Circuit Court for findings regarding the cost of legal assistance provided to the defendant. *People v Lewis*, 503 Mich 162 (2018). We do not retain jurisdiction.

Reconsideration Granted March 8, 2022:

PEOPLE V ANTOINE BOWMAN, No. 163031; Court of Appeals No. 350061. On order of the Court, the motion for reconsideration of this Court's November 29, 2021 order is considered, and it is GRANTED in part. We VACATE our order dated November 29, 2021. On reconsideration, the

application for leave to appeal the April 22, 2021 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE that part of the judgment of the Court of Appeals addressing the defendant's claim that he was denied the effective assistance of counsel by counsel's failure to object to the prosecutor's closing argument. We REMAND this case to the Wayne Circuit Court to conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine solely whether trial defense counsel was ineffective for failing to object to the prosecutor's closing argument that the defendant could not use self-defense because he was committing the crime of felon in possession of a firearm when he shot the victim, see *People v Dupree*, 486 Mich 693 (2010). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

Leave to Appeal Denied March 8, 2022:

PEOPLE v GREENE, No. 162972; Court of Appeals No. 355485.

PEOPLE v HANNA, No. 163079; Court of Appeals No. 355233.

PEOPLE v ELLEDGE, No. 163217; Court of Appeals No. 350639.

PEOPLE v AVERY, No. 163265; Court of Appeals No. 355938.

PEOPLE v DARRYL SMITH, No. 163278; Court of Appeals No. 356601.

PEOPLE v GREGORY HARRIS, No. 163285; Court of Appeals No. 356378.

In re ORTIZ-KEHOE, No. 163288; Court of Appeals No. 351849.

PEOPLE v CLOUD, No. 163325; Court of Appeals No. 356588.

BREECE v JOHNSON, No. 163358; Court of Appeals No. 353759.

CAN IV PACKARD SQUARE, LLC v SCHUBINER, No. 163367; Court of Appeals No. 352510.

PEOPLE v PERRY, No. 163370; Court of Appeals No. 351661.

PEOPLE v EBEL, No. 163374; Court of Appeals No. 356946.

MAYER v MAYER, No. 163376; Court of Appeals No. 356276.

TAYLOR v BELILL, No. 163406; Court of Appeals No. 354613.

PEOPLE v LEONARD, No. 163433; Court of Appeals No. 356738.

PEOPLE v DAVID DAVIS, No. 163457; Court of Appeals No. 356880.

STAMPONE v KENT CIRCUIT JUDGE, No. 163464; Court of Appeals No. 357137.

PEOPLE v CAMERON WRIGHT, No. 163471; Court of Appeals No. 348250.

PEOPLE v LAMARR ROBINSON, No. 163472; Court of Appeals No. 357765.

PEOPLE v CAMERON WRIGHT, No. 163473; Court of Appeals No. 348251.

PEOPLE v ROY SUTTON, No. 163507; Court of Appeals No. 356998.

PEOPLE v ARMSTRONG, No. 163543; Court of Appeals No. 357586.

CAN IV PACKARD SQUARE, LLC v PACKARD SQUARE, LLC, Nos. 163555 and 163556; Court of Appeals Nos. 348857 and 350519.

SADOWSKI v STATE OF MICHIGAN, No. 163565; Court of Appeals No. 354193.

PEOPLE v JUSTIN WILLIAMS, No. 163571; Court of Appeals No. 357747.

PEOPLE v JEROME BANKSTON, No. 163577; Court of Appeals No. 352604.

PEOPLE v SHIGWADJA, No. 163583; Court of Appeals No. 357626.

PEOPLE v BURNS, No. 163604; Court of Appeals No. 349102.

PEOPLE v GRIFFIN, No. 163611; Court of Appeals No. 357537.

GREAT LAKES WATER AUTHORITY v DANIELS-KARIM INVESTMENTS, LLC, No. 163618; Court of Appeals No. 354554.

RIVERA v SVRC INDUSTRIES, INC, No. 163656; reported below: 338 Mich App 663.

PEOPLE v BEACH, No. 163662; Court of Appeals No. 357474.

PEOPLE v WOODS, No. 163666; Court of Appeals No. 357595.

PEOPLE v COLE, No. 163684; Court of Appeals No. 350891.

PEOPLE v LEE, No. 163691; Court of Appeals No. 358316.

MILLER v GILYARD, No. 163698; Court of Appeals No. 357713.

PEOPLE v WHITE, No. 163708; Court of Appeals No. 354203.

PEOPLE v BRADFORD, No. 163722; Court of Appeals No. 357952.

In re THE MARVIN ADELL CHILDREN'S FUNDED TRUST, No. 163730; Court of Appeals No. 357127.

MATA v VAN BUREN COUNTY, No. 163732; Court of Appeals No. 354146.

AYESH v CHAALAN, No. 163736; Court of Appeals No. 354966.

PEOPLE v DOUGLAS SKINNER, No. 163738; Court of Appeals No. 357606.

PEOPLE v STANLEY DANIELS, No. 163740; Court of Appeals No. 350446.

PEOPLE v JUDY, No. 163743; Court of Appeals No. 352770.

PEOPLE v MACON, No. 163755; Court of Appeals No. 357223.

MONTGOMERY DRAIN DRAINAGE DISTRICT v 17 BAKER ROAD, LLC, No. 163760; Court of Appeals No. 357855.

PEOPLE v DEVOWE, No. 163765; Court of Appeals No. 358214.

PEOPLE v COOPER, No. 163776; Court of Appeals No. 358059.

PEOPLE v HUGHES, No. 163782; reported below: 339 Mich App 99. ZAHRA, J., would grant leave to appeal.

MAYNARD v CARTER, No. 163786; Court of Appeals No. 357681.

SHORES HOME OWNERS ASSOCIATION v WIZINSKY, Nos. 163794-163796; Court of Appeals Nos. 353321, 356520, and 356761.

REID v HURLEY MEDICAL CENTER, No. 163808; Court of Appeals No. 357379.

LC v JTC, No. 163810; Court of Appeals No. 358462.

PEOPLE v REED, No. 163824; Court of Appeals No. 358504.

PEOPLE v ANTHONY WALKER, No. 163839; Court of Appeals No. 358747.

PEOPLE v LANGLEY, No. 163842; Court of Appeals No. 358636.

PEOPLE v SULLIVAN, No. 163852; Court of Appeals No. 358075.

CITY OF MADISON HEIGHTS v SAYERS, No. 163862; Court of Appeals No. 354330.

TITUS v AUTO-OWNERS INSURANCE COMPANY, No. 163894; Court of Appeals No. 353581.

Reconsideration Denied March 8, 2022:

PACOLA v OBSTETRICS AND GYNECOLOGY OF BIG RAPIDS, PC, No. 162919; Court of Appeals No. 355356.

BRAXTON v BEAUMONT HEALTH TROY, No. 162944; Court of Appeals No. 351397.

Remand Ordered March 11, 2022:

KOOMAN v BOULDER BLUFF CONDOMINIUMS UNITS 73-123, 125-146, INC, No. 162537 and 162538; reported below: 334 Mich App 188. On March 3, 2022, this Court heard oral argument on the application for leave to appeal the October 15, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). We REMAND this case to the Ottawa Circuit Court to permit the defendants-appellees to raise the argument that the state court proceedings in this matter are barred by collateral estoppel. The circuit court shall, after receiving briefing by the parties and holding any hearing it

deems necessary, submit its findings on this issue to the Clerk of the Supreme Court within 56 days of the date of this order. We retain jurisdiction.

Leave to Appeal Denied March 11, 2022:

PEOPLE V JOEL DAVIS, No. 160775; Court of Appeals No. 332081. On October 7, 2021, the Court heard oral argument on the application for leave to appeal the November 12, 2019 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CLEMENT, J. (*dissenting*). I dissent from the Court's order denying leave to appeal. Under our recent decision in *People v Wafer*, 509 Mich 31 (2022), defendant's convictions for aggravated domestic violence, MCL 750.81a(3), and assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84(1)(a), are incompatible. Defendant's conviction for aggravated domestic violence should therefore be set aside.

I believe this case should be controlled by *Wafer*. In *Wafer*, the defendant was convicted of second-degree murder, MCL 750.317, and one of the elements of murder is that the defendant acted with malice, see *People v Goecke*, 457 Mich 442, 463-464 (1998). We held that a defendant found guilty of murder (and who therefore acted *with* malice) could not also have "discharg[ed] a firearm that is pointed or aimed intentionally *but without malice* at another person" in violation of MCL 750.329(1) (emphasis added). "As a purely textual matter, . . . the language of the offenses is inconsistent, leading to the natural conclusion that the same person cannot be punished under both offenses for the same conduct." *Wafer*, 509 Mich at 41-42. "Absent other textual indications to the contrary[,] . . . it is hard to imagine a clearer sign that the Legislature did not intend to authorize cumulative punishments for these crimes." *Id*. at 42.

The statutes at issue here are very similar to those in *Wafer*. Defendant was convicted of AWIGBH, which criminalizes "[a]ssault[ing] another person *with intent to do great bodily harm*, less than the crime of murder." MCL 750.84(1)(a) (emphasis added). He was also convicted of second-offense aggravated domestic violence under MCL 750.81a(3). Second-offense aggravated domestic violence under § 81a(3) is defined as an act of aggravated domestic violence under § 81a(2) paired with a prior conviction for the same conduct, so to violate § 81a(3), one must necessarily violate § 81a(2). Aggravated domestic violence is defined as having attacked a domestic partner "without a weapon and inflict[ing] serious or aggravated injury upon that individual *without intending to commit murder or to inflict great bodily harm less than murder* . . . ." MCL 750.81a(2) (emphasis added). If defendant is guilty of having assaulted his victim with intent to do great bodily harm less than murder, he cannot also have assaulted his victim *without* intending to inflict great bodily harm less than murder. As in *Wafer*, the language of the offenses is inconsistent, which should lead to the natural conclusion

that the same person cannot be punished under both offenses for the same conduct. In my view, it is hard to imagine a clearer sign that the Legislature did not intend to authorize cumulative punishments for these crimes.

I readily acknowledge that what distinguishes these statutes from those at issue in *Wafer* is that there is, at least arguably, a textual indication to the contrary. The AWIGBH statute provides that "[t]his section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same conduct as the violation of this section." MCL 750.84(3). I do not believe this language should derogate from the clear sign provided by the Legislature that it did not intend to authorize cumulative punishments for these crimes. Its actual text does not speak to this situation. In *Wafer*, the obstacle to convicting the defendant of both second-degree murder and statutory manslaughter was not anything in the murder statute; rather, it was the language in the manslaughter statute stating that the offense was committed if the defendant acted "without malice." Similarly, in this case a conclusion that the same criminal act cannot sustain a conviction for both AWIGBH and aggravated domestic violence does not depend on anything in the AWIGBH statute, but rather language in the domestic violence statute that is incompatible with that conviction. In other words, the AWIGBH statute says that *this section* does not prohibit a person from being convicted of another violation of law arising out of the same conduct, but on these facts it would not be *this section* (the AWIGBH statute) that prohibits the cumulative conviction, but rather the aggravated domestic violence section, which requires that the defendant have acted "without intending . . . to inflict great bodily harm less than murder."

I also question whether the disclaimer in § 84(3) remains meaningful under our current approach to these double-jeopardy principles. It appears to me that this language first appeared in our statutes when the Legislature criminalized taking a weapon from a peace officer. See 1994 PA 33. That enactment also included the statement that "[t]his section does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating this section." MCL 750.479b(3). But at that time, our test for whether the same conduct could be held to violate separate statutes asked whether the "[s]tatutes prohibit[ed] conduct that is violative of distinct social norms . . . ." *People v Robideau*, 419 Mich 458, 487 (1984). If an individual attacked a police officer and stole his service pistol, for example, the language made clear that the assault and the theft were violations of "distinct social norms" and could be punished cumulatively. The language appears to have subsequently become boilerplate that the Legislature uses. See MCL 750.50c(8); MCL 750.81d(5); MCL 750.495a(4); MCL 750.120a(5); MCL 750.436(5); MCL 750.479(6); MCL 750.16(7); MCL 750.18(9); MCL 333.17764(8); MCL 750.520n(3); MCL 722.642(8); MCL 750.234a(3); MCL 750.234b(8); see also MCL 436.1904(4). But *Robideau* is no longer the law. See *People v Smith*, 478 Mich 292, 315 (2007). Now, to decide whether cumulative punishments are allowed, we ask whether the Legislature has clearly

authorized them, and if it has not, we look to the abstract elements of the offenses to see whether each crime has an element that the other lacks. *Id*. at 316. Under *Robideau*, if the courts determined that two criminal statutes prohibited conduct that was violative of the same social norm, the existence of a conviction under one statute precluded a conviction under the other. Under *Smith*, it is not the existence of a conviction that could preclude a conviction under some other statute, but rather the text of the particular statutes at issue. This disclaimer appears to me to be responsive to a multiple-punishments test the courts no longer are using.

Here, as in *Wafer*, I believe the language in MCL 750.81a(2) is a clear expression of legislative intent that the same act cannot violate both that section and MCL 750.84(1)(a). Because the expression of legislative intent is clear, it is not necessary to analyze the abstract elements of the offenses. I do not believe the disclaimer in § 84(3) undermines this conclusion, and I would therefore set aside defendant's conviction for aggravated domestic violence, meaning that I dissent from the Court's decision to deny leave to appeal.

PEOPLE V HUNT, No. 162869; Court of Appeals No. 352385.

PEOPLE V KENYON CLINTON, No. 163242; Court of Appeals No. 356410.

JETER V WELLPATH, LLC, No. 163442; Court of Appeals No. 356759.

ZAHRA, J. (*dissenting*). I would grant the application for the reasons expressed in my dissenting statement in *Legion-London v Surgical Inst of Mich Ambulatory Surgery Ctr, LLC*, 508 Mich 1006 (2021).

VIVIANO, J. (*dissenting*). I would grant leave to consider reversing the trial court for the reasons stated in Justice ZAHRA's dissent in *Legion-London v Surgical Inst of Mich Ambulatory Surgery Ctr, LLC*, 508 Mich 1006 (2021).

Summary Disposition March 16, 2022:

PEOPLE V MANWELL, No. 162238; Court of Appeals No. 333916. By order of April 2, 2021, the application for leave to appeal the October 29, 2020 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Hawkins* (Docket No. 161243). On order of the Court, the motion to amend the application is GRANTED. The case of *People v Hawkins* having been decided on May 28, 2021, 507 Mich 949 (2021), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal we REMAND this case to the Court of Appeals for reconsideration in light of *Hawkins*. The motions to expand the record, to compel discovery, to remand, and to stay in abeyance are DENIED.

ZAHRA and VIVIANO, JJ., would deny leave to appeal.

PEOPLE V TALLMAN, No. 163563; Court of Appeals No. 357625. On order of the Court, the application for leave to appeal the September 1, 2021 order of the Court of Appeals is considered and, pursuant to MCR

7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

ZAHRA, VIVIANO, and BERNSTEIN, JJ., would deny leave to appeal.

Leave to Appeal Granted March 16, 2022:

PEOPLE v DEWEERD, No. 162966; Court of Appeals No. 349353. The parties shall include among the issues to be briefed whether a defendant who has generally disavowed knowledge of unlawful activity should be considered to have "interfered with or attempted to interfere with the administration of justice . . . ." MCL 777.49(c). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

CRAMER v TRANSITIONAL HEALTH SERVICES OF WAYNE, No. 163559; reported below: 338 Mich App 603. On order of the Court, the application for leave to appeal the August 26, 2021 judgment of the Court of Appeals is considered, and it is GRANTED, limited to the issues of: (1) whether the four-factor test in *Martin v Pontiac Sch Dist*, 2001 Mich ACO 118, lv den 466 Mich 873 (2002), (a) is at odds with the principle that a preexisting condition is not a bar to eligibility for workers' compensation benefits, and (b) conflicts with the plain meaning of MCL 418.301(2); and (2) assuming that *Martin* provides the appropriate test, the parties shall address whether, on this record, the Court of Appeals erred in affirming the Michigan Compensation Appellate Commission's conclusion that the magistrate properly applied *Martin*, as well as the standard in *Yost v Detroit Bd of Ed*, 2000 Mich ACO 347, lv den 465 Mich 907 (2001). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Workers' Compensation Law Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Oral Argument Ordered on the Application for Leave to Appeal March 16, 2022:

LONG LAKE TOWNSHIP v MAXON, No. 162946; reported below: 336 Mich App 521. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether it violated the appellees' Fourth Amendment rights by using an unmanned drone to take aerial photographs of the appellees' property for use in zoning and nuisance enforcement. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the

appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied March 16, 2022:

BORKOWSKI v NILES, No. 161214; Court of Appeals No. 347354.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

PEOPLE v TIMOTHY HORTON, No. 162704; Court of Appeals No. 348236.

PEOPLE v CHRISTENSEN, Nos. 163227 and 163228; Court of Appeals Nos. 350877 and 350878.

PEOPLE v LEHRE, No. 163300; Court of Appeals No. 348185.

PEOPLE v MILLER, No. 163384; Court of Appeals No. 346744.

PEOPLE v STEPHEN GOODMAN, No. 163425; Court of Appeals No. 353248.

PEOPLE v NADJA KIOGIMA, No. 163455; Court of Appeals No. 353815.

PEOPLE v STEVEN GOODMAN, No. 163617; Court of Appeals No. 346845.

Rehearing Denied March 16, 2022:

In re BRUCE U MORROW, JUDGE 3RD CIRCUIT COURT, No. 161839.

Oral Argument Ordered on the Application for Leave to Appeal March 17, 2022:

PEOPLE v PEELER, No. 163667; Court of Appeals No. 357754. The parties may file supplemental briefs by 5:00 p.m. on April 14, 2022, addressing whether a defendant charged with a felony after a proceeding conducted pursuant to MCL 767.3 and MCL 767.4 is entitled to a preliminary examination. Each party may file a response brief by 5:00 p.m. on April 21, 2022. MCR 7.314(B)(1). The time allowed for oral argument shall be 15 minutes for each side.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Amicus curiae briefs shall be filed by 5:00 p.m. on April 21, 2022.

CLEMENT, J., not participating due to her prior involvement as chief legal counsel for the Governor.

In re BABY BOY DOE, No. 163807; reported below: 338 Mich App 571. The parties may file supplemental briefs by 5:00 p.m. on April 14, 2022, addressing: (1) whether a complaint for divorce that seeks custody of an unborn child qualifies as a petition to gain custody of a newborn under the Safe Delivery of Newborns Law (SDNL), MCL 712.1 *et seq*., which requires the petition of a nonsurrendering parent to be filed "[n]ot later than 28 days after notice of surrender of a newborn has been published," MCL 712.10(1); and (2) whether the application of the SDNL violates the due process rights of an undisclosed father. See *In re Sanders*, 495 Mich 394 (2014). Each party may file a response brief by 5:00 p.m. on April 27, 2022. MCR 7.314(B)(1). The time allowed for oral argument shall be 15 minutes for petitioner, 15 minutes for respondent, and 15 minutes for cross-appellants.

The Family Law Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Amicus curiae briefs shall be filed by 5:00 p.m. on April 27, 2022.

Summary Disposition March 18, 2022:

PEOPLE V MESHKIN, No. 161324; Court of Appeals No. 348831. On January 13, 2022, the Court heard oral argument on the application for leave to appeal the April 30, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we VACATE the Court of Appeals opinion and REMAND this case to the Allegan Circuit Court for a new trial.

When a witness testifies to the good character of the defendant in a criminal case, MRE 405(a) permits cross-examination of the witness about specific instances of conduct that might call into question the defendant's reputation for honesty and integrity. The purpose of this cross-examination is to test the credibility of the character witness and help the fact-finder determine what weight to give the witness's testimony. *People v Dorrikas*, 354 Mich 303, 316-317 (1958). Though trial courts have wide discretion in evaluating such inquiries, " '[w]ide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse.' " *Id*. at 318, quoting *Michelson v United States*, 335 US 469, 480 (1948). We have been clear about the trial court's responsibilities in this regard, saying these inquiries should not be made without:

> (1) the trial judge determining, in the absence of the jury, whether or not the criminal acts actually took place, the time of their commission, and a determination as to whether they were relevant to the issue being tried, and (2) the trial judge making a

> careful instruction to the jury as to the reasons testimony as to the criminal acts is being admitted. [*Id*. at 326.]

These steps must be followed to ensure counsel is not " 'taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box.' " *Id*. at 321, quoting *Michelson*, 335 US at 481.

Defendant presented a character witness at trial, and on cross-examination, the prosecutor asked this witness if it was true that defendant had committed a previous sexual assault. The trial court did not determine whether there was any factual basis to support the question, the prosecution did not offer any, and the trial court did not instruct the jury as to the reasons why such a question was permissible. Inquiries of this type, without any basis in fact and without any of the necessary protections afforded by the trial court, are improper. *Dorrikas*, 354 Mich at 317-318, 326-327; *People v Whitfield*, 425 Mich 116, 131-133 (1986). The trial court erred by allowing a " 'groundless question to waft an unwarranted innuendo into the jury box.' " *Dorrikas*, 354 Mich at 321, quoting *Michelson*, 335 US at 481.

Defendant tried to offer testimony to show the falsity of the suggestion inherent in the prosecution's question, but the trial court excluded the testimony. Defendant argues that this denied him his constitutional right to a fair trial. We agree. Given that this case "essentially boiled down to whether the complainant's allegations" were true, *People v Armstrong*, 490 Mich 281, 293 (2011), this error was not harmless beyond a reasonable doubt, *People v Anderson*, 446 Mich 392, 404-406 (1994).

Defendant also argues that he was denied his constitutional right to present a defense because the trial court excluded his proposed expert from testifying that the complainant suffered from Reactive Attachment Disorder (RAD). While we need not reach this question in light of our holding that defendant is entitled to a new trial on the basis of the prosecution's improper cross-examination, we address the admissibility of this expert testimony because it is likely to arise on retrial. In excluding the evidence, the trial court reasoned, "I think the prejudicial nature of the evidence would be to mislead the jury to believe that everyone that has RAD lies about everything they say." But defendant's offer of proof states that his expert would confine his testimony to "the relevant facts of the Reactive Attachment Disorder diagnosis" and refrain from any "evaluative statements regarding the veracity of [the complainant's allegations], the accuracy of diagnoses, or any other facet related to the facts of this case." And the prosecution has conceded that this evidence is not categorically inadmissible.

Expert testimony related to a complainant's background is often admissible, so long as the expert does not opine on whether the complainant is being truthful. *People v Peterson*, 450 Mich 349, 373-375 (1995). While RAD may present a trial court with a more difficult challenge than other types of expert testimony, other jurisdictions appear to navigate this complexity. See *Large v State*, 177 P3d 807, 817-818 (Wy, 2008); *Darst v State*, 323 Ga App 614, 622-623 (2013); *State v Weisbarth*, 384 Mont 424, 425-429 (2016); *State v Salsbery*, 4 Wash App

2d 1023 (2018). On retrial, if the parties seek to admit expert testimony, the trial court can conduct a *Daubert* hearing to ensure that the proposed testimony is both relevant and reliable as is required under MRE 702. See *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993); *People v Tomasik*, 498 Mich 953 (2015). The scope of the expert's testimony, if admissible, could also be determined by the court in advance to address the potential prejudice from any specific testimony. We do not retain jurisdiction.

PEOPLE v GROSS, No. 163180; Court of Appeals No. 356670. By order of September 10, 2021, the prosecuting attorney was directed to answer the application for leave to appeal the May 20, 2021 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and REMAND this case to the Wayne Circuit Court for an evidentiary hearing to determine if the subject of the defendant's offer of proof is evidence which was not discovered before his first motion for relief from judgment, MCR 6.502(G)(2), and if so, whether defendant is entitled to a new trial. *Brady v Maryland*, 373 US 83 (1963); *People v Cress*, 468 Mich 678 (2003). The motion for bond is DENIED.

ZAHRA and VIVIANO, JJ., would deny leave to appeal.

OUSLEY v PHELPS TOWING, INC, No. 163602; Court of Appeals No. 351378. On order of the Court, the application for leave to appeal the August 26, 2021 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals. The Jackson Circuit Court erred by granting the defendant's motion for summary disposition under MCR 2.116(C)(10) before the close of discovery because the driver of the tow truck had not yet been deposed. Therefore, under the facts of this case, there remains a " 'fair likelihood that further discovery will yield support for the nonmoving party's position.' " *Kern v Kern-Koskela*, 320 Mich App 212, 227 (2017), quoting *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34 (2009). We REMAND this case to the Jackson Circuit Court for entry of an order denying the defendant's motion for summary disposition and for further proceedings not inconsistent with this order.

Oral Argument Ordered on the Application for Leave to Appeal March 18, 2022:

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC v PARK STREET GROUP REALTY SERVICES, LLC, No. 163320; reported below: 337 Mich App 529. The parties shall file supplemental briefs within 42 days of the date of this order addressing the issues raised in the application and cross-application for leave to appeal, and specifically addressing: (1) whether a usury-savings clause is void as a violation of public policy; (2) whether the plaintiff violated the criminal usury

statute, MCL 438.41, by seeking to collect on the contract in court or by engaging in any other acts that violated the statute; and (3) if the plaintiff violated MCL 438.41, whether it is barred by the wrongful conduct rule from recovering the principal on the loan. In the supplemental briefs, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). Each party shall file a response brief within 21 days of being served with the other party's supplemental brief. The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied March 18, 2022:

PEOPLE v STENBERG, No. 163690; Court of Appeals No. 357412.

Declaratory Relief Granted in Part and Denied in Part March 21, 2022:

RAISE THE WAGE v BOARD OF STATE CANVASSERS, No. 164120. On order of the Court, the motion for expedited consideration is GRANTED. The complaint is considered, and declaratory relief is GRANTED as follows: the form of an initiative petition is not improper or in violation of MCL 168.482 for bearing a union label or other printer's mark like the mark on the petition at issue in this case. The mark does not violate the type-size requirements of MCL 168.482, which neither expressly nor implicitly precludes the inclusion of a printer's mark. Cf. *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 608 n 37 (2012) (stating that "the petition must actually comply with the statutory mandates"); *Protect our Jobs v Bd of State Canvassers*, 492 Mich 763, 778 (2012) ("[A] petition must fully comply with mandatory statutory provisions that pertain to a petition's requirements regarding form."). In all other respects, the complaint for declaratory relief is DENIED, because the Court is not persuaded that it should grant the requested relief. The motion to intervene is DENIED.

VIVIANO, J. (*concurring in part and dissenting in part*). I agree with the majority that MCL 168.482 does not establish any type-size requirements for the printer's mark at issue in this case.[1] But I would not reach the broader issue of whether printer's marks are permissible on petitions. Because no one has challenged the petition on the basis that the statute prohibits the mark, there is no reason to decide the issue now.[2]

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[1] I also agree with the majority's decision to deny the complaint for declaratory relief in all other respects and to deny the motion to intervene.

[2] Even if I were inclined to hold that these printer's marks are acceptable on petitions, I would clarify that the ruling applies to

Justice ZAHRA has made a compelling case that the union label is not part of the petition and therefore is not allowed by the statute. As he explains, the statutory requirements are detailed and exact, and they make no mention of union labels, recycling symbols, or any other marks that might be placed on petitions. This statutory silence might reasonably imply that these marks are prohibited. *In re Morrow*, 508 Mich 490, 513 (2022) (VIVIANO, J., concurring); (explaining the canon of *expressio unius est exclusio alterius*, under which a statute's " 'expression of one thing implies the exclusion of others' ") (citation omitted). As noted, however, this issue has not been raised or developed, and I would therefore not address it at this time.[3] For these reasons, I concur in part and dissent in part from the Court's order and would leave this additional issue for an appropriate future case.

BERNSTEIN, J. (*concurring in part and dissenting in part*). I join the majority of this Court in granting plaintiff's motion for expedited consideration as well as declaratory relief. I believe it is clear that a union label on an initiative petition is not subject to type-size requirements as set forth in MCL 168.482. Unlike the majority, I would also grant the Governor's motion to intervene, as I believe it is clear that a

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printer's marks generally, not simply union-affiliation marks. That is, I would be cautious not to suggest that our ruling was based on the political viewpoint expressed by the mark. Such a ruling would raise constitutional free-speech concerns. See *Iancu v Brunetti*, 588 US ___, ___; 139 S Ct 2294, 2299 (2019) ("The government may not discriminate against speech based on the ideas or opinions it conveys.").

[3] Of course, we are operating under tight deadlines. Legislative initiative petitions must be submitted by June 1, 2022, and constitutional initiative petitions by July 11, 2022. See MCL 168.471. Candidate petitions face an even tighter time frame for submission: April 19, 2022. See MCL 168.551. With the deadline this close, any decision that printer's marks are prohibited on candidate petitions could render it impossible for candidates who have followed what appears to be the historical practice of using petitions with these marks to timely collect and submit complying petitions. This might raise constitutional concerns about candidates' access to the ballot. See *Anderson v Celebrezze*, 460 US 780, 786-787 (1983) (explaining that the constitutional rights to vote and of freedom of association can be burdened by restrictions on candidates' eligibility for the ballot). At the very least, the time frame here should cause us to seriously consider limiting any ruling against printer's marks to prospective application only, as we did in a recent case involving initiative petitions. See *League of Women Voters of Mich v Secretary of State*, 508 Mich 520, 565 (2022) (" '[W]here injustice might result from full retroactivity [of a judicial decision], this Court has adopted a more flexible approach, giving holdings limited retroactive or prospective effect.' ") (citation omitted).

union label on a candidate's *nominating* petition is similarly not subject to type-size requirements. See MCL 168.544c(1). A union label is simply not a part of the petition itself. Given pending election deadlines, I would grant the Governor's motion to intervene and decide the issue presented there as well. To the extent that similar issues might arise in the context of other petitions not presently before this Court, declaratory relief can be sought in separate legal actions as necessary.

WELCH, J., joins the statement of BERNSTEIN, J.

ZAHRA, J. (*dissenting*). I dissent. The Court peremptorily holds that text on a petition that is printed in smaller than 8-point type is not prohibited seemingly because it is included in a symbol on a petition. A fair reading of the order also suggests agreement with plaintiff's position that any symbol shown on a petition is permissible under Michigan law. These are dubious conclusions of law resolving questions of public significance that are worthy of further review. I would order argument on the application and decide the case with the benefit of supplemental briefing from the parties and invited amicus. Pressed to decide this issue without additional briefing or oral argument, I would hold that the Board of State Canvassers is not authorized to approve initiative petitions that contain text smaller than 8-point type regardless whether that text is contained within a symbol on the petition. Further, at this point and without the benefit of full briefing, I am inclined to conclude that the Board of State Canvassers is not authorized to approve the placement of *any* symbol on the petition not otherwise permitted by statute.

MCL 168.482 addresses the form of initiative petitions and is highly specific in regard to the contents within a petition. For instance, "the heading of each part of the petition must be prepared in the [prescribed] form and printed in capital letters in 14-point boldfaced type[.]"[1] The petition also requires "[a] summary in not more than 100 words of the purpose of the proposed amendment or question proposed . . . and be printed in 12-point type."[2] Then, "[t]he full text of [an] amendment so proposed must follow the summary and be printed in 8-point type."[3] Lastly, a specific "warning [directed to a signatory of the petition] must be printed in 12-point type immediately above the place for signatures . . . ."[4]

In no way does MCL 168.482 suggest the petition may contain text that is smaller than 8-point type. Given the statute's specificity in regard to exacting capital letters and particular point types relating to every portion of the petition, there is simply no discretion the Board may exercise to approve any text in the petition that is smaller than 8-point type. This is true regardless of the message conveyed by the noncompliant text.

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[1] MCL 168.482(2).

[2] MCL 168.482(3).

[3] *Id*.

[4] MCL 168.482(5).

Plaintiff presents two arguments to support its claim that the petition may include text that is smaller than 8-point type. First, plaintiff directs our attention to a separate statute, MCL 168.544c(1), which governs nominating petitions. Specifically, this statute provides that "[t]he *balance* of the petition must be printed in 8-point type." Plaintiff argues that this phrase reflects how the Legislature intended to remove any possibility that a petition contain type that is smaller than 8 points with regard to nominating petitions. Since the Legislature failed to include a similar provision in MCL 168.482, plaintiff contends that a type size smaller than 8 points is permitted for initiative petitions. This argument is not persuasive. " 'If the language of the statute is clear, no further analysis is necessary or allowed.' "[5] MCL 168.482 is not ambiguous. Indeed, its specificity in regard to point type is the very opposite of ambiguous. In essence, plaintiff is suggesting that the *in pari materia* canon of construction requires these two statutes to be construed in light of one another. "The rule, *in pari materia*, cannot be invoked here for the reason that the language of the statute is clear and unambiguous."[6] Even if invoked, the rule does not compel a different result. The phrase "[t]he balance of the petition must be printed in 8-point type" is not needed to interpret MCL 168.482, which regulates every aspect of an initiating petition.

Second, plaintiff argues that the union "bug" is not really part of the petition at all, and there is no statutory requirement about what nonpetition language may or may not say or how it must be said. And the type-size requirements apply to text, not labels. Plaintiff claims that the union bug here is a trademark, sign, or symbol, not text. I agree with plaintiff that the union bug (and for that matter the recycling symbol that also appears on the petition) is not part of the petition at all. I simply disagree with plaintiff that anything that is not part of the petition should be placed on the petition. A petition is defined in terms of "formal written request."[7] MCL 168.482 highly regulates the text and form of a petition. As earlier described, the text must conform to letter-case requirements and point-type requirements. Nonformal indicia, such as symbols, are not included within the meaning of a "formal written request," i.e., a petition. This understanding resonates given that the statute itself already provides for neutral symbols, such as boxes to check or lines for filling in information. These symbols are not text but are expressly delineated by statute to facilitate the petition. The symbols in the instant case are entirely unnecessary and do not facilitate the petition. The union bug at issue in this case is improper because it contains type much smaller than an 8-point type. Further, the union bug and the recycling symbol are also improper because the statutory language does not sanction their placement. A petition posits serious questions to voters. Symbols in support of groups and causes are

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[5] *Coldwater v Consumers Energy Co*, 500 Mich 158, 167 (2017), quoting *Boyle v Gen Motors Corp*, 468 Mich 226, 229 (2003).

[6] *Voorhies v Recorder's Court Judge*, 220 Mich 155, 157 (1922).

[7] *Black's Law Dictionary* (11th ed).

distractions at the very least. I would end the practice of allowing symbols of any kind on petitions.[8] Plaintiff would not suffer prejudice as a result because it had only sought a preliminary determination of the petition, which the Board is not even obligated to entertain. Plaintiff can circulate its petitions by simply removing the union bug and recycling symbol from its petition.

In sum, I would order argument on the application. Otherwise, I would affirm the Board's preliminary denial and hold that the text within the union label is noncompliant because it is smaller than 8-point type. I would further hold that symbols are not to be placed on a petition regardless of the content or text.

Summary Disposition March 23, 2022:

PEOPLE v FERRAIUOLO, No. 163361; Court of Appeals No. 357078. On order of the Court, the application for leave to appeal the June 11, 2021 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

In re GUARDIANSHIP OF MARY ANN MALLOY, No. 163553; Court of Appeals No. 358006. On order of the Court, the motion for leave to provide supplemental authority is GRANTED. The application for leave to appeal the September 13, 2021 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

In re GUARDIANSHIP OF DANA JENKINS, No. 163560; Court of Appeals No. 358021. On order of the Court, the application for leave to appeal the September 13, 2021 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

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[8] In *Council About Parochiaid v Secretary of State*, 403 Mich 396, 397 (1978), this Court in an order "conclude[d] that the descriptive material attached to the petition at the time of circulation [was] not a part of the petition and, when considered with the summary paraphrase of the proposed amendment and the body of the petition, [was] not deceptive." I agree with *Council About Parochiaid*'s conclusion that material attached to the petition at the time of circulation is not a part of the petition. But I find *Council About Parochiaid* distinguishable because, unlike in this case, the material was not included on the petition itself.

Leave to Appeal Granted March 23, 2022:

SCHAAF v FORBES, No. 163404; reported below: 338 Mich App 1. The parties shall include among the issues to be briefed: (1) whether the circuit court was vested with subject matter jurisdiction of the plaintiffs' complaint, which sought a determination of interests in the subject property and partition, see MCL 700.1302; MCL 700.1303; (2) whether Michigan law allows a trust to hold title to real property as a joint tenant with right of survivorship; and (3) whether the deeds in dispute in this case were valid insofar as they granted the trustee of a trust a life estate in the real property as a joint tenant with right of survivorship. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Real Property Law and Probate & Estate Planning Sections of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Oral Argument Ordered on the Application for Leave to Appeal March 23, 2022:

PEOPLE v LEWIS, No. 162743; Court of Appeals No. 349774. The appellant shall file a supplemental brief within 42 days of the order appointing counsel, or of the ruling that the defendant is not entitled to appointed counsel, addressing: (1) whether the search warrant affidavit established a sufficient nexus between the alleged drug trafficking and defendant's home, see *Illinois v Gates*, 462 US 213, 238 (1983); compare *United States v Brown*, 828 F3d 375 (CA 6, 2016), with *United States v White*, 874 F3d 490 (CA 6, 2017), and *United States v Reed*, 993 F3d 441 (CA 6, 2021); and (2) if not, whether the officers relied on the search warrant in good faith. *People v Goldston*, 470 Mich 523 (2004). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

WILMORE-MOODY v ZAKIR, No. 163116; Court of Appeals No. 352411. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the rescission of an insurance policy under the no-fault act, MCL 500.3101 *et seq*., bars recovery of noneconomic damages under MCL 500.3135(2)(c) on the basis that the claim-

ant "did not have in effect . . . the security required by [MCL 500.3101(1)] at the time the injury occurred." In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

VECTREN INFRASTRUCTURE SERVICES CORP v DEPARTMENT OF TREASURY, No. 163742; reported below: 339 Mich App 117. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the taxpayer established by clear and cogent evidence that "the business activity attributed to it in this state 'is out of all appropriate proportion to the actual business activity transacted in this state and leads to a grossly distorted result' " under MCL 208.1309(3) of the Michigan Business Tax Act, MCL 208.1101 *et seq*.; (2) whether application of the statutory formula in this case runs afoul of the Due Process and Commerce Clauses incorporated in the statute because it does not fairly determine the portion of income from the sale of a business attributed to in-state activities; and (3) whether remand for the parties to determine an alternate method of apportionment conflicts with MCL 208.1309(2), which vests exclusive authority to approve an alternate method of apportionment in the Department of Treasury. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

PEOPLE v LYON, No. 164191; Court of Appeals No. 360548. The parties may file supplemental briefs by 5:00 p.m. on April 14, 2022, addressing: (1) whether MCL 767.3 and MCL 767.4 violate Michigan's constitutional requirement of separation of powers, Mich Const 1963, art 3, § 2; (2) whether those statutes confer charging authority on a member of the judiciary; (3) whether a defendant charged after a proceeding conducted pursuant to MCL 767.3 and MCL 767.4 is entitled to a preliminary examination; and (4) whether the proceedings conducted pursuant to MCL 767.3 and MCL 767.4 violated due process, Mich Const 1963, art 1, § 17. Each party may file a response brief by 5:00 p.m. on April 21, 2022. MCR 7.314(B)(1). The time allowed for oral argument shall be 15 minutes for each side.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs

amicus curiae. Amicus curiae briefs shall be filed by 5:00 p.m. on April 21, 2022.

CLEMENT, J., not participating due to her prior involvement as chief legal counsel for the Governor.

Leave to Appeal Denied March 23, 2022:

PEOPLE v FLUHART, No. 162017; Court of Appeals No. 353464.

NAWAI WARDACK TRANSPORTATION COMPANY v RMA GROUP AFGHANISTAN LIMITED, No. 162918; Court of Appeals No. 350393.

BED BATH & BEYOND, INC v DEPARTMENT OF TREASURY, Nos. 163443 and 163444; Court of Appeals Nos. 352088 and 352667.

PEOPLE v TOMASZYCKI, No. 163506; Court of Appeals No. 357839.

BURNETT v AHOLA, Nos. 163753 and 163754; Court of Appeals Nos. 356502 and 356505.

BURNETT v AHOLA, No. 163762; Court of Appeals No. 356505.

Rehearing Denied March 23, 2022:

AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN v CALHOUN COUNTY SHERIFF'S OFFICE, No. 163235; Court of Appeals No. 352334.

Summary Disposition March 25, 2022:

PEOPLE v BRANHAM, No. 163202; Court of Appeals No. 350452. On order of the Court, the application for leave to appeal the June 3, 2021 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE that part of the Court of Appeals opinion holding that a request for a self-defense instruction that included fear of serious injury would have been meritless or futile. This omitted instruction was supported by the evidence and the instructions actually provided did not sufficiently protect defendant's right to a properly instructed jury. Accordingly, had trial counsel requested this instruction, the trial court would have been required to provide it. See *People v Rajput*, 505 Mich 7, 10 (2020). We REMAND this case to the Court of Appeals for consideration of whether trial counsel's failure to request a self-defense jury instruction that included the fear of serious injury, see M Crim JI 7.15, was "representation [that] fell below an objective standard of reasonableness," see *Strickland v Washington*, 466 US 668, 688 (1984), that prejudiced him, see *id*. at 687, 694. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v HOBSON, No. 163255; Court of Appeals No. 353077. On order of the Court, the application for leave to appeal the May 13, 2021

judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Section II of the Court of Appeals opinion, REVERSE Section III of the Court of Appeals opinion, and REMAND this case to the Wayne Circuit Court as on reconsideration granted to reopen the proofs and permit the defendant to provide additional testimony regarding the prejudice prong of her *Strickland*[1] claim under *People v Ginther*, 390 Mich 436 (1973). Pursuant to this Court's June 2, 2017 order, the circuit court held an evidentiary hearing and determined that the performance of the defendant's trial and appellate counsel fell below an objective standard of reasonableness, but that the defendant was not prejudiced by the error. At that hearing, the defendant was repeatedly questioned about a life with the possibility of parole sentence for second-degree murder, but it is uncontroverted that such a sentence was not a possibility at the time of the defendant's trial. MCL 769.9(2); *People v Moore*, 164 Mich App 378, 386-392 (1987). The defendant raised this error in a motion for reconsideration, which the circuit court denied. The circuit court thus failed to determine if the defendant would have accepted the plea that she was actually offered, a finding required under *Lafler v Cooper*, 566 US 156 (2012). The Court of Appeals erred in holding that the possibility that the circuit court might have rejected the plea agreement is grounds for denying relief. The circuit court did not reach that issue in this case and there is no basis in the record to assume that the circuit court would have refused to accept the plea that the defendant was actually offered.

ZAHRA, J. (*dissenting*). I respectfully dissent. I cannot conclude that the trial court erred by finding that defendant failed to satisfy her burden of demonstrating a reasonable likelihood that she would have accepted the prosecution's plea offer had she been effectively advised by trial counsel, as is required in order to establish prejudice for purposes of an ineffective-assistance-of-counsel claim.[1] There is very little in the record of this decades-old case to show what motivated defendant to

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[1] *Strickland v Washington*, 466 US 668 (1984).

[1] Where a defendant alleges that he or she would have accepted a plea offer and not proceeded to trial because of trial counsel's alleged ineffectiveness, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that

> but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. [*Lafler v Cooper*, 566 US 156, 164 (2012).]

reject the offered plea deal. While the *Ginther*[2] hearing provided defendant an opportunity to demonstrate that she would have accepted the plea, reviewing courts must remain mindful of the fact that credibility determinations remain the responsibility of the trial courts. Here, defendant primarily presented self-serving testimony that she would have done whatever trial counsel advised her to do; this evidence was subject to credibility findings by the trial court and, even if accepted as true, does not equate to a showing that defendant would have accepted the plea offer but for trial counsel's deficient performance. While a questionable hypothetical situation was posed to defendant at the *Ginther* hearing—she was asked if she would have accepted a sentence with a maximum of life with parole even though such a sentence was not available[3]—her uncertain response to that question is noteworthy given that the maximum that would have been possible under the plea deal actually offered would have been a very lengthy term of years. Defendant's explicit reluctance to state that she would have accepted a plea with a maximum of parolable life—"I guess I would have took the twenty-five to life"—would seem to apply with equal force to the lengthy term-of-years maximum that could have been imposed under the proffered plea deal. Therefore, even if the terms of the hypothetical situation itself were not available to defendant, the equivocal nature of defendant's response is informative as to whether she would have accepted the plea deal and can have a great impact on the trial court'scredibility determination. In any event, defendant's lukewarm response to a hypothetical situation that was not directly applicable does not relieve her of her burden to establish prejudice.

In sum, defendant bears the burden to show that she would have accepted the plea offer but for counsel's erroneous advice, and she has not done so. The trial court assessed the credibility of the witnesses, as best as it could in a case this old, and was not convinced that defendant satisfied her burden. I would not disturb this credibility determination. For these reasons, and because I find it hard to believe that a "do-over" *Ginther* hearing will be productive or a good use of the trial court's resources, I would deny leave to appeal.

Relief Denied March 25, 2022:

LEAGUE OF WOMEN VOTERS OF MICHIGAN v INDEPENDENT CITIZENS REDISTRICTING COMMISSION, No. 164022. On order of the Court, the complaint is considered, and relief is DENIED, because the Court is not persuaded that it should grant the requested relief.

CAVANAGH, J. (*concurring*). I concur in the denial. Plaintiffs have not sustained their burden to show that the map for the Michigan House of Representatives (the "Hickory map") adopted by the Independent Citi-

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[2] *People v Ginther*, 390 Mich 436 (1973).

[3] See MCL 769.9(2); *People v Moore*, 164 Mich App 378, 386-392 (1987).

zens Redistricting Commission (the Commission) failed to comply with constitutional requirements. The Michigan Constitution requires that the Commission's plan "not provide disproportionate partisan advantage to any political party." Const 1963, art 4, § 6(13)(d). This obligation cannot be viewed in isolation, but rather must be assessed in concert with the Commission's obligation to respect the full list of prioritized criteria, including higher priority criteria such as communities of interest. See Const 1963, art 4, § 6(13)(a) through (g). Further, disproportionate advantage "shall be determined using accepted measures of partisan fairness." Const 1963, art 4, § 6(13)(d).

The Commission considered disproportionate partisan advantage by, among other things, receiving relevant presentations and memorandums from hired redistricting experts including Dr. Lisa Handley, reviewing draft plans against accepted measures of partisan fairness, and revising draft plans to reduce partisan advantage. The Commission states that it chose to balance partisan fairness with other higher-order constitutional criteria, including its consideration of the identified communities of interest in Flint and the Chaldean community. Plaintiffs have not rebutted that this was a permissible choice. Indeed, plaintiffs failed to meaningfully address the Commission's obligation to consider the partisan-advantage criteria as intertwined with other enumerated and prioritized constitutional criteria.[1]

Further, plaintiffs' expert report from Dr. Christopher Warshaw shows that the differences between plaintiffs' proposed Promote the Vote map and the Hickory map are *de minimis*. See Warshaw, *An Evaluation of the Partisan Fairness of the Michigan Independent Citizens Redistricting Commission's State House Districting Plan* (January 28, 2022) (Warshaw Report), pp 11-16, attached as Exhibit 1 to plaintiffs' complaint. Moreover, Dr. Warshaw concedes that his analysis of two partisan-fairness measures, the efficiency gap and the mean-median difference, was not significantly different from Dr. Handley's calculations. *Id*. at 4 n 6. In light of the absence of a meaningful factual dispute on these points, plaintiffs have not shown that a *de minimis* deviation in partisan advantage between the plans is legally significant. Plaintiffs have made no argument that the similar partisan-fairness metrics, largely agreed upon by Drs. Handley and Warshaw, have ever been accepted by any court to establish a constitutional violation. In sum, plaintiffs have not made the case that the Commission's efforts were insufficient to comply with constitutional requirements. Const 1963, art 4, § 6(19).

MCCORMACK, C.J., joins the statement of CAVANAGH, J.

WELCH, J. (*dissenting*). In 2018 the voters of Michigan overwhelmingly supported Proposal 2, which amended our state Constitution and established the Independent Citizens Redistricting Commission. Const 1963, art 4, § 6. The voters entrusted this Court with the responsibility

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[1] While Dr. Warshaw opined that the maps were similar in terms of compactness, he did not analyze any other § 6(13) criteria. See Warshaw Report at 16-17.

of ensuring that the commissioners comply with the constitutional mandate handed to them by the voters. Const 1963, art 4, § 6(19). Under our Constitution, the Commission "shall abide" by seven criteria when developing and adopting redistricting plans for state legislative and congressional districts. Const 1963, art 4, § 6(13)(a) through (g). The word "shall" means that the action is "mandatory." *Lakeshore Group v Dep't of Environmental Quality*, 507 Mich 52, 64 (2021). The inaugural Commission convened in 2020 to create its redistricting plans. This is thus the first opportunity for this Court to examine the interaction among the various constitutionally-mandated criteria. The law is a blank slate. I would have heard this case and taken the time to make certain that the will of the voters who supported Proposal 2 was actually reflected in the redistricting plan. I dissent from the Court's decision to not hear this case.

The plaintiffs challenge whether the adopted redistricting plan for the Michigan House of Representatives complies with the requirement that "[d]istricts shall not provide a disproportionate advantage to any political party." Const 1963, art 4, § 6(13)(d). This assessment "shall be determined using accepted measures of partisan fairness." *Id*. What amount of advantage to a political party is "disproportionate" or what statistical methods of measuring partisan fairness are acceptable are open questions. The plaintiffs in this case submitted an expert report concluding that the state House plan fails the partisan-fairness requirement because it provides a disproportionate advantage to the Republican Party. The expert's submitted statistical modeling suggests that the adopted plan will favor the Republican Party in 99% of scenarios; that "[o]n this plan, Republicans are likely to win the majority of the seats even if they win the minority of votes"; and that "Democrats could win a minority of the seats while winning a majority of the vote."[1] According to plaintiffs, this built-in, asymmetrical partisan advantage for the Republican Party is not transient and will likely persist for this entire redistricting cycle. See Grofman & King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v Perry*, 6 Election Law Journal 2, 25 (2007) (stating "a partisan bias of 1-3 percentage points . . . is typically persistent over the decade following the redistricting, and accounts for measurable differences in the representation of the state's population in the state legislature"). The

[1] Plaintiffs' expert, Christopher Warshaw, J.D., Ph.D., is a political scientist at George Washington University who studies public opinion, representation, elections, and polarization in American politics. His work has been published in numerous peer-reviewed journals and his expertise in questions of measuring partisan fairness has been recognized and valued by both state and federal courts. See, e.g., *League of Women Voters of Mich v Benson*, 373 F Supp 3d 867 (ED Mich, 2019), judgment vacated on other grounds by *Chatfield v League of Women Voters of Mich*, ___ US ___; 140 S Ct 429 (2019); *Adams v DeWine*, ___ Ohio St 3d ___; 2022-Ohio-646 (2022). The Commission does not dispute Dr. Warshaw's expertise or figures.

statistical modeling suggests that the adopted plan will effectively prevent the Democratic Party from obtaining a majority in the state House except in wave election years. Is the state House plan compliant with our Constitution's requirement that an adopted plan not provide a disproportionate advantage to a political party? Without any hearing, explanation of the law, or application of facts against a settled legal standard, we have no way to actually know.

In the absence of any settled legal standard or baseline for how a challenge should proceed, it is unjust to criticize the plaintiffs' expert-supported presentation of their case as somehow lacking. On the contrary, the plaintiffs' challenge raises a question of first impression that checks all the usual boxes to warrant our review. See MCR 7.305(B) (stating that grounds for appellate review include an issue that "involves a legal principle of major significance to the state's jurisprudence" and "has significant public interest"). This Court's role in redistricting disputes, as in every setting, has always been "to determine what are the requirements of this constitution and to define the meaning of those requirements in specific applications." *In re Apportionment of State Legislature—1982*, 413 Mich 96, 114 (1982). Today, the Court does neither.

The responsibility to give meaning to and enforce our Constitution's antipartisan gerrymandering provision belongs to this Court. Indeed, this Court is the only judicial authority empowered to ensure the Commission's adopted plans comply with the redistricting criteria. Const 1963, art 4, § 6(19). The United States Supreme Court has determined that federal courts are not an available forum for claims of partisan gerrymandering. *Rucho v Common Cause*, 588 US ____; 139 S Ct 2484, 2506-2507 (2019); see also *Banerian v Benson*, 589 F Supp 3d 735, 736 (2022) (rejecting challenge to a claim of partisan gerrymandering as nonjusticiable in federal courts). The *Rucho* Court placed the obligation to hear these kinds of claims squarely on state courts like ours, even citing Michigan as an example of a state whose voters had adopted a state constitutional provision prohibiting or limiting "partisan favoritism in redistricting." *Rucho*, 588 US at ____; 139 S Ct at 2507.

In its response, the Commission states that "communities of interest" prevented the Commission from adopting a fairer map on partisan metrics. There is a separate redistricting criterion that "[d]istricts shall reflect the state's diverse population and communities of interest" that is prioritized one step higher than the criterion that "[d]istricts shall not provide a disproportionate advantage to any political party." Const 1963, art 4, § 6(13)(c) and (d). But this Court has never decided how these criteria should balance or whether a different plan could have better balanced all criteria. Further, the Commission never settled upon a definition of "communities of interest" and never identified how "communities of interest" are intentionally reflected in the adopted plan.[2]

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[2] The Constitution requires that "[f]or each adopted plan, the commission shall issue a report that explains the basis on which the commission

By failing to engage in a meaningful examination of what the law requires, the Court invites a watered-down approach that may ultimately frustrate the intentions of the more than 60% of Michigan voters who supported the prohibition of partisan gerrymandering. I dissent.

BERNSTEIN, J., joins the statement of WELCH, J.

Leave to Appeal Denied March 25, 2022:

SWANZY v KRYSHAK, No. 163058; reported below: 336 Mich App 370.

VIVIANO, J. (*dissenting*). I respectfully dissent from the Court's decision to deny leave to appeal. This case presents a jurisprudentially significant question regarding when a claim for vicarious liability against a professional corporation sounds in medical malpractice. Because I question the Court of Appeals' analysis and conclusion, I would hear oral argument on the application for leave to appeal.

The decedent in this case was treated for diabetes by Dr. Edward J. Kryshak, who was employed by defendant Spectrum Health Primary Care Partners (defendant). The decedent's wife had a question about the decedent's insulin and called Dr. Kryshak's office to ask if she could use an old vial of insulin that she had at home. She alleges that she spoke with Robin Zamarron, a certified but unlicensed medical assistant, who told her she could use the insulin and directed her as to how much to give him. The amount Ms. Zamarron told the decedent's wife was five times the amount that should have been administered. The decedent's wife administered the amount she had been directed to administer, which caused the decedent to fall into a coma and die.

The decedent's wife, as personal representative of the decedent's estate, sued Dr. Kryshak and defendant.[1] Count 1 of her complaint contained two parts: (1) that defendant was vicariously liable for Ms. Zamarron's negligence in giving incorrect information about the insulin substitution and dosage, and (2) that defendant was directly liable for its negligent training and supervision of Ms. Zamarron. The trial court granted partial summary disposition to plaintiff, ruling that Count 1 sounds in ordinary negligence, not medical malpractice. The Court of Appeals affirmed, holding that a claim of medical malpractice could not accrue against defendant for its direct negligence in failing to train Ms.

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made its decisions in achieving compliance with plan requirements . . . ." Const 1963, art 4, § 6(16). Without this information, it is difficult for this Court to comply with our own charge "to review a challenge to any plan adopted by the commission" and "to remand a plan to the commission for further action if the plan fails to comply with the requirements of this constitution . . . ." Const 1963, art 4, § 6(19). While my colleagues infer that it is the plaintiffs' burden to show noncompliance in the first instance, it is difficult for any plaintiff to do so given the fact that the Commission has yet to comply with its constitutional obligation to provide a record of its decision-making process.

[1] Dr. Kryshak is not a party to this appeal.

Zamarron or its vicarious liability for Ms. Zamarron's allegedly negligent actions. *Swanzy Estate v Kryshak*, 336 Mich App 370 (2021).

I question the Court of Appeals' analysis and conclusion with respect to vicarious liability for Ms. Zamarron's allegedly negligent actions. A medical malpractice action cannot accrue against an individual or entity who is incapable of medical malpractice. *Adkins v Annapolis Hosp*, 420 Mich 87, 95 (1984). Thus, we have previously recognized that "[t]he first issue in any purported medical malpractice case concerns whether it is being brought against someone who, or an entity that, is capable of malpractice." *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 420 (2004). When determining whether a claim sounds in ordinary negligence or medical malpractice, Michigan courts ask two questions: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Id*. at 422. If the answer to both questions is yes, the claim sounds in medical malpractice and is subject to the procedural and substantive requirements that govern such claims. *Id*.

At issue in this appeal is whether defendant is capable of malpractice, the answer to which turns on the first *Bryant* prong—"whether the claim pertains to an action that occurred within the course of a professional relationship[.]" *Id*. at 422. We have previously explained the professional relationship test as follows:

> A professional relationship sufficient to support a claim of medical malpractice exists in those cases in which a licensed health care professional, licensed health care facility, or the agents or employees of a licensed health care facility, were subject to a contractual duty that required that professional, that facility, or the agents or employees of that facility, to render professional health care services to the plaintiff. [*Id*.]

MCL 600.5838a is the accrual statute establishing when a medical malpractice cause of action accrues. Only providers and facilities covered by MCL 600.5838a can meet the professional relationship prong of the *Bryant* test. See *Potter v McLeary*, 484 Mich 397, 415 (2009). MCL 600.5838a(1) states, in relevant part:

> For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, whether or not the licensed health care professional, licensed health facility or agency, or their employee or agent is engaged in the practice of the health profession in a sole proprietorship, partnership, professional corporation, or other business entity, accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

It is undisputed that defendant does not meet the definition of "licensed health care facility." It also is not itself a "licensed health care professional." However, that does not end the inquiry. The question in this case is whether defendant may be vicariously liable for Ms. Zamarron's actions because of her alleged status as an employee who was delegated professional acts, tasks, or functions under MCL 333.16215(1). In *Potter* we addressed when a plaintiff must provide a notice of intent (NOI) to a professional corporation (PC) prior to commencing a medical malpractice action predicated on the PC's vicarious liability for one of its providers. We explained that "[w]hen a PC renders professional services, it is rendering those professional services through the licensed health care pro-vider [sic] and the two are treated as though they are one entity." *Potter*, 484 Mich at 418. Therefore, "a plaintiff must provide a timely NOI to a PC before commencing a medical malpractice action when the claims alleged against the PC are predicated on its vicarious liability for a licensed health care provider who is rendering professional services." *Id*. at 425. In a footnote, we stated, "Conversely, when a claim asserted against a PC involves the actions of an employee or agent who is unlicensed or not rendering professional services as delineated in MCL 450.225, the NOI requirement would be unnecessary, because such a claim would sound in ordinary negligence rather than medical malpractice." *Id*. at 403 n 4.

MCL 450.225 is now found at MCL 450.1285 and states, in relevant part:

> (1) A professional corporation shall not provide professional services in this state except through its officers, employees, and agents who are duly licensed or *otherwise legally authorized to provide the professional services in this state*. The term "employee" does not include a secretary, bookkeeper, technician, or other assistant who is not usually and ordinarily considered by custom and practice to be providing a professional service to the public for which a license or other legal authorization is required. [Emphasis added.]

MCL 333.16215(1) permits a medical licensee to "delegate to a licensed or unlicensed individual who is otherwise qualified by education, training, or experience the performance of selected acts, tasks, or functions where the acts, tasks, or functions fall within the scope of practice of the licensee's profession and will be performed under the licensee's supervision." Thus, it appears that a claim against a PC involving the actions of an employee who is unlicensed may sound in medical malpractice if the acts, tasks, or functions of the employee at issue were delegated to the employee by a medical licensee under MCL 333.16215(1).

In the present case, there are questions of fact regarding whether Dr. Kryshak delegated any acts, tasks, or functions to Ms. Zamarron and what the extent of such delegation may have been. As a result, it appears that there remains a genuine question whether the first part of Count 1 of plaintiff's complaint sounds in medical malpractice and not ordinary negligence.

The Court of Appeals in this case focused only on Ms. Zamarron's status as an unlicensed medical assistant. It provided no analysis of MCL 450.1285 or MCL 333.16215(1); in other words, it did not consider whether Ms. Zamarron was rendering professional services in a manner that would satisfy the first prong of *Bryant*. Indeed, when the Court of Appeals quoted footnote 4 of *Potter*, it only emphasized the phrase "who is unlicensed" and omitted the reference to MCL 450.225 (again, now found at MCL 450.1285). *Swanzy Estate*, 336 Mich App at 384-385 ("In addition, our Supreme Court expressly stated in *Potter* that 'when a claim asserted against a [professional corporation] involves the actions of an employee or agent *who is unlicensed* or not rendering professional services[,] . . . such a claim would sound in ordinary negligence . . . .' "), quoting *Potter*, 484 Mich at 403 n 4 (emphasis and alterations in *Swanzy*).[2]

The Court of Appeals also rejected defendant's suggestion that it follow *Flie Estate v Oakwood Healthcare Inc*, unpublished per curiam opinion of the Court of Appeals, issued December 12, 2017 (Docket No. 333389). The Court in *Flie* disagreed that footnote 4 of *Potter* stood for the proposition "that any cause of action against a PC based on the acts of the PC's unlicensed employee *necessarily* sounds in ordinary negligence." *Flie*, unpub op at 6. *Flie* observed that MCL 450.1285(1) "expressly recognizes that both licensed *and* unlicensed employees can render professional services." *Id*. The Court of Appeals in this case declined to apply *Flie*, finding it to be unpersuasive. It believed that the plaintiff in *Flie* "sought to hold the professional corporation vicariously liable for actions of a physician it employed, not for the actions of the unlicensed medical assistant" and that it was thus "not tasked with evaluating whether a professional corporation could be held vicariously liable based solely upon its status as the employer of an employee who was not a licensed health care professional under MCL 600.5838a(1)(b)." *Swanzy*, 336 Mich App at 386-387.

Although *Flie* was unpublished, I nevertheless question whether the Court of Appeals in this case was correct to reject its analysis. If the services being provided would render an entity liable for medical malpractice if they were being provided directly by a licensed individual,

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[2] The Court of Appeals also relied on three other cases that, combined with *Potter*, it believed "stand for the proposition that an institutional defendant is only capable of being held vicariously liable for the professional malpractice of its employees who are licensed healthcare providers under MCL 600.5838a(1)(b)." *Swanzy Estate*, 336 Mich App at 385. Those cases were *Kuznar v Raksha Corp*, 481 Mich 169 (2008); *LaFave v Alliance Healthcare Servs, Inc*, 331 Mich App 726 (2020); and *Sabbagh v Hamilton Psychological Servs, PLC*, 329 Mich App 324 (2019). But all three of those cases appear to be distinguishable. None of them involved a claim against an entity that was based on the conduct of one of its unlicensed employees who was acting under authority delegated to them by a professional licensee.

and those same services are being provided by an unlicensed individual under validly delegated authority on behalf of the licensed individual, that would seemingly satisfy the professional-relationship prong of *Bryant*. If so, the claim could sound in medical malpractice. Additionally, as noted, the question in this case is not whether defendant can be held vicariously liable based solely on its status as the employer of Ms. Zamarron; the question is whether it may be liable based on Ms. Zamarron's status as an employee who was delegated professional acts, tasks, or functions under MCL 333.16215(1).

For these reasons, I think the Court of Appeals may have erred in holding that defendant's vicarious liability for Zamarron's negligent actions cannot sound in medical malpractice. I respectfully dissent from the Court's decision to deny leave to appeal and instead would hear oral arguments on defendant's application.

In re APPORTIONMENT–KENT COUNTY–2021, No. 163952; Court of Appeals No. 359310.

CAVANAGH, J. (*concurring*). I concur in the Court's denial order. I agree with my dissenting colleague's observation that this Court has not weighed in on what it means for a county commissioner district to "not be drawn to effect partisan political advantage" as required by MCL 46.404(h). I further agree that the various standards utilized in recent years by the Court of Appeals, see *Apportionment of Kent Co Bd of Comm'rs—1972*, 40 Mich App 508 (1972), and *In re Apportionment of Clinton Co—1991 (After Remand)*, 193 Mich App 231 (1992), are divorced from the text of the statute. Further, I appreciate the concerns raised about continuing uncertainty surrounding the meaning of MCL 46.404(h) and how it is to be applied in relation to the other criteria laid out in MCL 46.404.

Nonetheless, I support the majority's decision to deny leave to appeal in this case. Petitioners' arguments in this case ostensibly focus on MCL 46.404(b), MCL 46.404(e), and MCL 46.404(h). I detect no clear error in the Court of Appeals' rejection of assertions that the adopted plan is not contiguous in violation of MCL 46.404(b), or in its conclusion that the divisions of the townships, villages, and cities, MCL 46.404(e), are reasonable when considered in the context provided by the population and the need to satisfy the divergence standard. *Apportionment of Wayne Co Bd of Comm'rs—1982*, 413 Mich 224, 264 (1982) ("A reasonable choice in the reasoned exercise of judgment should ordinarily be sustained."). Even assuming that petitioners are correct that the adopted plan "shows a meaningful Republican bias" while the plans they support are "significantly less biased,"[1] and that this is contrary to MCL 46.404(h), I do not think petitioners have raised a successful challenge to the adopted plan.

We do not view the criteria of MCL 46.404 in rigid order. *Wayne Co—1982*, 413 Mich at 259. That is, we do not require "exhaustive

[1] It has been alleged that the adopted plan provides a 5.5% partisan edge to the Republican Party, while petitioners' preferred plan would give only a 1.6% advantage to the Republican Party.

compliance with each criterion before turning to a succeeding criterion . . . ." *Id*. However, the statute clearly indicates that criteria (a) through (h) are "stated [in] order of importance[.]" MCL 46.404. According to the Legislature, that commissioner districts "not be drawn to effect partisan political advantage" is the criterion that holds the least weight. Petitioners fail to acknowledge that the adopted plan conforms to criteria that are, by statute, more essential. For example, they do not contest that the approved plan better achieves population equality, MCL 46.404(a),[2] and requires fewer combinations of townships and cities, MCL 46.404(d),[3] than either of their preferred plans. Because of the hierarchy set forth in MCL 46.404, regardless of what test or standard we might adopt to gauge partisan political advantage,[4] I see no way for petitioners' challenge to prevail.[5]

Again, I share my dissenting colleague's concerns about the lack of a statutory-language-based standard for MCL 46.404(h), but in this case the purported partisan edge is insufficient to overcome the simple fact that the adopted plan more closely adheres to the criteria that the Legislature has designated as more important. Therefore, I concur in the Court's denial order.

MCCORMACK, C.J., joins the statement of CAVANAGH, J.

WELCH, J. (*dissenting*). While much attention is paid to the decennial redistricting process for congressional and state legislative seats, far less attention is paid to the redistricting process for county commission seats in the same cycle. Michigan's county commissioners serve as the elected executive and legislative body for each county. Whether through direct employment, funding support, or collaboration with other entities, county governments affect many aspects of residents' daily lives, including law enforcement (sheriffs, prosecutors, and jails); courts; infrastructure (roads, water resources, and drainage); parks; administration of elections and vital records through the county clerk's office;

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[2] Pursuant to *Wayne County—1982*, 413 Mich at 263, the allowable population divergence is 11.9%. According to respondent, the petitioners' preferred plans had population divergences of 10.75% and 10.96%, while the adopted plan has a population divergence of only 6.43%.

[3] According to respondent, the approved plan include five instances where a township or part of a township is combined with a city. Petitioners' preferred plans allow for six instances of such combinations.

[4] Petitioners advocate for a results-based test without regard to intent, while respondents counter that the commission's intent to gerrymander is required to conclude that a plan has been drawn to effect partisan political advantage in violation of MCL 46.404(h).

[5] I must also note that petitioners' requested relief is for this Court to vacate the adopted plan and order the commission to adopt their preferred plan; however, the proper remedy would be a remand to the commission, not a judicial imposition of a plan that the commission flatly rejected. *Wayne County—1982*, 413 Mich at 266.

local health departments; taxes; and general financing for a variety of county and cooperative programs, projects, and initiatives. Michigan's counties vary widely in the services offered to their constituents, often based on the priorities of those who are elected. While these services may be less known to the public than policy implemented in Lansing or Washington, D.C., they are certainly no less important given the tangible impacts for people in their backyards.

In 2018, Michigan voters overwhelmingly supported Proposal 2, which amended the state Constitution and created an independent citizens redistricting commission charged with following numerous criteria in drawing new congressional and legislative districts. One of the criteria requires that the independent commission ensure that the districts "shall not provide a disproportionate advantage to any political party." Const 1963, art 4, 6(13)(d). The measure passed with 61% of the statewide vote.

While that amendment did not affect the apportionment of county commission districts for general-law counties, Michigan has had a statute for more than 50 years stating that county apportionment (or redistricting) plans shall not "be drawn to effect partisan political advantage." MCL 46.404(h). For 50 years, that requirement has been effectively ignored by the courts. As a result, whatever political party has controlled a county apportionment body in a general-law county has been able to brazenly gerrymander county commission districts with little fear of reprimand from the courts.[1] Every 10 years, this Court is asked to consider the statute's anti-gerrymandering provision and its application. And every 10 years, this Court punts. The Court has, once again, missed a once-in-a-decade opportunity to provide much needed guidance about the meaning and enforceability of MCL 46.404(h).

While the legal standards for evaluating county apportionment challenges applied by the Court of Appeals in this case were adopted decades ago, they were not and still are not based on the language enacted by the Legislature. Moreover, under the Court of Appeals' current standards, it remains unclear what evidentiary threshold one must meet to even obtain a hearing on the merits or be entitled to further factual development under MCR 7.206(D)(4). This Court's continued silence not only ensures that challenges to a county apportionment plan premised on a violation of MCL 46.404(h) will remain effectively unavailable, but it also leaves county apportionment commissions without binding guidance as to how they should balance compliance with criterion (h) against the other criteria outlined in MCL 46.404(a) to (g).

All legal disputes concerning the reapportionment of county commissioner district lines are inherently difficult and time-sensitive, and the

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[1] In general-law counties, "the county apportionment commission shall consist of the county clerk, the county treasurer, the prosecuting attorney, and the statutory county chairperson of each of the 2 political parties receiving the greatest number of votes cast for the office of secretary of state in the last preceding general election." MCL 46.403(1).

political undertones encourage courts to approach such disputes with caution. The United States Supreme Court recently held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Rucho v Common Cause*, 588 US ____, ____; 139 S Ct 2484, 2506-2507 (2019). See also *Vieth v Jubelirer*, 541 US 267, 274-276 (2004) (opinion of Scalia, J.). But *Rucho* was premised on the lack of a standard or rule found in the United States Constitution or federal law. *Rucho*, 588 US at ____; 139 S Ct at 2507. The Supreme Court's decision "does not condone excessive partisan gerrymandering. Nor does [its] conclusion condemn complaints about districting to echo into a void." *Id*. Instead, the Supreme Court left such matters to the states while specifically noting that some states, like Michigan, had approved constitutional amendments changing how and by whom state legislative and congressional districts would be drawn and others had statutes prohibiting or limiting "partisan favoritism in redistricting." *Id*. at ____; 139 S Ct at 2507-2508. Stated differently, states remain free to be the laboratories of democracy that they have always been. *New State Ice Co v Liebmann*, 285 US 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

Michigan was already a pioneering laboratory of democracy in matters concerning the apportionment of districts for elected county officials long before *Rucho* was decided. In 1966, our Legislature prohibited drawing general-law county commissioner districts to "effect partisan political advantage" when it enacted MCL 46.404.[2] When a challenge to a county apportionment plan is brought, the courts have an obligation to "review such plan to determine if the plan meets the requirements of the laws of this state." MCL 46.406. But since then, our Court has said little about the county apportionment process or the governing statutory standards. The Court previously rejected a defer-

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[2] MCL 46.404 was enacted by 1966 PA 261 and later amended by 1969 PA 137. The Legislature also enacted criteria to govern the apportionment of charter counties during the same legislative session. See 1966 PA 293 (codified at MCL 45.505), as amended by 1980 PA 7. That statute provides that districts "shall be drawn without regard to partisan political advantage." MCL 45.505(2). A third optional unified form of county governance was authorized by 1973 PA 139, MCL 45.551 *et seq*. Currently, only Wayne County and Macomb County are charter counties, and only Oakland County and Bay County have adopted the unified form. See Citizens Research Council of Michigan, *Counties in Michigan: An Exercise in Regional Government* (March 2017), p 5 <https://crcmich.org/PUBLICAT/2010s/2017/rpt395_counties_exercise_regional_government-2017.pdf> (accessed February 24, 2022) [https://perma.cc/ULT5-T2G6]. All other counties in Michigan are general-law counties in which the county commission serves as the top legislative and executive body of the county.

ential standard based on the "good faith" efforts of an apportionment commission because it was unworkable and recognized its obligation to provide "meaningful judicial review." *Apportionment of Wayne Co Bd of Comm'rs–1982*, 413 Mich 224, 265 (1982) (*Wayne Co—1982*). Instead, the Court held that "there will be areas for the exercise of judgment. A reasonable choice in the reasoned exercise of judgment should ordinarily be sustained." *Id*. at 264. But *Wayne Co—1982* is not dispositive of the current challenge brought under MCL 46.404(h).

Wayne Co—1982 focused on explaining how a county apportionment commission could lawfully balance compliance with MCL 46.404(a) to (f) with the population-proportionality ("one person-one vote") requirements imposed by the Equal Protection Clause of the United States Constitution. *Wayne Co—1982*, 413 Mich at 233-245, 249-264. While the Court rejected a "rigid reading of 'stated order' " in MCL 46.404, *id*. at 259, and noted that "[c]riterion (h) states that the pursuit of partisan political advantage may not be a goal," *id*. at 261, the Court's decision provided no guidance about how criterion (h) should be balanced against the other criteria in MCL 46.404. The only other decision from this Court interpreting MCL 46.404 likewise does not address MCL 46.404(h). See *In re Apportionment of Tuscola Co Bd of Comm'rs—2001*, 466 Mich 78 (2002). Thus, for over half a century, this Court has been silent about what MCL 46.404(h) means or how it should be balanced against the other statutory criteria. While lawsuits have been filed and appealed, the Court has consistently denied leave.

The Court of Appeals has attempted to fill in the gaps left in the vacuum created by this Court's silence. Several competing standards have emerged that are not based in the text of MCL 46.404(h).

One standard comes from *In re Apportionment of Kent Co Bd of Comm'rs*, 40 Mich App 508, 513-514 (1972) (*Kent Co—1972*). In *Kent Co—1972*, the Court of Appeals held that the proffered analysis of prior election results "has little bearing on the good faith of the apportionment commission in drawing the commissioner districts," *Kent Co—1972*, 40 Mich App at 511, that there was no statutory or constitutional requirement that "the plan must reflect the proportionate vote of either political party in the county," *id*. at 512, and that the petitioners failed to "demonstrate that the action of the Kent County Apportionment Commission constituted 'an intentional and systematic political gerrymander disenfranchising large numbers of registered voters . . . who regularly vote Democratic,' " *id*. at 513. In reaching its holding, the panel did not rely on the actual statutory language of MCL 46.404(h). Instead, the panel drew from *Whitcomb v Chavis*, 403 US 124, 153-155 (1971), a case concerning allegations of unlawful race-based redistricting brought under the Equal Protection Clause of the United States Constitution. See *Kent Co—1972*, 40 Mich App at 513-514. With zero analysis of the language of MCL 46.404(h), the court held as follows:

> We will not find any county's apportionment plan, which otherwise demonstrates a *good faith effort* to achieve districts of equal population, to have been drawn to effect partisan political advantage without the presentation of actual evidence by the petitioners that this consideration in adoption *was prominent in*

> *the deliberations by the drafters to the neglect of the other statutory guidelines*. [*Kent Co—1972*, 40 Mich App at 514 (emphasis added).]

The next missed opportunity was presented in *In re Apportionment of Clinton Co—1991 (After Remand)*, 193 Mich App 231 (1992) (*Clinton Co—1991*). In that case, the petitioners had conceded at oral argument that their partisan-political-advantage argument lacked merit because of the demographic factors. *Id*. at 235 ("[A]t oral argument it was conceded that there is effectively no Democratic political strength throughout the county . . . ."). Despite this, and without engaging with the text of MCL 46.404(h), the Court of Appeals held:

> We therefore need not decide whether a motivation test, *City of Mobile v Bolden*, 446 US 55; 100 S Ct 1490; 64 L Ed 2d 47 (1980), or a stricter results test, *Chisom v Roemer*, 501 US 380 [380]; 111 S Ct 2354; 115 L Ed 2d 348 (1991), is appropriate when a petition is filed challenging the legality of a reapportionment plan in light of MCL 46.404(h); MSA 5.359(4)(h). We note, however, that if partisanship can be demographically and cartographically established, it is usually considered intentional for the reasons adduced in *Gaffney v Cummings*, 412 US 735, 749-751; 93 S Ct 2321; 37 L Ed 2d 298 (1973).
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> Because there is no claim that precincts have been divided, and we have already rejected a claim that districts were drawn to effect partisan political advantage—particularly in the absence of any indication that the adopted plan unfairly alters the existing allocation of political power vis-a-vis voting strength, thus putting judicial interest "at its lowest ebb," *Gaffney*[, 412 US at] 753-754; *Davis v Bandemer*, 478 US 109, 128-129; 106 S Ct 2797; 92 L Ed 2d 85 (1986)—we conclude that the adopted plan "meets the requirements of the laws of this state." [*Clinton Co—1991*, 193 Mich App at 235, 239.]

This Court denied leave to appeal in both *Kent Co—1972* and *Clinton Co—1991*, and no other published decisions from the Court of Appeals have touched on the meaning of MCL 46.404(h). It thus appears that under existing Court of Appeals precedent, to prevail on a challenge under MCL 46.404(h), a petitioner must show one of the following: (a) a lack of good faith by the apportionment commission, (b) evidence that partisan advantage was a prominent consideration of the apportionment commission, or (c) evidence that the adopted plan unfairly alters existing allocations of political power vis-à-vis voting strength. All of these standards are divorced from the text of MCL 46.404(h), and they have become nearly impossible to meet from an evidentiary

perspective.[3] Deference to a commission's good-faith efforts was rejected in *Wayne Co—1982*. Moreover, in a reality where county reapportionment plans are not required to be drawn during open meetings[4] and apportionment commission members refuse to debate allegations of unfair political partisanship when they are raised,[5] it is unlikely that there will ever by evidence in the official minutes that supports a violation of MCL 46.404(h). One might conclude that the sole viable path to a meritorious MCL 46.404(h) challenge under current precedent is to show that an adopted plan unfairly alters existing allocations of political power vis-à-vis voting strength. This might be a viable option, if one can present strong evidence that one or more of the existing districts in which a majority of residents tend to vote one way has been broken up or reconfigured in a manner that shifts the balance in the other direction. But this method only helps with dilution-based claims. It does not allow for consideration of changing demographics or more advanced statistical analysis. If the Legislature had intended for only one narrow form of political gerrymandering to be prohibited, it would not have needed to enact a broad prohibition stating that "[d]istricts shall not be drawn to effect partisan political advantage." MCL 46.404(h).

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[3] For example, most, if not all, reapportionment challenges in 2011 were also disposed of without a full hearing on the merits, and often without factual development, using peremptory orders like the one that petitioners appeal in this case. See, e.g., *In re Apportionment—Kent Co—2011*, unpublished order of the Court of Appeals, entered Aug 9, 2011 (Docket No. 304697) (holding that the petitioners had not met their evidentiary burden for an MCL 46.404(h) challenge under *Clinton Co—1991*); *In re Apportionment—Presque Isle Co—2011*, unpublished order of the Court of Appeals, entered August 9, 2011 (Docket No. 304772) (holding that the petitioners had not met their evidentiary burden for an MCL 46.404(h) challenge under *Clinton Co—1991*); *In re Apportionment—Marquette Co—2011*, unpublished order of the Court of Appeals, entered July 12, 2011 (Docket No. 304414) (holding that the petitioners had not met their evidentiary burden for an MCL 46.404(h) challenge under *Clinton Co—1991*).

[4] The typical process appears to be for members of the county reapportionment commission to present previously prepared apportionment plans to the commission for consideration. In this case, plans were submitted by the county chairs of the Republican Party and Democratic Party.

[5] In this case, for example, one member of the Kent County Apportionment Commission raised concerns about the partisan advantage created by the proposed plan that was later adopted, but the other commission members declined to engage in any discussion of those concerns.

Our obligation to provide "meaningful judicial review," *Wayne Co—1982*, 413 Mich at 265, sometimes requires the Court to answer difficult questions to which there are no clear answers. I believe the Court has missed yet another opportunity to answer the difficult question of what the anti-gerrymandering language in MCL 46.404(h) means and how it can be applied in practice, and I am concerned that the Court of Appeals' current standards are not grounded in the statute. Perhaps the asserted partisan favoritism in this case would have been disproven or discredited. Or perhaps the assertion would not matter after criterion (h) is weighed against criteria (a) to (g). There is no way to know because existing precedent provides no guidance as to how such a balancing act should be performed.

I am also concerned that the Court of Appeals did not decide this case correctly under its own existing precedent. The majority in the Court of Appeals declined to refer this case to the circuit court under MCR 7.206(D)(4) for review of the evidence presented by the petitioners through an extensive report authored by a nationally recognized voting-rights and elections expert who has testified before many courts in this country.[6] The report purports to provide statistically conclusive proof that the adopted plan for Kent County favors the Republican Party substantially more than the alternative plan that was rejected by the apportionment commission. The petitioners argue that this demonstrates the respondent's intent to create a partisan political advantage under the plain language of MCL 46.404(h), as well as under *Clinton Co—1991*. Absent from the respondent's answer in the Court of Appeals (or in this Court) was any data, expert report, or statistical analysis refuting the opinions of the petitioners' expert. While it is highly likely that the respondent would have provided some counterevidence had the case been referred to the circuit court for factual development, it is shocking that the Court of Appeals deemed this unnecessary. If unrebutted statistical analysis from a seemingly qualified expert claiming to demonstrate that an adopted map creates an unfair and unnecessary partisan advantage in violation of MCL 46.404(h) is not enough to get an evidentiary hearing, then what is?

I believe the petitioners presented prima facie evidence of a potentially meritorious challenge to the adopted county apportionment plan under MCL 46.404(h). Accordingly, I believe the Court of Appeals

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[6] While the petitioners' proffered report has yet to be formally admitted into evidence due to the lack of an evidentiary hearing, the report was authored by Christopher Warshaw, J.D., Ph.D. He is a political scientist at George Washington University who studies public opinion, representation, elections, and polarization in American politics. He has provided expert reports in at least four redistricting cases, and he has provided expert testimony in three federal lawsuits related to the United States Census. If this case had been referred to the circuit court for factual development, then respondent could have challenged Dr. Warshaw's credentials or the methods used in his report under MRE 702 and 703.

majority abused its discretion by dismissing the petitioners' challenge without a full hearing on the merits or any further factual development. MCR 7.206(D)(4). At a minimum, this case should have been referred to the circuit court for appointment of a special master to make factual findings concerning the petitioners' evidence and any counterevidence the respondent may have produced. Instead, the residents of Kent County have been denied meaningful judicial review of a potentially meritorious claim of unlawful partisan gerrymandering.

The sum of the issues outlined above leaves me deeply disappointed in the Court's decision to deny leave to appeal. We instead will wait 10 more years. Perhaps then the uncertainty surrounding MCL 46.404(h) will finally be resolved. I respectfully dissent.

BERNSTEIN, J., joins the statement of WELCH, J.

In re APPORTIONMENT–MACOMB COUNTY–2021, No. 163978; Court of Appeals No. 359554.

CAVANAGH, J. (*concurring*). For similar reasons as those set forth in my concurring statement in *In re Apportionment of Kent Co—2021*, 509 Mich 893 (2022), I also concur in the Court's denial order in this case. I acknowledge that there is a lack of guidance in regard to the interpretation of the instruction in MCL 45.505(2) that charter county commission districts "shall be drawn without regard to partisan political advantage." However, the bare allegations of political gerrymandering in this case are unavailing in light of the fact, as the Court of Appeals recognized, that the adopted plan fares better regarding the balance of statutory requirements contained in MCL 45.505(2). Viewed in its entirety, the adopted plan appears to represent a "reasonable choice in the reasoned exercise of judgment . . . ." *Apportionment of Wayne Co Bd of Comm'rs—1982*, 413 Mich 224, 264 (1982). Therefore, I join the Court's order denying leave to appeal.

MCCORMACK, C.J., joins the statement of CAVANAGH, J.

WELCH, J. (*dissenting*). I dissent from the Court's decision to deny leave to appeal in this case for many of the same reasons raised in my dissenting statement in *In re Apportionment—Kent Co—2021*, 509 Mich 893 (2022) (*Kent Co—2021*). While this case concerns the reapportionment of county commissioner seats for a charter county, as opposed to the reapportionment of the general-law county at issue in *Kent Co—2021*, there is a similar absence of guidance from this Court about the meaning of the governing anti-gerrymandering statute. See MCL 45.505(2) (stating that "districts . . . shall be drawn without regard to partisan political advantage"). Even though MCL 45.505 was enacted over 50 years ago, neither this Court nor the Court of Appeals has ever interpreted its anti-gerrymandering provision. I believe the Court of Appeals erroneously dismissed the petitioners' challenge without a hearing on the merits by relying on inapplicable and erroneous legal precedent.

The petitioners argue that the adopted county apportionment plan creates an unlawful partisan advantage through packing, cracking, and changing the core constituency of certain county commissioner districts

in a manner that will alter the existing political power within the county. They argue that this violates MCL 45.505(2) and MCL 45.514(1)(b), which are statutes governing the apportionment of county commissioner districts for charter counties. The Court of Appeals dismissed these arguments because:

> Petitioners' arguments that the plan was drawn to effect partisan political advantage contrary to MCL 45.505(2) and 45.514(1)(b) is not supported by the record. Petitioners did not meet their burden of presenting actual evidence that partisanship was a prominent consideration in the adoption of the plan, or that the adopted plan unfairly alters the existing allocation of political power vis-à-vis voting strength. *In re Apportionment of Clinton Co — 1991 (After Remand)*, 193 Mich App 231; 483 NW2d 448 (1992), lv den 439 [Mich 981] (1992); *In re Apportionment of Kent Co Bd of Commissioners*, 40 Mich App 508, 513-514; 198 NW2d 915 (1972), lv den 388 Mich 757 (1972). [*In re Apportionment—Macomb Co—2021*, unpublished order of the Court of Appeals, entered January 20, 2022 (Docket No. 359554).]

The obvious problem with the Court of Appeals' decision is that neither of the cases it cited dealt with charter counties or MCL 45.505(2). There is no binding precedent from this Court or the Court of Appeals providing guidance as to the meaning or application of the anti-gerrymandering provision in MCL 45.505(2). Moreover, as I noted in my dissenting statement in *Kent Co—2021*, the standards adopted by the Court of Appeals in *In re Apportionment of Clinton Co—1991 (After Remand)* and *In re Apportionment of Kent Co Bd of Comm'rs* are not grounded in the text of MCL 46.404(h), which is the anti-gerrymandering provision for general-law counties.

This Court has, once again, missed the once-in-a-decade opportunity to provide much needed guidance to county apportionment bodies concerning compliance with Michigan's longstanding anti-gerrymandering laws. Perhaps in another decade, the uncertainty surrounding MCL 45.505(2)'s anti-gerrymandering provision will finally be resolved. I respectfully dissent.

BERNSTEIN, J., joins the statement of WELCH, J.

MGM GRAND DETROIT LLC v CITY OF DETROIT, No. 164079; Court of Appeals No. 358511.

Summary Disposition March 30, 2022:

FILIZETTI v GWINN AREA COMMUNITY SCHOOLS, No. 162092; Court of Appeals No. 344878. On January 13, 2022, the Court heard oral argument on the application for leave to appeal the August 27, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals and REMAND this case to the Marquette Circuit Court to reinstate the parts of its July 23, 2018 order that held that the stage cover and its

panels were building fixtures and that questions of fact remain to be resolved by the fact-finder under the public-building exception to governmental immunity. We DENY the application for leave to appeal in all other respects, including whether the individually named defendants were grossly negligent.

Unless an exception applies, the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., provides immunity from tort liability for government agencies "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). At issue here is the public-building exception, which explains, in part:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. [MCL 691.1406].

For the public-building exception to apply, a plaintiff must show that an injury was caused by a defect or dangerous condition of the building itself. *Reardon v Dep't of Mental Health*, 430 Mich 398, 400 (1988). The exception is limited to the repair and maintenance of the public building and does not include claims of design defects. *Renny v Dep't of Transp*, 478 Mich 490, 501, 505 (2007).

This Court has consistently considered fixtures to be part of the building for purposes of the public-building exception to governmental immunity. *Velmer v Baraga Area Sch*, 430 Mich 385, 387, 394-395 (1988) (holding that a milling machine in a school metal shop class was a fixture even though it was not permanently affixed to the floor). " 'The term "fixture" necessarily implies something having a possible existence apart from realty, but which may, by annexation, be assimilated into realty.' " *Fane v Detroit Library Comm*, 465 Mich 68, 78 (2001) (citation omitted). Whether an object is a fixture depends on the facts of each case and is determined by a three-factor test. *Id*. The three factors are: "[1] annexation to the realty, either actual or constructive; [2] adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and [3] intention to make the article a permanent accession to the freehold." *Velmer*, 430 Mich at 394, quoting *Peninsular Stove Co v Young*, 247 Mich 580, 582 (1929). An object that is not attached to a building can still be a fixture under this test if there are "objective, visible facts" supporting the intention to annex it to the building. *Velmer*, 430 Mich at 394 (citation omitted).

The lower courts correctly concluded that the objective and physical facts support the finding that the object causing injury—one of two 325-pound stage cover panels—was a fixture, and that no reasonable

trier of fact could conclude otherwise.[1] The panels were designed and custom-built with the sole and express purpose of preventing gym users from sustaining injuries caused by colliding with the alcove and stage they were intended to conceal. There is nothing in the record to suggest that the panels had any purpose or value beyond the purpose for which they were specifically designed and built. The design manual suggested the panels should be moved by several cooperating individuals using carts. Although the panels were removed annually to accommodate a graduation ceremony, plaintiffs have presented evidence that the school understood that it was essential to return them to their usual position attached to the stage and fastened in place after the ceremony was complete. These facts sufficiently establish that, at the time of the incident at issue, the panels were intended to be permanently annexed to the building itself. The lower courts were correct: under these facts, the panel that caused the injury was a fixture.

But the Court of Appeals majority erred by concluding that the plaintiffs alleged a noncognizable design-defect claim rather than a breach of the school's statutory duty to repair and maintain the building. In *Renny*, we recognized that "[c]entral to the definitions of 'repair' and 'maintain' is the notion of restoring or returning something . . . to a prior state or condition." *Renny*, 478 Mich at 501. When the panel fell, it had been leaned at an angle against a gym wall, instead of being secured to the wall and floor, as was its original and normal state. A reasonable jury could conclude that this constituted a "dangerous or defective condition." MCL 691.1406. The record suggests that both school officials and maintenance staff knew that, for the safety of the gym's users, the panels needed to be returned to their normal state by being reattached and bolted to the wall and floor—rather than leaning them against a wall. Thus, resecuring the panels to the wall and floor was part of the school's duty to repair and maintain the building. See *Renny*, 478 Mich at 506-507. Plaintiffs' claim falls squarely within this duty.

In the alternative, the majority explained that the dangerous or defective condition was more akin to a transitory condition, which is not actionable under *Wade v Dep't of Corrections*, 439 Mich 158, 168 (1992). This, too, is erroneous because *Wade*'s holding was premised on the plaintiff's inability to plead or articulate any defect of the public building itself that might have created the slippery condition on the cafeteria floor. *Id*. at 171. Having already concluded that the panels here

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[1] We do not agree with the dissent's attempt to distinguish the stage cover panels at issue from the milling machine in *Velmer* based on the weight of the fixtures. In *Velmer*, we merely held that the immense weight of the machine made physical attachment to the building unnecessary for purposes of constructive annexation. *Velmer* did not hold that the weight of an object is outcome-determinative, nor did it concern an object that was custom-built for a specific use in the building.

were fixtures and that those fixtures allegedly caused the bodily injury resulting in death, we reject the idea that this was a transitory condition.[2]

While plaintiffs' claim was premised on the school's failure to repair or maintain a public building, the injury was allegedly caused by the building itself, and the facts of this case support such a claim, there remain questions of fact about the public-building exception to the GTLA to be resolved by the fact-finder. As the circuit court held, there are questions of fact about whether "the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition." MCL 691.1406. The Court of Appeals erroneously concluded that summary disposition was required as to all defendants; at this stage, the GTLA does not bar plaintiffs' claims as to the liability of Gwinn Area Community Schools. Accordingly, we reverse in part and remand to the Marquette Circuit Court for further proceedings not inconsistent with this order.

ZAHRA, J. (*dissenting*). Because the majority improperly extends governmental statutory liability for "a dangerous or defective condition of a public building" under MCL 691.1406 to encompass a dangerous or defective condition that is not part "of a public building," I must respectfully dissent.

In this case, employees of defendant Gwinn Area Community Schools began reinstalling two large panels onto a high school gymnasium wall. It was summer and school was not in session, but the high school cheerleading team was practicing at the other end of the gym. The employees, who are also named defendants, staged the panels up against the gym wall and left them unattended to retrieve hardware to complete the task. Unbeknownst to defendant employees, the cheerleading coach had left the school to retrieve her three young daughters. Since the coach returned with her children shortly after defendant employees had left the gym to retrieve hardware, she was unaware that they had been working in the gym. The children began playing near the unattached panels while the cheerleaders practiced and, tragically, a panel fell on one of the young girls, who later died from her injuries.

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[2] For similar reasons, we reject defendant's argument that plaintiffs' claim fails because it is based on "negligent janitorial care." *Wade*, 439 Mich at 170. *Wade* only held that the public-building exception did not encompass negligent janitorial care in the context of a "foreign substance" on the floor that was not a part of the building itself; it did not address a situation in which negligent janitorial care created a dangerous or defective condition of the building itself. *Id*. at 161.

Under the governmental tort liability act,[1] defendants are provided immunity from tort liability if "engaged in the exercise or discharge of a governmental function."[2] There is, however, an exception to immunity in regard to public buildings:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.[3]

The first sentence of the public building exception states that governmental agencies have the duty to "repair and maintain public buildings under their control . . . ." Under the unambiguous and plain language of this sentence, the duty to repair and maintain public buildings relates "to the physical condition of the premises."[4] Similarly, "the second sentence of the exception imposes liability on governmental agencies for injuries 'resulting from a dangerous or defective condition *of* a public building . . . ."[5] The Legislature's choice to use the word "of" rather than "in" evidences its intent to have the exception apply in cases where the physical condition of the public building itself caused the injury at issue, as opposed to cases in which the injury was caused by an activity or a condition in the public building.[6] This Court has explained:

> While the use of the word "of" rather than "in" may at first blush appear to present an insignificant distinction, it appears that the Legislature chose its words carefully, as the phrase is repeated later in the same paragraph. A familiar axiom of statutory construction is that when interpreting an act, every word is presumed to have force or meaning and should not be rendered surplusage.
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> The word "of" is defined as:
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> > A term denoting that from which anything proceeds; indicating origin, source, descent, and the like . . . . Associated with or connected with, usually in some casual relation, efficient, material, formal, or final. The word has been

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[1] MCL 691.1401 *et seq*.

[2] MCL 691.1407(1).

[3] MCL 691.1406.

[4] *Reardon v Dep't of Mental Health*, 430 Mich 398, 410 (1988).

[5] *Id*.

[6] *Id*. at 411.

> held equivalent to after; at, or belonging to; in possession of; manufactured by; residing at; from. [Black's Law Dictionary (5th ed), p 975.]
>
> Thus, the Legislature's use of the phrase "dangerous or defective condition *of* a public building" indicates that the Legislature intended that the exception apply in cases where the physical condition of the building causes injury.[7]

On the basis of this statutory interpretation, this Court held:

> [T]he duty imposed by the public building exception relates to dangers actually presented by the building itself. To hold otherwise would expand the exception beyond the scope intended by the Legislature when it enacted the immunity act. The Legislature intended to impose a duty to maintain safe public buildings, not necessarily safety *in* public buildings.[8]

This Court has affirmed this holding from *Reardon* in several subsequent cases, making it well-established precedent that the Legislature did not intend the public building exception to impose a duty to maintain safety in public buildings; rather, "[t]he legislative intent regarding application of the public building exception statute is limited to injuries occasioned by a 'dangerous or defective physical condition *of the building itself*.' "[9]

Here, the majority relies on the common law of fixtures relating to real property to conclude that defendant Gwinn Area Public Schools is not immune from liability. I acknowledge that, "[i]n some cases, a fixtures analysis will be helpful in determining whether an item outside the four walls of a building is 'of a public building.' "[10] Yet, it must also be acknowledged that Michigan's common law of fixtures may encompass many items that are not "of a public building." For example, this Court has observed that "[t]he great weight of authority in this country sustains the rule that . . . manure made on the farm by the cattle . . . , which is made from the products of the farm, and as a result of the consumption of its produce thereon, becomes a part of the realty."[11]

Looking only at the common law of fixtures, this Court has stated that

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[7] *Id*. at 408.

[8] *Id*. at 415.

[9] *Wade v Dep't of Corrections*, 439 Mich 158, 163-164 (1992) (emphasis added). See also *Renny v Dep't of Transp*, 478 Mich 490, 497 (2007); *Fane v Detroit Library Comm*, 465 Mich 68, 77 (2001); *Horace v City of Pontiac*, 456 Mich 744, 750-751 (1998); *Hickey v Zezulka*, 439 Mich 408; 422-424 (1992); *Velmer v Baraga Area Sch*, 430 Mich 385, 394 (1988).

[10] *Fane*, 465 Mich at 77.

[11] *Taylor v Newcomb*, 123 Mich 637, 638 (1900).

> [t]he question whether an object is a fixture depends on the particular facts of each case, and is to be determined by applying three *factors*:
>
> > [1] annexation to the realty, either actual or constructive; [2] adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and [3] intention to make the article a permanent accession to the freehold.[12]

"Early in the development of fixture law, annexation was the determinative factor."[13] "The courts, however, began to create exceptions to these strict rules."[14] So the common law of fixtures evolved, and "[t]he first prong of the three-prong common law test, annexation, was thereafter given less weight, and the two remaining prongs of the test were weighed more heavily."[15] Indeed, now

> there are many cases in which items which would normally be considered to be fixtures are temporarily detached when the issue is raised; and such items will probably be held to be fixtures even though there is no physical attachment at all. For example, storm windows which were detached and stored before the property was sold, or a heavy machine which had been disassembled for repairs and may not even be on the land at the time may be held to be fixtures.[16]

While a fixtures analysis may sometimes be helpful in determining whether an item is "of a public building," that same analysis is decidedly unhelpful when its application contravenes the plain language of MCL 691.1406. As previously discussed in *Reardon* and its progeny, this statute makes clear that the condition must be "part of the building

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[12] *Velmer*, 430 Mich at 394, citing *Kent Storage Co v Grand Rapids Lumber Co*, 239 Mich 161, 164 (1927), and quoting *Peninsular Stove Co v Young*, 247 Mich 580, 582 (1929).

[13] Squillante, *The Law Of Fixtures: Common Law And The Uniform Commercial Code—Part I: Common Law Of Fixtures*, 15 Hofstra L Rev 191, 203 (1987).

[14] *Id*. at 206.

[15] *Id*.

[16] Polston, *The Fixtures Doctrine: Was It Ever Really The Law?*, 16 Whittier L Rev 455, 476 (1995) (citations omitted). In one early example of Michigan common law following this trend, this Court held "that cut stone and structural iron belonging to the owner of a lot on which there is a partially completed building, secured by the owner for use in the erection of the building, and lying on the same and adjoining lots at the time of sale, passed by the owner's warranty deed of the lot on which the building stood." Comment and Recent Cases, *Fixtures*, 14 Yale L J 241 (1905), citing *Bryne v Werner*, 138 Mich 328 (1904).

itself."[17] The item therefore *must* be annexed, actually or constructively, to realty.[18] This reading is entirely consistent with the Court's stated understanding that "the Legislature intended to impose a duty to maintain safe public buildings, not necessarily safety *in* public buildings."[19]

Looking at the common law of fixtures through the lens of governmental immunity, I conclude that "annexation" is best understood as a statutory requirement under MCL 691.1406 and not merely a factor. Michigan caselaw is readily harmonized under this approach. With one exception not applicable to this case, i.e., constructive annexation by massive weight,[20] this Court has never held that MCL 691.1406 encompasses unattached items as part of the building itself. To hold otherwise, as the majority has, would erode the broad immunity provided to governmental agencies and impose liability beyond that for a "dangerous or defective condition of a public building" itself. Even though the panels are common-law fixtures, they were nonetheless not yet part of the building itself under MCL 691.1406 and can only be considered a dangerous or defective condition *in* a public building as opposed to a "dangerous or defective condition *of* a public building." As the Court of Appeals concluded, "[t]he dangerous or defective condition

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[17] See note 9 of this statement.

[18] This proposition reasonably embraces cases in which improperly annexed fixtures or fixtures that fail to remain annexed to the public building cause injury. See, e.g., *Brewer v Wyandotte*, unpublished per curiam opinion of the Court of Appeals, issued March 9, 2006 (Docket No. 257395), p 3 ("Because the guardrails in question are designed to attach securely to those bleachers, despite their ready removability, for the purpose of protecting patrons at the front of the bleachers from falling, we conclude that the trial court did not err in regarding those rails as part of the realty for purposes of invoking the public building exception to governmental immunity."). Of course, MCL 691.1406 would still require in these cases proof that "the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

[19] *Reardon*, 430 Mich at 415.

[20] See *Velmer*, 430 Mich at 396, reversing a Court of Appeals' decision that a milling machine of "some two thousand-pound weight," *Velmer v Baraga Area Sch*, 157 Mich App 489, 495 (1987), was constructively attached to the building. While the panels in this case are quite heavy at some 325 pounds apiece, they are not remotely heavy enough to be considered constructively attached to a building by weight. Indeed, the panels are not heavier than many other common household items typically not considered fixtures, such as refrigerators, pool tables, gun safes, tool chests, exercise machines, and pianos.

was not of the fixtures (and therefore of the public building) themselves, but of how the employees placed the fixtures while installing them."[21] Thus, "the dangerous condition posed by the panels was related to the employees' negligence while installing them, not the permanent structure or physical integrity of the building itself."[22]

For the above reasons, I would affirm the judgment of the Court of Appeals.

VIVIANO and CLEMENT, JJ., join the statement of ZAHRA, J.

DOSTER v COVENANT MEDICAL CENTER, INC, Nos. 162332 and 162333; Court of Appeals Nos. 349560 and 350941. On January 12, 2022, the Court heard oral argument on the application for leave to appeal the September 17, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REMAND this case to the Saginaw Circuit Court for entry of an order denying the defendant's motion for summary disposition, rendering judgment in favor of the plaintiff for $540,269.64, and for further proceedings consistent with this order.

The plaintiff, Denise Doster, sued her employer for age discrimination under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*., in connection with its decision to hire a younger candidate for a position in her department. After discovery, the defendant filed a motion for summary disposition under MCR 2.116(C)(10), arguing that it had a legitimate, nondiscriminatory reason for its hiring decision. The trial court denied the motion, finding a question of fact remained as to whether the employer's proffered reason was pretextual. The defendant did not appeal, and the case proceeded to trial where the jury found for the plaintiff and awarded $540,269.64. After the verdict, the defendant appealed, arguing in part that the trial court erred in denying its motion for summary disposition. The Court of Appeals reversed; it held that the trial court should have granted the defendant's motion for summary disposition.

The panel believed that the plaintiff presented no evidence to raise a genuine issue of material fact about pretext. *Doster v Covenant Med Ctr,*

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[21] *Filizetti Estate v Gwinn Area Community Sch*, unpublished per curiam opinion of the Court of Appeals, issued August 27, 2020 (Docket No. 344878), p 8.

[22] *Filizetti Estate*, unpub op at 8. Under MCL 691.1407(2), defendant employees are liable only for gross negligence. The Court of Appeals concluded that "[b]ecause there was no material question of fact as to gross negligence, the trial court erred by failing to grant summary disposition under MCR 2.116(C)(7) and (10) in favor of the individual defendants." *Filizetti Estate*, unpub op at 6; see also *id*. at 2 (METER, P.J., concurring in part and dissenting in part). Plaintiffs sought to appeal this conclusion in this Court, but we declined to hear argument on this aspect of the application.

Inc, unpublished per curiam opinion of the Court of Appeals, issued September 17, 2020 (Docket Nos. 349560 and 350941), p 6. This was an error; when the evidence presented at the summary-disposition stage is viewed in the light most favorable to the plaintiff, reasonable minds can differ as to whether age discrimination was a motivating factor in the defendant's decision to hire a younger candidate over the plaintiff. See *Johnson v VanderKooi*, 502 Mich 751, 761 (2018); *Hazle v Ford Motor Co*, 464 Mich 456, 465-466 (2001).

When reviewing a motion for summary disposition under MCR 2.116(C)(10), a court's role is narrow. It "considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Johnson*, 502 Mich at 761 (quotation marks and citation omitted). In its review of the evidence, the court cannot make findings of fact. *Minter v Grand Rapids*, 275 Mich App 220, 230 (2007), rev'd in part on other grounds, 480 Mich 1182 (2008).

In the motion for summary disposition and response, the parties disputed the significance of an interviewer's written notes which referenced the chosen candidate "being young." The plaintiff argued that this evidence supported pretext; the defendant disagreed. The trial court held that it could not make a finding of fact as to which interpretation was more likely. Thus, when viewed in a light most favorable to the plaintiff, the trial court held that the evidence created a genuine issue of material fact as to whether age discrimination was a motivating factor in the defendant's hiring decision.

The Court of Appeals, however, found that the defendant's explanation about this evidence was reasonable while the plaintiff's was premised on "speculation." *Doster*, unpub op at 7. And for that reason, it reversed the trial court. To be sure, speculation isn't enough to give rise to a genuine issue of material fact. *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 16 (2016). But it's not a reviewing court's proper role to choose between competing interpretations of facts, but rather to determine whether the trial court was correct when it determined there was a material dispute of fact requiring the motion be denied. The trial court did not err when it determined that, viewed in a light most favorable to the plaintiff, there was a genuine issue of material fact about whether this evidence supported pretext such that the case should not be dismissed before a trial.

Justice ZAHRA finds the evidence supporting the plaintiff's claim wanting as well. And his consideration of it is reasonable. But, respectfully, Justice ZAHRA makes the same mistake the panel did. In reviewing an appeal from a denial of a summary-disposition motion, our job is not to determine the best understanding of competing evidence, but rather whether the trial court was correct that there was a question of fact that merited a jury trial. Justice ZAHRA cites *Hazle v Ford Motor Co*, 464 Mich 456, to support his conclusion. But in that case, there was no evidence of pretext at all—only a statement made by the plaintiff's attorney. *Id*. at 474. Statements of counsel are not evidence. *Hazle* stands for the unremarkable proposition that a motion for summary disposition should be granted where there is no disputed evidence.

Justice ZAHRA also criticizes the Court's decision to involve itself in this case. We share his view that this Court should focus its time and attention on jurisprudentially significant issues. We believe the proper role of a reviewing court in determining that a litigant's claim should be dismissed is such an issue. And we assume that the jury that awarded the plaintiff $540,269.64 believed its time and attention was also significant. Reasonable minds could disagree about the evidence the plaintiff provided. The trial court was correct to let the jury decide which interpretation was more credible. We do not retain jurisdiction.

ZAHRA, J. (*dissenting*). I would deny leave to appeal because the Court of Appeals correctly determined that plaintiff presented insufficient evidence of age discrimination to survive defendant's motion for summary disposition. Although the record at the time of summary disposition contains evidence sufficient to create a prima facie case of age discrimination, defendant articulated a legitimate, nondiscriminatory reason for its action. Because plaintiff failed to offer any evidence that defendant's stated reasons were a pretext for discrimination, defendant was entitled to summary disposition as a matter of law.[1] The majority's contrary conclusion is wholly unfounded, as it is based solely on an out-of-context portion of an interviewer's note. Moreover, the Court's action of summarily reversing by order an unpublished opinion of the Court of Appeals is the latest in a series of cases in which the Court imprudently engages in error correction involving applications taken from unpublished opinions of the Court of Appeals. We should not spend our judicial resources on matters that lack jurisprudential significance. For these reasons, I dissent.

Plaintiff, Denise Doster, worked as a recruiter in the human resources (HR) department of defendant, Covenant Medical Center, Inc., for many years. When she was over 60 years old, plaintiff applied for a position as an HR generalist with defendant, but defendant hired Brent Ruddy, a 27-year-old, instead. Plaintiff then filed this age discrimination action, and defendant moved for summary disposition.

To avoid summary disposition of an employment discrimination claim, a plaintiff must proceed through the *McDonnell Douglas* framework.[2] Under that framework, "once a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case."[3] If the employer makes such an articulation, "the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse

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[1] See *Hazle v Ford Motor Co*, 464 Mich 456, 477 (2001).

[2] *McDonnell Douglas Corp v Green*, 411 US 792, 802-803 (1973).

[3] *Hazle*, 464 Mich at 464.

action taken by the employer toward the plaintiff."[4] Whether plaintiff satisfied this last step is the issue on appeal.

Plaintiff was interviewed by a panel, but Alison Henige, defendant's HR manager, made the ultimate hiring decision. Henige testified that Ruddy was the best fit for the position because he had consulting experience and defendant needed someone who could "hit the ground running" as a consultant. In contrast, plaintiff did not have consulting experience. Another interviewer testified that, unlike plaintiff, Ruddy "could articulate and give past experience to [employment-related] questions." Plaintiff did not present evidence to dispel the testimony that experience was the basis of the hiring decision, let alone that age was a motivating factor. Indeed, she admitted that her consulting experience amounted to simply "talking" with people. Plaintiff testified that she believed that discrimination was the reason she did not get the job because another person with three years of experience in HR as a consultant got the job. She stated, "I just felt like I was discriminated against," adding that "[t]hey gave that job to him, and that was my job." Plaintiff's responses were similar to those of the plaintiff in *Hazle*, who stated, " 'Well, because I felt I was very qualified for the position and just from my own observation I just feel that I'm a better qualified person. They hired a Caucasian woman. So I felt it was a racial issue.' "[5] The *Hazle* Court explained that the plaintiff's subjective claim failed to create a genuine issue of material fact concerning whether the defendants discriminated in their employment decision.[6] Likewise, plaintiff's mere feeling here that she was discriminated against is not enough to overcome defendant's showing of a legitimate reason for its decision. This is especially so given that plaintiff plainly lacked the consulting experience of the applicant defendant hired.

To create an issue of material fact, the majority plucks two words out of the middle of a sentence in Henige's interview notes—"being young." These words, without more, are innocuous and insufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor in hiring Ruddy. Context matters. For example, had Henige made two columns, one identified as "pro" and the other as "con," and the words "being young" were written under the pro column, a reasonable inference of unlawful age discrimination could have been drawn in plaintiff's favor. But this was not the case. The context here proves

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[4] *Id*. at 465 (quotation marks and citation omitted). This Court has inconsistently applied both "motivating factor" and "but for" causation standards in discrimination cases under the Civil Rights Act, MCL 37.2101 *et seq*. See *Hrapkiewicz v Wayne State Univ Bd of Governors*, 501 Mich 1067 (2018) (MARKMAN, C.J., dissenting). I take no position here on which standard is proper because the parties have not argued that we should apply the "but for" standard and because the outcome would be the same under either standard.

[5] *Hazle*, 464 Mich at 476-477.

[6] *Id*. at 477.

damning to plaintiff's claim. Henige's notes summarize Ruddy's comments about values. She wrote, "Accountability—having the same standards & following them," and "Respect—being young—took a while to gain [respect with] leaders." Read in context, the note clearly indicates that Ruddy stated in his interview that, being young, it took a while for him to gain the respect of his leaders. The note does not in any way suggest that defendant relied on Ruddy's age when making its hiring decision. Henige's notes simply do not support plaintiff's claim as a matter of law.

Further, using the Court's limited resources to reverse the Court of Appeals' unpublished opinion in this matter is ill-advised. It has become commonplace for this Court to reverse by order perceived errors in opinions that are unpublished. This is a waste of our judicial resources, and it is not why the people of Michigan elected us to serve at the highest level of the judicial branch of government. As Michigan's court of last resort, we should use our precious resources to interpret the Constitution and laws of Michigan and to correct errors of lower courts that, if left uncorrected, will stain the fabric of Michigan's jurisprudence. The time expended on error correction is time taken away from matters that are of significant and vital concern to the more than 10 million people of Michigan.

For these reasons, I would deny leave to appeal.

VIVIANO and CLEMENT, JJ., join the statement of ZAHRA, J.

Oral Argument Ordered on the Application for Leave to Appeal March 30, 2022:

HILYARD v JOHNSTON, No. 163501; Court of Appeals No. 354721. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether: (1) Michigan courts may exercise personal jurisdiction over the respondent-appellee under MCL 552.2201(h) of the Uniform Interstate Family Support Act; (2) the appellee's failure to pay child support is "[t]he doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort" that permits Michigan courts to exercise personal jurisdiction over the appellee under MCL 600.705(2); and (3) there are sufficient minimum contacts for Michigan courts to exercise personal jurisdiction over the appellee consistent with the requirements of due process. See generally *Moore v McFarland*, 187 Mich App 214, 217-219 (1990); *Rainsberger v McFadden*, 174 Mich App 660, 666 (1989); *Black v Rasile*, 113 Mich App 601, 604 (1980). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Family Law Section and the Children's Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or

groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v BAIRD, No. 163672; Court of Appeals No. 357715. The parties may file supplemental briefs by 5:00 p.m. on April 14, 2022, addressing whether a defendant charged with a felony after a proceeding conducted pursuant to MCL 767.3 and MCL 767.4 is entitled to a preliminary examination. Each party may file a response brief by 5:00 p.m. on April 21, 2022. MCR 7.314(B)(1). The time allowed for oral argument shall be 10 minutes for each side. The motions to allow supplemental briefing and participate in oral argument are DENIED as moot.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Amicus curiae briefs shall be filed by 5:00 p.m. on April 21, 2022.

CLEMENT, J., not participating due to her prior involvement as chief legal counsel for the Governor.

Leave to Appeal Denied March 30, 2022:

SOUTH DEARBORN ENVIRONMENTAL IMPROVEMENT ASSOCIATION, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 162943; reported below: 336 Mich App 490.

PEOPLE v DRAUGHN, No. 163062; Court of Appeals No. 351688.

PEOPLE v SPEARS, No. 163186; Court of Appeals No. 350716.

BAUM v AUTO-OWNERS INSURANCE COMPANY, No. 163209; Court of Appeals No. 352763.

PEOPLE v SHERIDAN, No. 163409; Court of Appeals No. 350525.

PEOPLE v YOUNG, No. 163629; Court of Appeals No. 357549.

MICHIGAN HEAD & SPINE INSTITUTE PC v AUTO-OWNERS INSURANCE COMPANY, No. 163649; reported below: 338 Mich App 721.

PEOPLE v WOODBURY, No. 163733; Court of Appeals No. 352925.

PEOPLE v CRYSTAL, No. 163826; Court of Appeals No. 358418.

Rehearing Denied March 30, 2022:

TOWNSHIP OF FRASER v HANEY, No. 160991; reported below: 331 Mich App 96.

Reconsideration Denied March 30, 2022:

PEOPLE v CASSON, No. 163157; Court of Appeals No. 349090.

CAVANAGH, J. (*concurring*). I concur in the Court's order denying defendant's motion for reconsideration of the Court's December 21, 2021 order. I write separately, however, to express that this denial is without prejudice to defendant's ability to file a motion for relief from judgment under MCR Subchapter 6.500 based on defendant's claim that the trial court improperly instructed the jury that it "may" consider the two counts of first-degree criminal sexual conduct separately, as well as the issue of whether appellate counsel was ineffective for not raising this issue on appeal.

Summary Disposition April 1, 2022:

LEWIS v LEXAMAR CORP, No. 162692; Court of Appeals No. 350247. On January 12, 2022, the Court heard oral argument on the application for leave to appeal the December 17, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals. The standard of review for decisions from the Michigan Compensation Appellate Commission (MCAC) is generally deferential. While questions of law are reviewed de novo, *Arbuckle v Gen Motors, LLC*, 499 Mich 521, 531 (2016), the MCAC's factual findings should be affirmed so long as there is competent evidence in the record to support them. *Omer v Steel Technologies, Inc*, 332 Mich App 120, 134 (2020). See also MCL 418.861a(14) ("The findings of fact made by the commission acting within its powers, in the absence of fraud, shall be conclusive."). Based on those factual findings, the MCAC found that plaintiff's injury was compensable under the Worker's Disability Compensation Act of 1969 (WDCA), MCL 418.101 *et seq*.

Despite the Court of Appeals' judgment to the contrary, we too conclude that plaintiff's injury is compensable because it "ar[ose] out of and in the course of employment." MCL 418.301(1). As we explained in *Camburn v Northwest Sch Dist (On Remand)*, 459 Mich 471, 477 (1999), compensability in this circumstance turns on whether attendance is an "incident of . . . work." That depends on whether the employer would receive a direct benefit and whether attendance is required or at least definitely urged. *Id*., citing 1A Larson, Workmen's Compensation Law, pp 5-397 to 5-403. See also *Marcotte v Tamarack City Volunteer Fire Dep't*, 120 Mich App 671, 678 (1982). Such is the case here. There is competent record evidence that defendant Lexamar Corp (1) used plaintiff as a test case to determine whether to send employees to the community college for their vocational classes or whether to bring instructors to the employees and (2) definitely urged plaintiff to attend the vocational classes.

Yet plaintiff was injured not at the class that was incident to work, but on the commute. While injuries occurring on an employee's commute are generally not compensable under the act, there is an exception when "the employer derives a special benefit from the employee's activity at

the time of the injury." *Smith v Chrysler Group, LLC*, 331 Mich App 492, 495 (2020), quoting *Bowman v R L Coolsaet Constr Co (On Remand)*, 275 Mich App 188, 191 (2007). Again, because Lexamar Corp used plaintiff as a test case, it derived a special benefit from plaintiff's pursuit of his education, and plaintiff is entitled to compensation under the WDCA. We therefore REINSTATE the July 18, 2019 order of the MCAC affirming the decision of the magistrate.

ZAHRA, J., would deny leave to appeal.

PEOPLE v STEPHEN HORTON, No. 162824; Court of Appeals No. 355783. By order of November 5, 2021, the prosecuting attorney was directed to answer the application for leave to appeal the February 17, 2021 order of the Court of Appeals. On order of the Court, the prosecutor having declined to answer the application for leave to appeal, the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals shall include among the issues to be addressed the defendant's argument that his guilty plea was coerced by the plea offer to his wife. See *People v Samuels*, 339 Mich App 664 (2021).

PEOPLE v HOP, No. 162835; Court of Appeals No. 355692. By order of October 8, 2021, the prosecuting attorney was directed to answer the application for leave to appeal the January 25, 2021 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

ZAHRA and VIVIANO, JJ., would deny leave to appeal.

PEOPLE v HAMIEL, No. 163402; Court of Appeals No. 356746. By order of December 1, 2021, the prosecuting attorney was directed to answer the application for leave to appeal the July 7, 2021 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. We DIRECT the Court of Appeals to address: (1) whether the defendant established good cause for the transcription of additional proceedings, MCR 6.433(C)(3); and if not, (2) what more the defendant was required to allege or provide to establish good cause under the court rule.

VIVIANO, J. (*dissenting*). I respectfully dissent from the Court's order remanding this case to the Court of Appeals and would instead deny leave to appeal because it appears to me that the trial court correctly denied defendant's request to have most or all of the lower court transcripts provided to him at public expense. Under MCR 6.433(C)(3), a defendant who wishes to pursue postconviction remedies can obtain transcripts of proceedings not already transcribed upon a showing of good cause. A mere conclusory statement that a transcript is necessary to pursue postconviction remedies is insufficient to establish good cause for obtaining transcripts under MCR 6.433(C). *People v Caston*, 228

Mich App 291, 303 n 5 (1998). At a minimum, good cause requires a defendant to explain why the requested transcripts are needed to pursue the particular claim or claims for relief a defendant is asserting if the need is not apparent.[1] Although the defendant in this case indicated the types of claims that he intended to assert in his motion for relief from judgment when he requested the transcripts, he has not explained (nor is it otherwise clear to me) why the transcripts are needed to develop these claims or file his motion. Since his request for transcripts is not meaningfully different from the request in *Caston*, it appears to me that the trial court properly denied his request.

PEOPLE V SIMMONS, No. 163469; reported below: 338 Mich App 70. On order of the Court, the application for leave to appeal the July 1, 2021 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE that part of the Court of Appeals judgment holding that double jeopardy would bar a retrial of the defendant in the 37th District Court because the Macomb Circuit Court entered an order of acquittal. Because the circuit court was acting in an appellate capacity, its order of acquittal was not final—it was subject to appellate review or reconsideration. See *People v Oros*, 502 Mich 229, 234 (2018). The circuit court therefore properly exercised its authority under MCR 7.114(D) and MCR 2.119(F) when it reconsidered and reversed its own order of acquittal, thus eliminating any double jeopardy concerns related to its prior determination of the defendant's innocence.

The circuit court's June 5, 2019 opinion and order appears to acknowledge that the prosecution had failed to put forward sufficient evidence that the defendant's arrest was lawful, but because it attributed that failure to the district court's error in preventing the parties from presenting facts about that issue to the jury, it remanded for a new trial. But it was the prosecution that asked the court to bar the defendant from arguing to the jury that the arrest was unlawful and objected to jury instructions that would have informed the jury about the lawful arrest element; the circuit court's order did not account for the prosecution's role in this evidentiary error. We REMAND this case to the Court of Appeals to consider whether the circuit court found that the

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[1] In *People v Russell*, 469 Mich 1044 (2004), this Court denied leave to appeal "without prejudice to defendant's refiling . . . his motion for relief from judgment, accompanied by a request, pursuant to MCR 6.433(C)(3), for an order directing transcription of the plea proceeding that the record indicates was conducted on January 22, 1993." The Court continued, "Defendant's limited mental abilities and his claim that he was not privy to the plea agreement would appear to support a finding of good cause to direct preparation of the transcript, if possible." *Id*. That a defendant wishing to pursue a motion for relief from judgment based on a claim that he was not privy to the plea agreement would need a transcript of the plea hearing is apparent without further explanation.

prosecution had failed to put forward sufficient evidence that the defendant's arrest was lawful and, if so, whether double jeopardy bars the defendant's retrial where an appellate court has determined that there was insufficient evidence to convict, but the insufficiency resulted from the district court's erroneous order granting a prosecution request. We do not retain jurisdiction.

VIVIANO, J. (*concurring in part and dissenting in part*). I concur with the first paragraph of the Court's order, which reverses that part of the Court of Appeals' judgment holding that double jeopardy would bar a retrial of the defendant. But I dissent as to the second paragraph remanding this case to that court for consideration of a new issue that has not been presented by either party. I would instead reinstate the Macomb Circuit Court's June 5, 2019 order remanding the case to the district court for a new trial.

In re BMGZ, No. 163703; reported below: 339 Mich App 28. On order of the Court, the application for leave to appeal the September 16, 2021 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals. On December 14, 2021, the trial court denied appellant's petition for stepparent adoption because the proposed adoptee had turned 18, although the denial was without prejudice to filing a petition for an adult adoption. Because the underlying proceedings have been dismissed, this appeal, which challenges the trial court's interlocutory decision to decline appellant's request that it make factual findings in support of appellant's pursuit of Special Immigrant Juvenile status, is moot. Where a case is rendered moot while on appeal, it is appropriate to vacate the decisions of the lower courts. *League of Women Voters v Secretary of State*, 506 Mich 561, 588-589 (2020). In all other respects, the application for leave to appeal is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Oral Argument Ordered on the Application for Leave to Appeal April 1, 2022:

PETERSEN FINANCIAL, LLC v CITY OF KENTWOOD, No. 163072; reported below: 337 Mich App 460. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the City of Kentwood lacked the express or implied power to extend the payment terms of the special assessment where the city established it via a valid agreement with the developer, confirmed it through a resolution, and reserved the power to extend its payment terms through legislative action. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). Appellee Petersen Financial shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

TRUGREEN LIMITED PARTNERSHIP v DEPARTMENT OF TREASURY, No. 163515; reported below: 338 Mich App 248. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether it qualifies for the use tax exemption in MCL 205.94(1)(f) because its consumption or use of fertilizers, herbicides, and insecticides constitutes "caring for . . . things of the soil . . . ." In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v GUYTON, No. 163700; Court of Appeals No. 354221. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the appellant's plea was not understanding, accurate and voluntary because the prosecutor misinformed her that by pleading guilty she would not be prosecuted as a third habitual offender when, in fact, she could only have been prosecuted as a second habitual offender. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

DOE v GENERAL MOTORS, LLC, No. 163775; Court of Appeals No. 355097. The appellants shall file a supplemental brief within 42 days of the date of this order addressing whether the Genesee Circuit Court erred by granting summary disposition to the appellee under the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act of 1969, MCL 418.101 *et seq*., because further discovery presented a fair likelihood of yielding support for the appellants' position. *Kern v Kern-Koskela*, 320 Mich App 212, 227 (2017), quoting *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34 (2009). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The

appellee shall file a supplemental brief within 21 days of being served with the appellants' brief. A reply, if any, must be filed by the appellants within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers. The motion to expand the record is DENIED.

Order Directing Supplemental Briefing Entered April 1, 2022:

LONG LAKE TOWNSHIP v MAXON, No. 162946; reported below: 336 Mich App 521. By order of March 16, 2022, the Court directed the Clerk to schedule oral argument on the application. On order of the Court, the briefing deadlines set forth in that order are STAYED, pending further order of the Court. We DIRECT the parties to file supplemental briefs within 28 days after the date of this order addressing whether the exclusionary rule applies to this zoning dispute, such that the Court of Appeals properly remanded for an order suppressing all photographs taken of defendants' property. See *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357, 364 (1998) (declining to extend the operation of the exclusionary rule beyond the criminal trial context).

Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Amicus briefs shall be filed by 5:00 p.m. on April 29, 2022.

Leave to Appeal Denied April 1, 2022:

PEOPLE v MORGAN, No. 163440; Court of Appeals No. 351580.

VIVIANO, J. (*dissenting*). In denying leave to appeal in this case, this Court leaves in place an unpublished Court of Appeals decision holding that defense counsel's cross-examination of the victim, which it believed bolstered instead of undermined her credibility, constituted objectively deficient performance that prejudiced defendant. But no *Ginther*[1] hearing has been held to determine if defendant's claims have any merit—indeed, an earlier panel of the Court of Appeals rejected defendant's request for a *Ginther* hearing. I believe that, at a minimum, we should order a *Ginther* hearing to assist in our review by allowing trial counsel to explain his approach to the case. For these reasons, I respectfully dissent.

In this case, defendant was convicted after a bench trial of two counts of first degree criminal sexual conduct (CSC-I) (victim under 13 years of age), MCL 750.520b(2)(b). The only direct evidence was the victim's testimony. Therefore, the central issue at the bench trial was the credibility of the victim. The victim testified that, when she was between the ages of eight and ten, she would stay over at her great-aunt Karen's home with her cousins. During this time, Karen's husband, defendant,

[1] *People v Ginther*, 390 Mich 436 (1973).

would touch the victim inappropriately. The victim explained that the abuse happened at night and during the day and that defendant threatened to hurt her and her family if she told anyone. On one occasion, defendant carried the victim from the dining room to his bedroom while Karen was at work and on other occasions defendant would sneak quietly into the dining room to abuse her. The victim first told her nine-year-old cousin, AL, about the abuse, and then her mother.

Defense counsel presented evidence that the apartment was cluttered and hard to move around in and that the floors squeaked, so it would have been difficult for defendant to sneak through the house at night. Karen also testified that she did not work nights, that she was always at home at night, and that it would not have been possible for defendant to get up at night to abuse the victim without waking her. Defense counsel also presented evidence to establish a motive for the victim to lie: the victim admitted that she did not like defendant because he was strict with her when she was at the house.

Defense counsel attempted to impeach the victim during cross-examination. It appears from the transcript that defense counsel was preparing to have the victim read from her preliminary examination testimony. The trial court, however, interjected and said, "She's not going to read. You can ask her whether or not she remembers being asked this question and giving this answer." Defense counsel complied, asking the victim several questions about her earlier testimony at the preliminary examination. Each time, he asked her if she remembered her prior statement. She responded in the affirmative to each question. During the course of this line of questioning, defense counsel drew out some inconsistencies between the victim's trial testimony and her preliminary examination testimony.[2] In reading her the preliminary examination testimony, he also introduced her earlier accusations against defendant, which she reaffirmed. Defense counsel also asked the victim if she remembered telling an examiner at a children's advocacy center called Kids-TALK that defendant touched her butt with his penis,

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[2] One of his first questions acknowledged the victim's testimony on direct examination that she had trouble recalling the first time she was abused. He asked whether, during that first time, defendant touched her private area with his mouth and his genitals. She responded, "Yes." Defense counsel read from the preliminary examination transcript the victim's testimony that the first time defendant abused her was by touching her private area with his fingers. She recalled providing that testimony. Accordingly, defense counsel highlighted the victim's inconsistent testimony concerning the first instance of abuse. Defense counsel then questioned her about the time when defendant touched her with his genitals. On direct examination, she had testified that she had her shirt on when this happened. Defense counsel read from the victim's preliminary hearing testimony in which she twice asserted her clothes had been off at that time. She also stated that she recalled providing that testimony.

to which the victim responded "yes." Defense counsel then asked if the victim had failed to mention this detail at the preliminary exam or during the trial. The victim responded that she had not been asked. But defense counsel explained that the prosecutor had asked the victim to list all of the places and times that she had disclosed defendant's abuse. Defense counsel also tried to ask the victim about her statement that most of the assaults happened at night, when Karen, her great-aunt, was working. This statement conflicted with Karen's testimony that she worked during the daytime. However, the prosecutor objected that defense counsel was reading the preliminary exam transcript and stated that there had been no inconsistencies. Defense counsel then stopped this line of questioning.

In finding defendant guilty, the trial court considered several factors. The trial court first rejected defendant's argument that the victim was lying because defendant was strict with her. It then found that there was a lack of evidence that the victim had a motive to lie. The trial court then discussed how and when the victim had disclosed the abuse and the consistency of her statements. On consistency, the trial court asked, "Has [the victim's] story been consistent?" In concluding that it had, the court reasoned, "She really wasn't impeached on anything of substance from the preliminary exam, Kids-TALK or the medical records that were admitted." Ultimately, the trial court concluded that the victim was "a credible witness and that she testified honestly."

Defendant appealed in the Court of Appeals, which held that defendant was entitled to a new trial because of ineffective assistance of counsel. The Court of Appeals found that defense counsel's strategy to impeach the victim based on the preliminary examination testimony was "wholly unreasonable" and that it constituted deficient performance. Moreover, the Court of Appeals found that defendant was prejudiced because the prosecution's case hinged entirely on the credibility of the victim's allegations and so defense counsel's success in undermining the victim's credibility was all the more critical. *People v Morgan*, unpublished opinion of the Court of Appeals, entered June 24, 2021 (Docket No 351580).[3] The prosecutor then filed the present application for leave to appeal, which the majority today denies.

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[3] The Court of Appeals also held that counsel was ineffective for failing to object to testimony by the victim's cousin, AL, who testified that the victim had told AL that defendant had touched her inappropriately. Defense counsel did not object to the hearsay testimony. However, it is unclear whether MRE 803A—which allows hearsay regarding a child's statement about sexual acts when the declarant was "under the age of ten when the statement was made"—would have applied. In any case, even if this was an error, it would likely be harmless as the statement was cumulative to the in-court testimony. Therefore, there is no reasonable probability that, but for this error, the result of the proceeding would have been different. See *People v Randolph*, 502 Mich 1, 9 (2018).

The right to counsel guaranteed by the United States and Michigan constitutions includes the right to effective assistance of counsel. US Const, Am VI; see also Const 1963, art 1, § 20. To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that trial counsel's performance was objectively deficient, and (2) that the deficiencies prejudiced the defendant. *People v Randolph*, 502 Mich 1, 9 (2018), citing *Strickland v Washington*, 466 US 668 (1984).

To satisfy the first prong, the defendant must show that counsel's performance fell below an objective standard of reasonableness. *People v Trakhtenberg*, 493 Mich 38, 51 (2012). In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy. *Id*. at 52, quoting *Strickland*, 466 US at 689. Initially, a court must determine whether the "strategic choices [were] made after less than complete investigation," *Trakhtenberg*, 493 Mich at 52, quoting *Strickland*, 466 US at 690-691 (alteration in *Trakhtenberg*). "Under *Strickland*, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Hinton v Alabama*, 571 US 263, 274 (2014) (quotation marks and citation omitted). "Defense counsel must be afforded 'broad discretion' in the handling of cases, which often results in 'taking the calculated risks which still do sometimes, at least, pluck legal victory out of legal defeat.' " *People v Pickens*, 446 Mich 298, 325 (1994) (citation omitted).

A very strong argument could be made that defense counsel here did not perform deficiently. Certainly, this case is unlike those in which we have found deficient performance, such as when counsel completely failed to investigate the client's case or prepare for the defense. See, e.g., *Trakhtenberg*, 493 Mich at 53-53; *People v Ackley*, 497 Mich 381, 389 (2015). There is no suggestion that defense counsel in this case was in any way unprepared. On the contrary, defense counsel conducted several interviews, hired an investigator, and admitted evidence establishing a motive for the victim to lie as well as evidence casting doubt on the victim's allegations. For example, defendant elicited testimony that made it seem less likely that defendant would be able to sneak around the apartment as the victim described in her testimony, as well as evidence that defendant was never alone with the victim. Defendant also elicited testimony from the victim that she and her mother did not like defendant. As the Court of Appeals noted, this was a "close case" and "defendant presented numerous pieces of evidence to cast doubt on whether th[e] allegations were worthy of belief." *Morgan*, unpub op at 8. Under these circumstances, defense counsel's strategic choices should be "virtually unchallengeable." *Hinton*, 571 US at 274 (quotation marks and citation omitted). In any event, it seems inherently contradictory to say that defense counsel's performance was good enough to cast doubt on the allegations, yet at the same time so objectively deficient that defendant received constitutionally ineffective assistance.

When it came to cross-examination, defense counsel's approach appears to represent a "calculated risk" of the sort courts should not second-guess. It is true that the victim's preliminary examination testimony was not favorable to defendant. But this was a bench trial, and it was unlikely that the fact-finder would be unduly swayed by hearing the testimony. Cf. *Gentile v State Bar of Nevada*, 501 US 1030, 1077 (1991) (Rehnquist, C.J., dissenting) ("[T]rial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it."); *People v Edwards*, 171 Mich App 613, 619 (1988) ("Generally, error is less likely to be deemed to require reversal in a bench trial because the judge is less likely to be deflected from the task of fact-finding by prejudicial considerations that a jury might find compelling."). Instead, this was a credibility contest, and it was critical for defense counsel to make the victim appear less credible. He therefore might have reasonably concluded that introduction of the preliminary examination testimony—which, recall, he initially did not seek to read into the record himself but did so only at the judge's direction—was worth the risk if it could undermine the victim's credibility. And he was, in fact, able to point out a few inconsistencies in the victim's testimony.[4]

This is no easy task when cross-examining a child victim. A more aggressive approach might have backfired, but so could a do-nothing strategy of asking minimal questions. See *Adams v Bertrand*, 453 F3d 428, 436 (CA 7, 2006) (finding it to be sound trial strategy not to aggressively cross-examine an assault victim); *Spencer v Donnelly*, 193 F Supp 2d 718, 734 (WD NY, 2002) (finding that the failure to cross-examine a child sexual-assault victim with regard to prior inconsistent statements, together with other flaws in counsel's performance, constituted ineffective assistance). Faced with these challenges, defense counsel took a middle path. Cf. *People v Caballero*, 184 Mich App 636, 640 (1990) (finding that failure to impeach a sexual-assault victim with inconsistent statements was not ineffective where the counsel testified that he feared antagonizing the court by attacking the victim). He gently probed the child victim's recollections and was able to produce a few inconsistencies in the victim's statements.[5] That he failed to produce

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[4] The Court of Appeals did not recognize any of the inconsistencies revealed by defense counsel's questioning. The court instead suggested that "her preliminary examination testimony was consistent with her trial testimony." *Morgan*, unpub op at 7. This erroneous conclusion formed the basis for the court's determination that counsel had provided ineffective assistance. *Id*.

[5] Indeed, counsel appears to have been following accepted practice by keeping his questions simple, asking only whether she remembered saying certain things at the preliminary examination. 1A Gillespie, Michigan Criminal Law & Procedure (2d ed), § 18:24, p 361. In doing so, he was "tak[ing] very small steps from one point to the next" and "very gently" attempting to elicit inconsistencies. *Id*. at 363. And in cueing the

more does not necessarily mean he was ineffective, nor does the fact that this approach risked revealing some consistencies in the victim's testimony in the preliminary examination and the trial. Counsel has broad discretion to take these types of risks. *Pickens*, 446 Mich at 325.

Given these arguments, before determining whether the risk was reasonable and whether counsel performed deficiently, I would order a *Ginther* hearing at which he could explain his strategy. Since a defendant "must overcome the strong presumption that counsel's performance was born from a sound trial strategy," *Trakhtenberg*, 493 Mich at 52, a *Ginther* hearing can assist in the court's review of the reasonableness of a counsel's approach by allowing counsel to explain his or her approach to the case. See, e.g., *People v Douglas*, 496 Mich 557, 586 (2014) (noting defense counsel's testimony at the *Ginther* hearing regarding his trial strategy).

By failing to provide even a *Ginther* hearing, the majority today appears indifferent to the difficulties faced by defense counsel in cases like this one and the social costs of a new trial. The Court of Appeals' approach in this case invites courts to sit as armchair quarterbacks, second-guessing counsel's trial strategy in difficult cases and leading to unnecessary retrials. If routinely followed, this will put victims and other witnesses through the stress and anxiety of another trial in many more instances than *Strickland* requires and will place more strain on our already overburdened courts. For these reasons, I respectfully dissent and would instead order a *Ginther* hearing to determine whether defense counsel provided unconstitutionally deficient representation.

LORD v SHARMA, No. 163836; Court of Appeals No. 357920.

LORD v SHARMA, No. 163838; Court of Appeals No. 357941.

Leave to Appeal Before Decision by the Court of Appeals Denied April 1, 2022:

MOORE MURPHY HOSPITALITY, LLC v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 164039; Court of Appeals No. 360175.

VIVIANO and BERNSTEIN, JJ. (*dissenting*). The COVID-19 pandemic, and the government's response to it, has disrupted the daily lives of the residents of our state. For a large portion of the last two years,

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victim's recall by using her statements at the preliminary examination, counsel perhaps was responding to the fact that " 'young children find free recall considerably more difficult than cued-recall and recognition.' " Keenan, *Child Witnesses: Implications of Contemporary Suggestibility Research in a Changing Legal Landscape*, 26 Dev Mental Health L 99, 101 (2007) (citation omitted). Thus, it seems that defense counsel employed a well-accepted approach for the questioning of child victims. It cannot be the case that every time such an approach does not work well, counsel has been ineffective.

individuals were isolated, students were left without regular schooling, workers were laid off, and business owners were forced to shutter their shops. Often, these were not simply incidents of the epidemic but the consequences of policies mandated by the executive branch. Of course, "it is not our role to consider or debate the practicality of any of these measures . . . ." *In re Certified Questions From the US Dist Court, Western Dist of Mich*, 506 Mich 332, 434 (2020) (BERNSTEIN, J., concurring in part and dissenting in part). It is our job, however, to timely resolve legal challenges to them. The Department of Health and Human Services (DHHS) seeks this Court's immediate review of the circuit court's decision declaring unconstitutional the statute that the DHHS has cited as authority for many of its COVID-19 orders. We would take the case now to give the Court an opportunity to provide clarity on a topic of great importance to our citizens: the extent of the executive branch's powers to respond to the COVID-19 pandemic. Because the majority has declined to do so, we respectfully dissent.

The present case is a sequel of sorts to *In re Certified Questions*, 506 Mich at 385 (majority opinion). There, this Court held that the statute the Governor had relied on for many of her executive orders addressing the epidemic—the Emergency Powers of the Governor Act (the EPGA), MCL 10.31 *et seq*.—represented an unconstitutional delegation of legislative power to the executive branch. Even before the EPGA was declared unconstitutional, however, the director of the DHHS had issued orders under the statute at issue in this case, MCL 333.2253, part of the Public Health Code, 333.1101 *et seq*. See *In re Certified Questions*, 506 Mich at 405 (VIVIANO, J., concurring in part and dissenting in part) (discussing the DHHS orders).[1] In essence, "nearly everything the Governor ha[d] done under the EPGA, she ha[d] also purported to do, via the DHHS Director, under MCL 333.2253." *Id*. at 405-406. Although MCL 333.2253 was noted in *In re Certified Questions*, none of the opinions produced in that case opined on the constitutionality of that statute. See *In re Certified Questions*, 506 Mich at 397-406 (VIVIANO, J., concurring in part and dissenting in part) (discussing the statute and its history but not addressing its constitutionality).

After the Court's decision in *In re Certified Questions*, the executive branch turned to the Public Health Code, and especially MCL 333.2253, as the primary source of authority for its orders pertaining to the epidemic. Just days after the Court's decision, the DHHS director issued an emergency order under MCL 333.2253 establishing significant re-

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[1] The statute states in relevant part:

> If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code. [MCL 333.2253(1).]

strictions across the state, including the closing of "indoor common areas" in restaurants. DHHS, *Emergency Order Under MCL 333.2253—Gathering Prohibition and Mask Order* (October 5, 2020). Roughly one month later, the director issued a new, more extensive order. DHHS, *Emergency Order Under MCL 333.2253—Gatherings and Face Mask Order* (November 15, 2020). Indoor gatherings were "prohibited at non-residential venues," and restaurants in particular were prohibited from providing indoor seating. *Id*. The order was later rescinded, but not before the current case arose.

After the November order was issued, Moore Murphy Hospitality, LLC (Moore Murphy), opened the Iron Pig Smokehouse for indoor dining in violation of the order. Moore Murphy was ordered to stop and was later issued a citation and a $5,000 fine. Moore Murphy appealed the citation to the Michigan Office of Administrative Hearings and Rules. On March 10, 2021, an administrative law judge (ALJ) granted the DHHS summary disposition, affirming the citation and fine. The case then went to the circuit court, which reversed the ALJ's decision. The court held that MCL 333.2253, like the EPGA, was an unconstitutional delegation of legislative power to the executive branch. The circuit court severed the statute from the Public Health Code.

The DHHS has filed the present bypass application in this Court, arguing that we should reverse the circuit court's ruling on various alternative grounds: by overruling *In re Certified Questions*, by holding that MCL 333.2253 is constitutional even under that case, or by holding that the circuit court overstepped its statutory authority under MCL 24.306(1) in severing the statute. The majority declines to hear the case now, sending it back through the normal appellate process, which could take years to fully resolve.

With the director's order already rescinded, and with COVID case numbers down, perhaps the case appears less urgent to some. But not to us. The epidemic has been cyclical, with new variants appearing just when the outlook has improved and restrictions are eased.[2] And then the cycle begins anew, with the imposition of new restrictions mandated by executive orders. Under the circuit court's ruling, the DHHS can no longer rely on MCL 333.2253. That may be a comfort to some and a cause of concern to others. But, until this Court rules, our citizens will not know what their rights are or whether they will continue to be subject to the emergency powers of the executive branch.

The powers exercised by DHHS altered the course of social and economic life in our state—they interfered with our civil liberties and

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[2] Indeed, there are early reports that another wave of infections could occur in Michigan. Chambers, *'Stealth omicron' cases starting to add up in Metro Detroit, Washtenaw County*, The Detroit News (March 19, 2022) (noting "a surge in coronavirus infections in Western Europe" and concerns about another outbreak here), available at <https://www.detroitnews.com/story/news/local/michigan/2022/03/19/stealth-omicron-cases-adding-up-metro-detroit-washtenaw-co/7103296001/> (accessed March 22, 2022) [https://perma.cc/SH7Y-SQUR].

our daily lives, including where and how we work, socialize, educate our children, and worship. Whether those powers were exercised wisely is not for us to judge. But it is our job to decide the extent to which the executive branch may properly wield that power in the first place. By passing up the opportunity to put this issue to rest, the majority lets the uncertainty fester. We therefore dissent from the majority's order and would grant the bypass application to decide the questions of immense importance presented in this case.[3]

Summary Disposition April 5, 2022:

PEOPLE v BECKUM, No. 162936; Court of Appeals No. 355260. On order of the Court, the application for leave to appeal the April 14, 2021 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v ARBABE, No. 162940; Court of Appeals No. 355439. By order of December 1, 2021, the prosecuting attorney was directed to answer the application for leave to appeal the January 29, 2021 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. The motion to remand is DENIED.

PEOPLE v MITCHELL, No. 163291; Court of Appeals No. 356960. On order of the Court, the application for leave to appeal the May 28, 2021 order of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration in light of *People v Betts*, 507 Mich 527 (2021), and direct that it hold this case in abeyance pending its decision in *People v Fabela* (Docket No. 158146), which we remanded to the Court of Appeals by order of February 2, 2022. After *Fabela* is decided, the Court of Appeals shall reconsider this case in light of *Fabela*.

PEOPLE v WEST, Nos. 163338 and 163339; Court of Appeals Nos. 356981 and 356982. By order of October 8, 2021, the prosecuting attorney was directed to answer the applications for leave to appeal the

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[3] The bypass application meets our standards for granting such applications, as the underlying decision held that a Michigan statute is invalid. See MCR 7.305(B)(4)(b) (allowing bypass applications when "the appeal is from a ruling that a provision of . . . a Michigan statute . . . is invalid"). While we normally let the full appellate process run its course, we believe that the finality concerns mentioned above weigh in favor of granting the application, especially given that the issue of emergency powers has continued to arise, a party has asked us to overrule our precedent, and this precedent is recent and guides the analysis here.

May 28, 2021 orders of the Court of Appeals. On order of the Court, the answers having been received, the applications for leave to appeal are again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the defendant's conviction for failure to comply with the Sex Offenders Registration Act, MCL 28.721 *et seq*., in No. 17-002956-FH. The retroactive application of 2011 PA 17 to the defendant, after the March 2011 offense that required him to register, violates the federal and state constitutional prohibitions on ex post facto laws. *People v Betts*, 507 Mich 527 (2021). We REMAND this case to the Alcona Circuit Court for further proceedings consistent with *Betts*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motions to vacate sentence and the motions to remand are DENIED as moot, without prejudice to the defendant moving for resentencing in No. 17-002961-FH on remand. The motions for appointment of counsel are DENIED, without prejudice to the defendant renewing his request on remand. We do not retain jurisdiction.

PEOPLE v TUNSTALL, No. 164033; Court of Appeals No. 358797. On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the November 2, 2021 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE that order and REMAND this case to the Court of Appeals. That court shall treat the defendant's delayed application for leave to appeal as having been filed within the deadlines set forth in MCR 7.205(A)(4) and shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(E)(2). The defendant's motion for relief from judgment was denied by the trial court on August 4, 2020, and the defendant timely moved for reconsideration of that order. The trial court denied the motion for reconsideration on September 30, 2020. The defendant filed a letter with the Court of Appeals under AO 2020-21 on December 1, 2020. That administrative order expired June 15, 2021. Under AO 2020-21, the defendant had approximately four months from the expiration of AO 2020-21 to timely file his delayed application. His September 28, 2021 filing in the Court of Appeals was therefore timely. We note that the defendant did not bring the fact that he had filed a timely motion for reconsideration to the attention of the Court of Appeals. The motion for miscellaneous relief is DENIED.

PEOPLE v WESTFALL, No. 164101; Court of Appeals No. 359927. On order of the Court, the application for leave to appeal the February 16, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration of the defendant's application under MCR 7.205 in light of the concern articulated in *People v Yost*, 468 Mich 122, 124 n 2 (2003).

Leave to Appeal Denied April 5, 2022:

PEOPLE v CARINES, No. 161730; Court of Appeals No. 351600.

PEOPLE v PIRKEL, No. 162765; Court of Appeals No. 354947.

PEOPLE v PEREZ, No. 162774; Court of Appeals No. 350037.

CITY OF EAST LANSING v SCHOMAKER, No. 162793; Court of Appeals No. 353129.

PHYLE v SCHEPPE INVESTMENTS, INC, No. 163195; Court of Appeals No. 353045.

ALWATEN COMPANY FOR GENERAL TRADING & OIL SERVICES, LLC v YOUSIF, No. 163236; Court of Appeals No. 352721.

PEOPLE v BELINDA JONES, No. 163238; Court of Appeals No. 354505.

PEOPLE v DIAPOLIS SMITH, No. 163263; Court of Appeals No. 356253.

PEOPLE v BONNER, No. 163297; Court of Appeals No. 352623.

PEOPLE v ROY, No. 163304; Court of Appeals No. 356557.

PEOPLE v GHOLSTON, No. 163309; Court of Appeals No. 350798.

PEOPLE v GORDON, No. 163317; Court of Appeals No. 356566.

HAUANIO v SMITH, No. 163352; Court of Appeals No. 352441.

PEOPLE v STRAMPEL, Nos. 163364 and 163365; Court of Appeals Nos. 352557 and 352558.

PEOPLE v SLACK, No. 163366; Court of Appeals No. 357496.

INTEGRATED HEALTH GROUP, PC v INTEGRATED HEALTHCARE SYSTEMS, LLC, No. 163377; Court of Appeals No. 349696.

PEOPLE v DUNCAN, No. 163386; Court of Appeals No. 350983.

PEOPLE v TIFFANIE EDWARDS, No. 163397; Court of Appeals No. 357008.

EMERY v CAREY, No. 163403; Court of Appeals No. 356573.

PEOPLE v BLUMKE, No. 163428; Court of Appeals No. 353460.

PEOPLE v CURTIS, No. 163434; Court of Appeals No. 351296.

PEOPLE v LOWERY, No. 163467; Court of Appeals No. 357267.

FORD v PLAKA RESTAURANT, LLC, No. 163468; Court of Appeals No. 356700.

MUSCHEGIAN v ESPARZA, No. 163479; Court of Appeals No. 353146.

CHARTER TOWNSHIP OF YPSILANTI v DAHABRA, No. 163502; Court of Appeals No. 354427.

MORSE v COLITTI, No. 163526; Court of Appeals No. 354720.

PEOPLE v STUER, No. 163532; Court of Appeals No. 354464.

PEOPLE v CRAWFORD, No. 163579; Court of Appeals No. 356582.

CITY OF DETROIT DOWNTOWN DEVELOPMENT AUTHORITY v LOTUS INDUSTRIES, LLC, No. 163622; Court of Appeals No. 350351.

PEOPLE v SHANANAQUET, No. 163627; Court of Appeals No. 350861.

FROST v GENERAL MOTORS, LLC, No. 163628; Court of Appeals No. 352720.

PEOPLE v PARKS, Nos. 163654 and 163655; Court of Appeals Nos. 349362 and 350305.

PEOPLE v SANDERS, No. 163659; Court of Appeals No. 357525.

PEOPLE v MORGAN JONES, No. 163697; Court of Appeals No. 357492.

RESIDENTS OF FRESH AIR PARK SUBDIVISION v POINTE ROSA HOMEOWNERS ASSOCIATION, INC, No. 163716; Court of Appeals No. 355011.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v GEORGE, No. 163721; Court of Appeals No. 357486.

PEOPLE v ROSS, No. 163726; Court of Appeals No. 351525.

DUSKIN v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 163729; Court of Appeals No. 351975.

PEOPLE v BARNES, No. 163734; Court of Appeals No. 358027.

KINGS LAKE GP, INC v KINGS LANE LIMITED DIVIDEND HOUSING ASSOCIATION LIMITED PARTNERSHIP, No. 163761; Court of Appeals No. 352447.

KINGS LAKE GP, INC v KINGS LANE LIMITED DIVIDEND HOUSING ASSOCIATION LIMITED PARTNERSHIP, No. 163763; Court of Appeals No. 352447.

PEOPLE v RYAN BAILEY, No. 163768; Court of Appeals No. 347548.

PEOPLE v DERRY THOMAS, No. 163774; Court of Appeals No. 358086.

JACKSON v DETROIT PENSION BUREAU, No. 163787; Court of Appeals No. 358768.

PEOPLE v KING, No. 163797; Court of Appeals No. 352264.

PEOPLE v HANEY, No. 163804; Court of Appeals No. 357929.

MAYS v INTERNATIONAL MARKET PLACE, INC, No. 163806; Court of Appeals No. 355224.

CALLAHAN v MAROTA, No. 163812; Court of Appeals No. 359155.

PEOPLE v MICHAEL JONES, No. 163818; Court of Appeals No. 353266.

PEOPLE v CHAVEZ-DELAGARZA, No. 163819; Court of Appeals No. 358425.

HARRINGTON v CHIPPEWA CORRECTIONAL FACILITY WARDEN, No. 163820; Court of Appeals No. 355041.

PEOPLE v BOWENS, No. 163825; Court of Appeals No. 352764.

PEOPLE v BARRITT, No. 163829; Court of Appeals No. 352253.

PEOPLE v PAGE, No. 163830; Court of Appeals No. 357387.

ECKER v NICKEL, No. 163840; Court of Appeals No. 357433.

PEOPLE v BROOKS, No. 163843; Court of Appeals No. 357570.

In re HARRISON, No. 163844; Court of Appeals No. 358815.

PEOPLE v RAMON JONES, No. 163846; Court of Appeals No. 357642.

PEOPLE v DARRELL HARRIS, No. 163847; Court of Appeals No. 358456.

PEOPLE v REYES, No. 163848; Court of Appeals No. 358495.

KIMBLE v UNIVERSITY PHYSICIAN GROUP, No. 163854; Court of Appeals No. 357764.

TRUSS v GOVERNOR, No. 163859; Court of Appeals No. 358323.

KEY v STONEMOR MICHIGAN, LLC, No. 163867; Court of Appeals No. 354763.

PEOPLE v CALLOWAY, No. 163875; Court of Appeals No. 357603.

PEOPLE v PERSON, No. 163878; Court of Appeals No. 347907.

PEOPLE v DARYL EDWARDS, No. 163885; Court of Appeals No. 353788.

PEOPLE v WILCHER, No. 163893; Court of Appeals No. 358472.

BORKE v KINNEY, Nos. 163897 and 163898; Court of Appeals Nos. 350809 and 354237.

PEOPLE v FLORA, No. 163899; Court of Appeals No. 355305.

PEOPLE v LEONARD DUPLESSIS, No. 163901; Court of Appeals No. 354402.

PEOPLE v LEONARD DUPLESSIS, No. 163903; Court of Appeals No. 356491.

ELIZABETH A SILVERMAN, PC v KORN, No. 163905; Court of Appeals No. 350830.

ZAHRA, would grant leave to appeal.

PEOPLE v TARONE WASHINGTON, No. 163914; Court of Appeals No. 352408.

PEOPLE v ZERNEC, No. 163915; Court of Appeals No. 353490.

VANZANDT v PEAKS, No. 163918; Court of Appeals No. 354819.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

PEOPLE v RIDDLE, No. 163919; Court of Appeals No. 351884.

PEOPLE v DUTY, No. 163922; Court of Appeals No. 358239.

PEOPLE v ANTHONY BUTLER, No. 163927; Court of Appeals No. 358971.

PEOPLE v ANTHONY BUTLER, No. 163928; Court of Appeals No. 358692.

PEOPLE v JACOBS, No. 163934; Court of Appeals No. 358787.

In re APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES, No. 163941; reported below: 339 Mich App 233.

PEOPLE v MCELROY, No. 163956; Court of Appeals No. 354931.

PEOPLE v MATHEY, No. 163960; Court of Appeals No. 358174.

PEOPLE v YOST, No. 163963; Court of Appeals No. 358970.

PEOPLE v PETERS, No. 163973; Court of Appeals No. 353688.

PEOPLE v GEORGE CUNNINGHAM, No. 164068; Court of Appeals No. 359947.

PEOPLE v MARSHALL, No. 164092; Court of Appeals No. 359455.

ZIRNHELT v MCCALL, No. 164094; Court of Appeals No. 354776.

GLOWACKI v GLOWACKI, No. 164192; Court of Appeals No. 359084.

Reconsideration Denied April 5, 2022:

PEOPLE v MOLINA, No. 161581; Court of Appeals No. 353317.

PEOPLE v DRANE, No. 163156; Court of Appeals No. 355992.

PEOPLE v KALVIN WASHINGTON, No. 163284; Court of Appeals No. 356640.

PEOPLE v GETTER, No. 163381; Court of Appeals No. 357141.

PEOPLE v CHRISTOPHER JOHNSON, No. 163474; Court of Appeals No. 350550.

PEOPLE v BOWDEN, No. 163535; Court of Appeals No. 357580.

PEOPLE v NULL, No. 163558; Court of Appeals No. 357593.

PEOPLE v ISCARO, No. 163599; Court of Appeals No. 357683.

PEOPLE v BERAK, No. 163693; Court of Appeals No. 352328.

BROWN v ATTORNEY GRIEVANCE COMMISSION, No. 163696.

Summary Disposition April 7, 2022:

PEOPLE v MICHAEL ROBINSON, No. 163789; Court of Appeals No. 358473. On order of the Court, the application for leave to appeal the October 14, 2021 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals shall expedite its consideration of this case.

Summary Disposition April 8, 2022:

In re SMITH-TAYLOR, No. 163725; reported below: 339 Mich App 189. By order of February 2, 2022, the petitioner Department of Health and Human Services was directed to answer the application for leave to appeal the October 14, 2021 judgment of the Court of Appeals. In lieu of filing an answer, the Department joined the respondent-mother in a motion to remand the case to the trial court because the Department concedes that it did not make reasonable efforts to reunite the family as required by statute. See MCL 712A.19a(2). On order of the Court, the application for leave to appeal is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REMAND this case to the Wayne Circuit Court for further proceedings consistent with this order.

The Court of Appeals erred by concluding that the Department was excused from preparing a case service plan for the respondent. See *In re Smith-Taylor*, 339 Mich App 189, 192 (2021). "Reasonable efforts to reunify the child and family must be made in *all* cases" absent aggravated circumstances. *In re Mason*, 486 Mich 142, 152 (2010) (quotation marks and citation omitted). Reasonable efforts must include "a service plan outlining the steps that both [the Department] and the parent will take to rectify the issues that led to court involvement and to achieve reunification." *In re Hicks*, 500 Mich 79, 85-86 (2017). It is undisputed that the Department failed to create a case service plan for the respondent. And yet, on appeal, the panel affirmed the trial court's decision to terminate her parental rights. Its conclusion that the Department was excused from creating a case service plan because aggravated circumstances applied misunderstood both the factual record and the law.

Under MCL 712A.19a(2)(a), there must be a "judicial determination that the parent has subjected the child to aggravated circumstances" before the Department is excused from making reasonable efforts. Aggravated circumstances are defined in MCL 722.638 to include "[b]attering, torture, or other severe physical abuse" of a child or sibling. MCL 722.638(1)(a)(*iii*). Aggravated circumstances are present both for a parent who is a "suspected perpetrator" of such abuse and a parent who is "suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk[.]" MCL 722.638(2).

While the respondent was hospitalized, her two eldest children, DL and DE, were placed in temporary custody with Child Protective

Services (CPS). A CPS investigator visited the respondent in the hospital, and the respondent explained that the children's father's home was an unfit environment. Over her objection, the Department approved placement of DL and DE with their father. DE was hospitalized for severe injuries consistent with nonaccidental trauma while the respondent was still hospitalized.

The Department sought termination of the parental rights of both the respondent and the father. At the preliminary hearing, the trial court found aggravated circumstances of severe physical abuse by the father excused the Department from making reasonable efforts to reunify him with his children. But it found reasonable efforts were still required as to the respondent. The court continued to reiterate the need for reasonable efforts as the case progressed. Although the Department never created a case service plan, the trial court nevertheless terminated the respondent's parental rights, finding that the mental health services that she sought and received on her own amounted to reasonable efforts by the Department. This was an error.

On appeal, the respondent challenged the Department's failure to make reasonable efforts. The Court of Appeals began its analysis by concluding that the respondent failed to preserve the issue because she failed to "raise the issue at the time the services [were] offered." *In re Smith-Taylor*, 339 Mich App at 200. But because services were never offered, the panel created an impossible obstacle for preservation and then determined that the respondent had not met it.

The panel also misconstrued the factual record. It claimed that "the record reflects that the children's father lived in the home" and that the "respondent allowed the children's father to become the children's caregiver." *Id*. at 201. But the record shows that at the relevant time the respondent was living separately from the children's father and told a CPS investigator that the children would not be safe in his home. Relying on this erroneous understanding of the record, the panel concluded that aggravated circumstances applied to the respondent because she had "placed DE 'at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk.' " *Id*., quoting MCL 722.638(2).

The panel also misconstrued the law. MCL 712A.19a(2)(a) requires a judicial determination that aggravated circumstances exist before the Department is excused from making reasonable efforts. The trial court determined that aggravated circumstances *did not* exist as to the respondent. In fact, it continued to reiterate the need for reasonable efforts throughout the progression of this case.

The panel's conclusion that there were aggravated circumstances—based on a misunderstanding of the facts—cannot justify the Department's failure to make reasonable efforts. The Department agrees. Its joint motion filed in this Court concedes that it was required to make reasonable efforts all along and failed to do so. Because we agree with the Department that it was required to make reasonable efforts, we reverse the panel's decision in this case and remand the case to the trial court so that the Department may do so. The joint motion to remand this case to the trial court is DENIED as moot. We do not retain jurisdiction.

Leave to Appeal Denied April 8, 2022:

PEOPLE v FLEMING, No. 163845; Court of Appeals No. 358374.

Oral Argument Ordered on the Application for Leave to Appeal April 15, 2022:

PEOPLE v ENCISO, No. 162311; Court of Appeals No. 342965. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether: (1) a defendant's unpreserved claim regarding his or her lack of physical presence at sentencing is subject to review for plain error; (2) lack of presence at sentencing is structural error; (3) if the error is not structural how a defendant could show the error affected the outcome of the lower court proceedings; and (4) if the error is structural how a prosecutor could rebut the presumption that the error seriously affected the fairness, integrity or public reputation of judicial proceedings. See *People v Davis*, 509 Mich 52 (2022). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied April 15, 2022:

PEOPLE v WIMBERLY, No. 163097; Court of Appeals No. 342751.

PEOPLE v DERRY THOMAS, No. 163777; Court of Appeals No. 358535.

Application for Leave to Appeal Granted April 20, 2022:

GRADY v WAMBACH, No. 163902; reported below: 339 Mich App 325. The parties shall address whether an insurance company has statutory standing to challenge whether the members and managers of a health-care provider incorporated as a professional limited liability company (PLLC) are properly licensed in this state as required by the Michigan Limited Liability Company Act (MLLCA), MCL 450.4904(2). See *Miller v Allstate Ins Co*, 481 Mich 601 (2008), and *Sterling Heights Pain Mgt v Farm Bureau Gen Ins Co of Mich*, 335 Mich App 245 (2020). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

Oral Argument Ordered on the Application for Leave to Appeal April 20, 2022:

GALVAN v POON, No. 163741; Court of Appeals No. 352559. The appellants shall file a supplemental brief within 42 days of the date of this order addressing whether the covenant of title under MCL 565.151, which states that the premises "are free from all incumbrances," includes a covenant that the structure of the premises conforms to currently applicable building codes. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellants' brief. A reply, if any, must be filed by the appellants within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied April 20, 2022:

DAVIS v JACKSON PUBLIC SCHOOLS, No. 161836; Court of Appeals No. 344203. On January 12, 2022, the Court heard oral argument on the application for leave to appeal the July 2, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

PEOPLE v BYCZEK, No. 163262; reported below: 337 Mich App 173.

PEOPLE v DODSON, No. 163783; Court of Appeals No. 354202.

GUILLARD v HEGEWALD, No. 163798; Court of Appeals No. 353883.

STOUT v CHAPMAN, No. 163832; Court of Appeals No. 355608.

KRIEGER v DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY and other cases, Nos. 163994-164018; Court of Appeals Nos. 358076, 358096-358101, 358104-358106, 358108-358110, 358117-358118, 358120, 358129, 358131-358132, 358138-358141, and 358143-358144.

Summary Disposition April 22, 2022:

PRICE v AUSTIN, No. 161655; Court of Appeals No. 346145. On November 10, 2021, the Court heard oral argument on the application for leave to appeal the April 30, 2020 judgment of the Court of Appeals. On order of the Court, the application for leave to appeal is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals, and we REMAND this case to the Saginaw Circuit Court for entry of an order denying the

defendants' motion for summary disposition, except on the grounds conceded by the plaintiff, and for further proceedings consistent with this order. The panel majority erred by determining that the defendant-driver's testimony was credible. Although some evidence supported the defendant-driver's testimony, only he could know what happened inside his truck that day or whether he had any reason to suspect that an imminent syncopal episode might warrant certain conduct.[1] When "the credibility of a witness or deponent is crucial, summary judgment should not be granted." *Arber v Stahlin*, 382 Mich 300, 309 (1969);[2] accord *Brown v Pointer*, 390 Mich 346, 354 (1973). Because the defendant-driver's credibility was crucial to the success of his sudden-emergency defense, summary disposition should not have been granted. The dissent emphasizes that the defendant-driver's testimony leaves no question of fact for trial, see *post* at 950, but as Judge GLEICHER correctly recognized, the fact-finder may determine whether the defendant-driver acted as a "reasonably prudent person would have done under all the circumstances of the accident . . . ." *Szymborski v Slatina*, 386 Mich 339, 341 (1971) (quotation marks and citations omitted; see also *Moning v Alfono*, 400 Mich 425, 435-436 (1977). We do not retain jurisdiction.

VIVIANO, J. (*dissenting*). There are two related questions in this case. First, has defendant rebutted the presumption of negligence that attaches due to the fact that the accident at issue occurred when his car crossed over the centerline of the road? Second, if the presumption has been rebutted, is defendant also entitled to summary disposition? The Court of Appeals majority answered both questions in the affirmative, upholding the trial court's grant of summary disposition to defendant. A majority of this Court disagrees on the basis that the jury might disbelieve defendant's testimony, making it inappropriate to find that the presumption has been rebutted and, by extension, to grant summary disposition. While it is true that we must not decide credibility questions

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[1] The dissent asserts that "all of the evidence in the case demonstrates that [the defendant-driver] crossed the line because of a sudden emergency . . . ." *Post* at 948. "Demonstrates" goes too far. We agree that the evidence is consistent with a sudden emergency, but it's also consistent with falling asleep at the wheel (thus highlighting the problem with granting summary disposition).

[2] The dissent suggests that *Arber*'s proposition is limited to issues "involv[ing] the defendant's subjective intent." *Post* at 949 n 5. But we have approvingly cited *Arber*'s proposition in *Brown v Pointer*, 390 Mich 346, 354 (1973), a case having no apparent connection to subjective intent. In any event, we see little difference between the denial of the requisite intent for defamation in *Arber* and the denial of responsibility for the accident in the present case. In both cases, the denial is self-serving and only the denier is privy to the facts supporting the denial. The determination of what actually happened thus "must be resolved from a study of the witness on the stand . . . ." *Arber*, 382 Mich at 309.

at the summary-disposition stage, there is no categorical bar to finding a presumption rebutted or deciding a case as a matter of law in these circumstances. In fact, our caselaw holds that not only can an evidentiary presumption like the present one be overcome by a defendant's own testimony, but that the case can be decided as a matter of law on the very same evidence. Because I believe that defendant has sufficiently rebutted the presumption and that no question of material fact remains, I would affirm the Court of Appeals judgment.

I. FACTS AND GENERAL LEGAL STANDARD

This negligence action resulted from an automobile accident that occurred when defendant Samuel Austin, after experiencing a coughing fit, blacked out and drove his tractor-trailer into the other lane on a two-lane roadway. He had nearly made it to the shoulder of that lane when he hit the car driven by plaintiff, Arthur Price, Jr. Plaintiff filed suit against defendant and others, alleging negligence and gross negligence. Plaintiff offered as proof of negligence defendant's violation of MCL 257.634(1), which requires that "the driver of a vehicle . . . drive the vehicle upon the right half of the roadway . . . ." This raised a rebuttable presumption that defendant was negligent. See *Zeni v Anderson*, 397 Mich 117, 130-131 (1976). To rebut the presumption, defendant argued that he experienced a sudden emergency. See *White v Taylor Distrib Co, Inc*, 482 Mich 136, 139-140 (2008) (discussing the sudden-emergency exception to presumptions of negligence). Specifically, he claimed that he passed out just before the accident. As proof, he presented testimony from himself, multiple treating physicians, and the responding police officer; GPS evidence; and the lack of skid marks on the road. Defendant further argued that rebutting the presumption meant there were no disputes of material fact, thus entitling him to summary disposition. Plaintiff disagreed that rebuttal would result in summary disposition but provided only bare accusations that defendant was lying about having passed out. The trial court granted defendant summary disposition, finding that plaintiff had failed to demonstrate that there was a genuine issue of material fact concerning whether defendant experienced a sudden emergency. The Court of Appeals affirmed in an unpublished decision, with Judge GLEICHER dissenting.

The party moving for summary disposition has the burden to demonstrate that there is no dispute regarding a fact material to one or more issues. *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 85 (2016). The movant meets this burden when the lack of dispute "negates an essential element of the nonmoving party's claim." *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996) (quotation marks and citation omitted). Once an essential element is negated, the nonmovant must then " 'come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case.' " *Skinner v Square D Co*, 445 Mich 153, 161 (1994), quoting *Durant v Stahlin*, 375 Mich 628, 640 (1965) (emphasis omitted); see also MCR 2.116(G)(4) ("When a motion under [MCR 2.116](C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere

allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial."). When the nonmovant fails to meet this burden, the movant is entitled to summary disposition. *Bank of America*, 499 Mich at 85.

II. ANALYSIS

The threshold question is whether defendant has rebutted the presumption of negligence that arose due to his violation of MCL 257.634(1). In answering this question, however, our caselaw also points to the answer for the second question: the evidence used to rebut the presumption can, in the absence of other evidence raising a genuine issue of material fact, be sufficient to decide the case as a matter of law.

A. THE PRESUMPTION AND REBUTTAL

In Michigan, a presumption is merely a procedural device that shifts the burden of producing evidence to the party against whom the presumption operates. *Widmayer v Leonard*, 422 Mich 280, 286 (1985). It dissolves when that party presents sufficient evidence. The presumption can be rebutted "by a showing on the part of the party violating the statute of an adequate excuse under the facts and circumstances of the case." *Zeni*, 397 Mich at 129-130. One such excuse is a sudden emergency, which "applies 'when a collision is shown to have occurred as a result of a sudden emergency not of the defendants' own making.' " *White*, 482 Mich at 139-140, quoting *Vander Laan v Miedema*, 385 Mich 226, 231 (1971). A sudden emergency must be " 'totally unexpected.' " *White*, 482 Mich at 140, quoting *Vander Laan*, 385 Mich at 232. We have held that "a sudden, unexpected blackout could present a sudden emergency sufficient to rebut the statutory presumption." *White*, 482 Mich at 140.[1]

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[1] The presumption in *White* arose from a violation of MCL 257.402(1), which provides in relevant part that "when it is shown by competent evidence, that a vehicle traveling in a certain direction, overtook and struck the rear end of another vehicle proceeding in the same direction, . . . the driver or operator of such first mentioned vehicle shall be deemed prima facie guilty of negligence." Although the statute that was violated in the present case, MCL 257.634, does not contain an express provision for a presumption, our caselaw does not require this in order for the presumption to arise. See *Zeni*, 397 Mich at 130 ("[O]ver a 65-year period, cases concerning the effect in a negligence action of violation of the statute requiring vehicles to keep to the right side of the road have almost consistently adopted a rebuttable presumption approach, even though the language of the statute is not written in terms of a presumption.").

In order to overcome presumptions analogous to the one in this case, we have required the evidence to be "clear, positive, and uncontradicted . . . ." *Krisher v Duff*, 331 Mich 699, 706 (1951). *Krisher* provides a thorough explanation of this rule and how it relates to whether a case can be decided as a matter of law. The defendants in *Krisher* were brothers, one of whom borrowed the other's car. *Id*. at 702. The law imposed a presumption that the borrowing was with the owner's consent and the question was whether the trial court properly instructed the jury on the standard for rebutting the presumption. *Id*. at 702, 704.

In explaining why a high level of proof was required for overcoming this presumption, we specifically noted that the defendant would often be the only one with relevant evidence. *Id*. at 706. "The presumption," we said, "is given more weight," i.e., is harder to overcome, "because of the dangerous instrumentality involved and the danger of permitting incompetent driving on the highway; and because the proof or disproof of consent or permission usually rests *almost entirely with the defendants*." *Id*. (emphasis added). Continuing, we emphasized that "[t]he defendant owner frequently may be the only witness and not disinterested." *Id*. This factor "operate[d] to make this a stronger presumption," requiring a greater degree of evidence to rebut. *Id*. at 707, see also *id*. at 708 (" 'The difficulty of showing the consent of the owner except by evidence of facts and circumstances, where the owner and the driver may be the only persons who can directly testify that no consent was given to drive the car, has a distinct bearing on the construction of the statutory presumption here involved.' ") (citation omitted).

Despite the fact that the defendants might provide the only relevant evidence, successful rebuttal is still possible. "Such rebuttal may be accomplished on the testimony of the defendants alone, if such testimony is clear, positive and uncontradicted." *Id*. at 708. To be sure, "if some doubt has been cast on the credibility of the defendants or their witnesses, so that their evidence is not clear, credible and convincing, it is proper to submit the issue . . . to the jury." *Id*. at 709. And in this regard, "[t]he credibility of the evidence brought forth by defendants may be affected by the manner in which witnesses testify, if they are not disinterested witnesses." *Id*. Nevertheless, the mere fact that the rebuttal evidence comes from the defendants alone is not enough—as we noted again, "[i]t has been held that uncontradicted evidence given by defendants alone is sufficiently clear, positive and credible to rebut the presumption" if no "doubt has been cast on the testimony . . . ." *Id*. at 710.

B. THE PRESUMPTION AND JUDGMENT AS A MATTER OF LAW

At this point, *Krisher* explained the relationship between the presumption and the disposition of the case as a matter of law. The process described above "is entirely a determination as to whether or not the defendants have met the burden of going forward with the evidence . . . ." *Id*. at 710. Thus, the initial determination is whether the presumption has been overcome. *Id*. "If it has been overcome," then the question is "whether or not the plaintiffs can prove all the issues of the

case . . . by a preponderance of the evidence." *Id*. In other words, the presumption dissipates and the question becomes the normal one: is there a genuine issue of material fact left for the fact-finder to adjudicate? Cf. *Klat v Chrysler Corp*, 285 Mich 241, 248 (1938) (noting that after the presumption was overcome, "[t]he failure of plaintiff to proceed with rebuttal evidence made it incumbent upon the trial judge as a matter of law to direct a verdict in favor of defendants").

This framework from *Krisher* reflects the nature of the sudden-emergency doctrine. To prove his case here, plaintiff must show that defendant acted negligently, i.e., did not act like a reasonably prudent person under the circumstances. See *Antcliff v State Employees Credit Union*, 414 Mich 624, 631-632 (1982) ("In a negligence action, . . . the standard of care required is always the care which a person of reasonable prudence would exercise under the circumstances as they existed."). The sudden-emergency doctrine "is a 'logical extension of the "reasonably prudent person" rule,' and as such is not an affirmative defense." *Szymborski v Slatina*, 386 Mich 339, 341 (1971), quoting *Baker v Alt*, 374 Mich 492, 496 (1965) (some quotation marks omitted). "An affirmative defense is one that does not challenge the 'merits of the plaintiff's claim'; that is, it 'seeks to foreclose the plaintiff from continuing a civil action for reasons unrelated to the plaintiff's prima facie case.' " *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 507 Mich 272, 304-305 (2021) (citation omitted). Accordingly, a sudden-emergency argument attacks the element of the prima facie case requiring the plaintiff to prove that the defendant acted negligently. A defendant would therefore not be liable if he or she could prove that his or her vehicle crossed onto the wrong side of the road because of an unexpected fainting or blackout. See *Soule v Grimshaw*, 266 Mich 117, 119 (1934) ("The trial court properly charged that defendant had no right to drive on the wrong side of the highway; that he was not liable if he fainted or became unconscious immediately prior to the accident, so the passing of his automobile to the wrong side of the highway was not his voluntary act.").[2]

The sudden-emergency doctrine is thus relevant both to the presumption and to the ultimate merits of the dispute. *Krisher* bears this out. There, in stating that the testimony of the defendant "alone" could rebut the presumption, we indicated that such testimony could also "justify the court in taking the case away from the jury and directing a verdict in favor of the defendant." *Krisher*, 331 Mich at 708; see also *id*. at 710 ("It has been held that uncontradicted evidence given by

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[2] It must be emphasized, of course, that proving a sudden emergency does not automatically entitle the defendant to judgment as a matter of law. The fact-finder "is permitted to consider the emergency as one of the circumstances relevant in determining whether the actor behaved reasonably." 1 Dobbs, Hayden, & Bublick, The Law of Torts (2d ed), § 142, p 445. But as *Soule* shows, if the defendant loses consciousness and is not otherwise negligent, this sudden emergency could justify a verdict for the defendant.

defendants alone is sufficiently clear, positive and credible enough to rebut the presumption and justify a directed verdict for the defendant."). We cited multiple cases for this proposition. One was *Christiansen v Hilber*, 282 Mich 403 (1937), in which it was observed that we had rejected the argument that simply because a jury might disbelieve testimony opposing a presumption, a directed verdict should not enter. See *id*. at 407, discussing *Union Trust Co v American Commercial Car Co*, 219 Mich 557, 559 (1922) (rejecting the plaintiff's argument that "the jury might not have accepted the testimony, and plaintiff [therefore] could have prevailed" based on the presumption). In such a case, " '[i]t would [be] an idle ceremony, under the evidence, to have submitted the case to the jury, for the direct, positive and uncontradicted evidence presented an issue of law for the court and not an issue of fact for the jury.' " *Christiansen*, 282 Mich at 407, quoting *Union Trust*, 219 Mich at 560. Because the unimpeached witness's testimony was uncontradicted, it " 'should be credited and have the effect of overcoming a mere presumption.' " *Christiansen*, 282 Mich at 409 (citation omitted). *Christiansen* applied this to a case in which the evidence opposing the presumption came from the defendant's own testimony. The testimony there met the standards for overcoming the presumption *and* we held that the trial court did not err by directing a verdict for defendant as a matter of law. *Id*. at 410.

Another case cited by *Krisher* is *Brkal v Pletcher*, 311 Mich 258 (1945). There, the defendant's testimony was not impeached or contradicted by opposing evidence. *Id*. at 260-261. It was, therefore, sufficient to overcome the presumption *and* require a directed verdict. *Id*.; see also *Wehling v Linder*, 248 Mich 241 (1929) (holding that a defendant's testimony corroborated by the record and otherwise uncontradicted was sufficient to overcome the presumption and require a directed verdict against the plaintiff).

The United States Supreme Court has taken this very approach to directed verdicts. The Court has recognized that, while the jury is to assess credibility, "this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view it is open to doubt." *Chesapeake & O R Co v Martin*, 283 US 209, 216 (1931). This is true even when the testimony at issue comes from an interested witness. *Id*. at 216-217. The mere fact that the witness has an interest that might otherwise call the testimony into doubt is not enough to bar a directed verdict "[w]here . . . the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising or suspicious . . . ." *Id*. at 218.

A directed verdict is directly analogous to the motion for summary disposition under MCR 2.116(C)(10) that was filed in the present case. Although the fact-finder is charged with resolving factual disputes, "when no fact question exists, the trial judge is justified in directing a verdict." *Caldwell v Fox*, 394 Mich 401, 407 (1975). Like a motion under MCR 2.116(C)(10), "[a] motion for a directed verdict challenges the sufficiency of the evidence." *Barnes v 21st Century Premier Ins Co*, 334

Mich App 531, 550 (2020). As such, " '[t]he test with respect to a motion for summary disposition brought under MCR 2.116(C)(10) is essentially the same in regard to a motion for a directed verdict . . . .' " *Id*. at 550-551 (citation omitted).[3] The primary difference is that the motion for directed verdict comes at the close of the evidence offered by the opposing party. See MCR 2.516. Consequently, the caselaw indicating that a defendant's testimony overcoming the presumption can also entitle the defendant to a directed verdict is relevant to whether that same testimony could justify granting a motion for summary disposition under MCR 2.116(C)(10).

This Court's caselaw above is therefore on point and provides the appropriate rules and framework for deciding the present case. If defendant's testimony is clear, positive, and uncontradicted, then it overcomes the presumption. If the same evidence negates an element of plaintiff's prima facie case, and plaintiff has not proffered any evidence calling into question defendant's credibility, defendant is entitled to summary disposition. Finally, under the caselaw above, defendant here is not precluded from either overcoming the presumption or obtaining a judgment as a matter of law simply because the supporting evidence consists of the defendant's testimony concerning events of which the defendant has peculiar knowledge.

C. CREDIBILITY AND SUMMARY DISPOSITION

The majority here and the Court of Appeals dissent do not grapple with the above caselaw. Instead, they rely on the general principle that credibility determinations are for the jury. To be sure, the jury is the appropriate body for deciding upon credibility, *if* credibility is at issue. See *Franks v Franks*, 330 Mich App 69, 90 (2019) (noting that a nonmoving party cannot defeat a motion for summary disposition based on "the mere possibility that a jury might disbelieve an essential witness" and that "the nonmoving party must identify evidence that puts the affiant's or the deponent's credibility at issue to avoid summary disposition"). And while a witness's interest in the case or testimony on matters known only by the witness can be a basis for questioning his or her credibility—thus creating a triable issue, see *id*.—the caselaw above demonstrates that a defendant's testimony can nevertheless entitle the defendant to judgment as a matter of law. See *Krisher*, 331 Mich at 708. Indeed, the high level of proof necessary to overcome the presumption is necessitated precisely because the defendant has unique knowledge of the events. *Id*. at 706.

It makes sense that summary disposition cannot be denied based on the mere possibility the jury would disbelieve a defendant. A bright-line

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[3] See Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 Nw U L Rev 774, 800-801 (1983) (arguing that the approach used by the United States Supreme Court in the directed-verdict context should apply to the summary-disposition context).

approach would almost always preclude summary disposition because an appellate court could find an issue of credibility in nearly every case that comes before it. See, e.g., 10A Wright, Miller, & Kane, Federal Practice & Procedure (4th ed), Civil, § 2726 (noting that a court is "usually . . . able to find an issue of credibility lurking in the cases brought before that court"). This state of affairs "would cripple the summary [disposition] procedure" and overload courts with cases in which a trial is not necessary. *Id*.; see also *Hoard v Roper Hosp, Inc*, 387 SC 539, 549 (2010) ("One may not, however, avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. This argument, if accepted, would render summary judgment obsolete . . . ."). If the record contains enough other evidence that would make it possible to find a contradiction in the witness's testimony if one existed, and yet none can be found, then the fact that the jury might disbelieve the witness should not bar summary disposition. *State of Mind*, 78 Nw U L Rev at 802. Thus, even when the relevant evidence is in the knowledge or control of the movant, "if all the evidence appears to have been disclosed, ostensibly the movant's credibility is less in doubt and the court, in deciding whether to grant the motion, simply may consider the opposing party's lack of knowledge as a factor, which, when weighed with all the other circumstances in the case, may preclude summary judgment." 10A Federal Practice & Procedure, Civil, § 2726.

In explaining these basic principles, the United States Supreme Court has noted that while the movant bears the burden, "the plaintiff[-nonmovant] is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." *Anderson v Liberty Lobby, Inc*, 477 US 242, 256 (1986). "This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery." *Id*. at 257.[4] Thus, as one court has observed, when the motion for summary disposition rests at least in part upon the movant's own affidavits or testimony, summary disposition is appropriate if the testimony is not "inherently incredible" or suspect, the averments are uncontradicted, and there appears to be no need for cross-examination. *Kidd v Early*,

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[4] In a case predating *Anderson*, the Supreme Court indicated that opinion testimony, even if uncontradicted, cannot be used as the basis for granting a motion for summary disposition because that evidence is subject to the jury's assessment of credibility. *Sartor v Arkansas Natural Gas Corp*, 321 US 620, 627-628 (1944). But it has been observed that much of the movant's evidence in that case "consisted of expert opinion which, unlike uncontradicted lay testimony, the jury is not required to believe." *State of Mind*, 78 Nw U L Rev at 804. Moreover, the movant's own documentary evidence contradicted its affidavits supporting its motion for summary judgment. *Id*.; see also *Sartor*, 321 US at 626 (noting that the testimony offered in support of the motion for summary judgment before a second trial had been rejected by the jury at the first trial and was inconsistent with the jury's findings in that trial).

289 NC 343, 370 (1976) ("We hold that summary judgment may be granted for a party . . . on the basis of his own affidavits (1) when there are only latent doubts [i.e., doubts that stem from the witness's interest as the movant] as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition [and] failed to point to specific areas of impeachment and contradiction . . . , and (3) when summary judgment is otherwise appropriate."); cf. *Hoard*, 387 SC at 549 (the fact that the jury might discredit the movant's testimony is not a reason to deny summary disposition).

This is nothing more than a straightforward application of the principle that the nonmovant cannot preclude summary disposition based on nothing more than "unsupported assumptions and speculation." *Lum v Koles*, 426 P3d 1103, 1109 (Alas, 2018) (quotation marks and citations omitted). As this Court has stated, " '[a] litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.' " *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7-8 (2016), quoting *Maiden v Rozwood*, 461 Mich 109, 121 (1999).

D. APPLICATION

Applying this law to the present case, I would hold that defendant has presented clear, positive, and uncontradicted evidence to overcome the presumption against him and, further, that because there is no genuine issue of material fact left for the jury on the issue of defendant's negligence, defendant is entitled to summary disposition. Given that discovery has occurred, we are not bound to conclude that the jury could disbelieve defendant simply because some of the evidence was within his control and he had an interest in his testimony. See *Anderson*, 477 US at 251; *Kidd*, 289 NC at 370. Defendant admitted that his truck crossed the center of the highway, in violation of MCL 257.634. In support of his sudden-emergency claim, defendant testified that while driving he passed out because of a sudden medical issue, waking up only after the accident when a witness began shaking him and yelling at him.

All the evidence gathered through discovery supports that testimony. The police report indicated that defendant said he passed out, causing his vehicle to cross over the centerline. The medical records from his hospital stay immediately following the accident match his deposition testimony. The records also show that he had similar episodes numerous times while at the hospital. The doctors diagnosed him has having suffered a sudden or acute syncopal episode. The subsequent investigation of the accident also bore out defendant's description of events. There were no skid marks that would demonstrate that defendant had been alert and attempting to apply the brakes. Moreover, GPS records indicated that the truck did not slow down until it went off the road and traveled 60 to 70 feet into a cornfield.

Given this record, it is apparent that defendant has produced clear, positive, and uncontradicted evidence sufficient to overcome the presumption. Once the presumption dissolves, the question becomes

whether there is a question of material fact for the jury to decide. The evidence defendant produced attacks the element of plaintiff's prima facie case requiring plaintiff to demonstrate that defendant failed to exercise reasonable care under the circumstances. In response, plaintiff has done nothing more than offer the mere possibility that the jury would discredit defendant's testimony. Plaintiff has given no reason for the jury to do so and has pointed to no additional evidence that would call into question the corroborating evidence.

It is true, as the Court of Appeals dissent noted, that even after dissolution of the presumption, an inference of negligence might arise from the fact that defendant crossed the centerline. See *Widmayer*, 422 Mich at 289 ("Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced."). But the inference still "must be weighed against the rebutting evidence." *Id*. And in the present case, a jury could not reasonably infer negligence from the mere crossing of the line—all of the evidence in the case demonstrates that he crossed the line because of a sudden emergency and not any negligence on his part.

The one factual assertion the majority seems to rely upon is the assertion that "only he could know what happened inside his truck that day . . . ."[5] But as can be seen above, this is plainly incorrect. Other

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[5] The majority has not cited any caselaw for the proposition that a party's exclusive knowledge of the facts precludes summary disposition. The Court of Appeals has indicated that such an approach *might* apply. See *Franks*, 330 Mich App at 90-91 ("To the extent that this Court's decisions seem to apply an absolute exception to the application of summary disposition premised on the mere possibility that a jury might disbelieve an essential witness, . . . the application of that rule is limited to those situations in which the moving party relies on subjective matters that are exclusively within the knowledge of its own witness and those in which the witness would have the motivation to testify to a version of events that are favorable to the moving party."). But *Franks* did not trace this rule back to any caselaw from this Court. See *id*., citing *White v Taylor Distrib Co, Inc*, 275 Mich App 615, 630 (2007), aff'd 482 Mich 136 (2008) (describing this rule but not citing authority for it, having earlier cited a similar but slightly distinct rule from *Wilmington Trust Co v Manufacturers Life Ins Co*, 624 F2d 707, 709 (CA 5, 1980) ("Here, . . . the disputed fact is (1) within the exclusive knowledge of the movant, whose supporting evidence is (2) subjective in character, and (3) upon whom the burden of persuasion rests."). And even if this represents a correct rule, it does not apply in cases like the present one, in which the testimony is uncontradicted and corroborated by evidence outside the defendant's control.

The majority also cites *Arber v Stahlin*, 382 Mich 300, 309 (1969), emphasizing that defendant's testimony here is "crucial" to his case.

evidence also demonstrates what happened, including the medical records, the GPS records, and the physical evidence of the accident (specifically the lack of skid marks and the truck's resting place far in the cornfield). All of that circumstantial evidence supports defendant. Nothing in it, or anything else plaintiff has produced, contradicts defendant's recitation of what occurred.[6]

Consequently, there is no genuine issue of material fact for the jury to decide.[7]

Arber required a determination of whether the defendants acted with actual malice, meaning they published information knowing it to be false or recklessly disregarding whether it was false. *Id*. at 308. In such a case, we said that "[t]he determination of actual malice depends on more than a mere denial[.]" *Id*. at 308-309. Instead, the issue of actual malice could only be "resolved from a study of the witness on the stand, his interest or lack of interest in the case, his role in the publication of the alleged libel, and the many other factors making up the issue of credibility." *Id*. at 309. The issue therefore involved the defendant's subjective intent. Even so, we did not suggest that summary disposition was inappropriate when the testimony was crucial *and* uncontradicted *and* corroborated by all the other evidence. Such circumstances are, however, directly covered by our caselaw on presumptions and directed verdicts, which shows that judgment as a matter of law can be appropriate based on the defendant's testimony.

[6] The majority goes on to say that only defendant "could know . . . whether he had any reason to suspect that an imminent syncopal episode might warrant certain conduct." There has been some mention that defendant had experienced cardiac issues in the past, years before the accident. But there is no evidence that he had ever experienced a syncopal episode. Moreover, he had been medically certified to drive multiple times before the accident and there had been no driving incidents. Thus, there can be no argument that defendant had any reason to suspect he would black out or that he acted unreasonably in deciding to drive that day.

[7] The majority attempts to distract the reader from the lack of evidence favoring plaintiff by saying that the record is "consistent" with many different occurrences, such as defendant's having fallen asleep. But this resort to "consistency" means very little in these circumstances. The evidence is also "consistent" with an out-of-body experience or alien abduction. But there is no evidence tending to prove such events. And similarly, there is no affirmative evidence of defendant's having fallen asleep apart from the medical emergency. Tellingly, plaintiff does not even make this argument or point to any evidence that would give rise to such an inference. Instead, this conjecture about what might have happened—even in the absence of any affirmative proof—has been

III. CONCLUSION

The trial court did not err by granting summary disposition to defendant in this case. Defendant has presented clear, positive, and uncontradicted evidence to overcome the presumption that he was negligent. Although some of that evidence comes in the form of his testimony, plaintiff has not provided evidence calling that testimony into doubt. The evidence that has been produced all supports defendant's testimony. Consequently, there is no question of fact left for the jury and defendant is entitled to summary disposition. In concluding otherwise, the majority today relies on the possibility that the jury will disbelieve defendant even though it has no reason to do so. This conclusion disregards a century of our caselaw holding that a defendant's testimony can overcome a presumption and justify judgment as a matter of law. I fear that today's majority order will make it impossible for defendants relying on their own testimony to obtain summary disposition even when all of the other evidence supports that testimony. As a result, the majority's order has the potential to clog our courts with unnecessary trials. For these reasons, I respectfully dissent.

ZAHRA, J., joins the statement of VIVIANO, J.

PEOPLE V SOULLIERE, No. 163710; Court of Appeals No. 354414. On order of the Court, the application for leave to appeal the July 29, 2021 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE the Court of Appeals and REINSTATE the Oakland Circuit Court's order granting defendant's motion to suppress and dismissing the charges. As noted by dissenting Judge SHAPIRO, the record does not support the conclusion that the officers knew that defendant was the driver of the car at the time of the traffic stop. Thus, Detective Bishop's prior knowledge of defendant has no bearing on whether the officers had a reasonable suspicion of criminal activity at the time the stop was made. The majority therefore clearly erred by considering that knowledge in concluding that reasonable suspicion existed. See *People v Champion*, 452 Mich 92, 98 (1996) ("A valid investigatory stop must be justified at its inception . . . ."). Similarly, the majority erred by relying on Deputy Panin's training and experience that hand-to-hand drug transactions were likely transpiring when the owner of the house was present because Panin did not discover that the owner was present at the time of the alleged drug transaction until *after* the traffic stop.

Further, the majority's reliance on the exchange of money in the driveway of a house known as a place where people sold drugs was flawed. As noted by Judge SHAPIRO, Deputy Panin conceded that he did not observe any other activity on that day indicative of drug activity.

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gratuitously supplied by the majority, which now seems to require rebuttal not only of the presumption of negligence, but of any other theoretically possible but unproven explanations for the events in question.

And despite the claim that it was known as a drug house, probable cause had never been established to search the home.

That leaves Deputy Panin's observation of the passenger in the car giving money to the driver of the car and the driver counting it. Without more, Panin's observation does not support a finding of reasonable suspicion of criminal activity. Deputy Panin did not observe the passenger take anything from the driver in return for the money. His observation therefore amounts to nothing "more than an inchoate or unparticularized suspicion or 'hunch,' " *Champion*, 452 Mich at 98, and the trial court did not err by granting defendant's motion to suppress and dismissing the charges.

ZAHRA, J., would grant leave to appeal.

VIVIANO, J. (*dissenting*). The majority here holds that where an experienced police officer sees what he believes to be a hand-to-hand transaction of methamphetamine at an address known to be used for illicit drug activity, there is no reasonable suspicion to conduct a brief investigatory stop of the vehicle in which the transaction occurred. Because I believe the majority misapplies the standard governing such a stop and misconstrues the factors supporting the police officers' reasonable suspicion at the time of the stop, I dissent.

Police officers may conduct an investigatory stop of a vehicle if the totality of the circumstances "yield[s] a particular suspicion that the individual being investigated has been, is, or is about to be engaged in criminal activity. . . . That suspicion must be reasonable and articulable . . . ." *People v Nelson*, 443 Mich 626, 632 (1993). Moreover, "[a] stop of a motor vehicle for investigatory purposes may be based upon fewer facts than those necessary to support a finding of reasonableness where both a stop and a search [are] conducted by the police." *People v Whalen*, 390 Mich 672, 682 (1973).[1]

The initial problem with the majority's approach is that it examines the evidence seriatim rather than as a whole. "Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case, on the basis of an analysis of the totality of the facts and circumstances." *People v Jenkins*, 472 Mich 26, 32 (2005). It is the "totality of the circumstances as understood and interpreted by law enforcement officers, not legal scholars, [which] must yield a particular suspicion that the individual being investigated has been, is, or is about to be engaged in criminal activity." *Nelson*, 442 Mich at 632. "[F]actors that in isolation appear innocent may, in combination, provide a police officer with reasonable suspicion to justify an investigative stop." *People v Oliver*, 464 Mich 184, 193 (2001). Thus, it is not enough to analyze each piece of evidence in isolation as the majority does here.

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[1] In this case, the issue is only whether the stop was justified; everything that occurred after the stop is justified as a search incident to arrest because defendant did not have a driver's license. MCL 257.311; MCL 257.901; *People v Chapman*, 425 Mich 245, 250-251 (1986); *United States v Robinson*, 414 US 218, 235 (1973).

Moreover, the majority's separate analyses of the evidence are flawed. First, the majority says that Deputy Bishop's prior knowledge concerning defendant was irrelevant because the officer did not know that it was defendant they were stopping. That makes sense, but this observation was not critical to the Court of Appeals' analysis and it is not determinative here in light of the other evidence discussed below. The majority's second argument is that Deputy Panin's experience was irrelevant because it was based, in part, on knowing that drug deals were likely occurring when the owner of the home was present.[2] It was error to rely on this, the majority contends, because Panin did not know the owner was part of the transaction until after the stop. That is true, as far as it goes, but it does not go very far here. Deputy Panin's testimony was not simply premised on the owner being present. He testified that he observed "some kind of transaction between the driver and the passenger," followed by the driver's counting money. Based on his training and experience, Deputy Panin believed that he witnessed a hand-to-hand drug transaction. This testimony was independent of whether the owner of the house had been involved in the transaction.

The majority's next argument is that knowledge of the house's use for drug sales was "flawed" because no drug sales were observed that day. But there is no support for the majority's apparent belief that the police must witness the crimes being committed in order to have reasonable suspicion:

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." [*Nelson*, 443 Mich at 638, quoting *Adams v Williams*, 407 US 143, 145-146 (1972).]

The question in this case is whether there was reasonable suspicion, not even for a search but merely for an investigatory stop. To the extent the majority holds that the officer must witness an actual crime, the majority has eliminated the concept of reasonable suspicion.[3] Contrary

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[2] Deputy Panin was trained in narcotics and surveillance and, at the time of the stop, had spent 15 years in the Oakland County Sheriff's Department and 4 years on the Oakland County Narcotics Enforcement Team. During his career, he investigated 500 drug cases and was the officer in charge in half of those cases. At both the preliminary examination and the evidentiary hearing, he was qualified as an expert in street-level drug dealing.

[3] In these circumstances, such a rule is tantamount to requiring there to be probable cause for an arrest. If the much higher standard of probable cause was met, there would be no need for reasonable suspicion

to the majority's unfounded assertion, courts routinely rely on the fact that the location is a known crime area when determining whether there is reasonable suspicion to justify a stop. See, e.g., *People v Champion*, 452 Mich 92, 99 (1996) (finding reasonable suspicion and citing among other factors that "the area was a known drug crime area") (quotation marks and citation omitted).

At this point in the analysis, the majority has eliminated almost all the evidence; the only piece left is Deputy Panin's observation of the money exchange. The majority's final argument is that this evidence alone is insufficient to support reasonable suspicion. But this is not the only evidence supporting reasonable suspicion. As noted, Deputy Panin's testimony that the exchange of money was indicative of a drug transaction was based on his lengthy experience. Cf. *Nelson*, 443 Mich at 636 ("[D]eference should be given to a law enforcement officer of twenty-three years who states that certain behavior by particular individuals exhibits a 'carbon copy' of what the officer would otherwise believe to be a drug purchase."). Moreover, he and Deputy Bishop had received information from various sources that the house in question was being used for drug sales.

This evidence, considered as a whole, gives rise to a reasonable suspicion sufficient to justify a stop. While it is certainly true that the exchange of money outside a house might not otherwise be suspicious to a lawyer or judge, Deputy Panin's testimony indicates that the manner of the exchange here would reasonably raise the suspicions of an experienced police officer. In light of the information the officers received that the house was being used for drug sales, the decision to stop defendant reflects "commonsense judgments and inferences about human behavior." *Jenkins*, 472 Mich at 32 (quotation marks and citations omitted); cf. *Nelson*, 443 Mich at 636-637 (agreeing with a decision holding that a defendant's presence in a high-crime area together with his evasive behavior was sufficient to justify reasonable suspicion supporting a stop).

By examining the evidence piece by piece, the majority loads the dice for its conclusion that no piece of evidence alone justified the stop. And in doing so, the majority appears to suggest that to have reasonable suspicion, the officers needed to actually observe the illicit drugs as they were being exchanged. Such a holding would do away with the concept of reasonable suspicion. The Court of Appeals appropriately determined that reasonable suspicion existed in this case. I therefore respectfully dissent and would deny leave.

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allowing a mere investigatory stop. For the same reasons, the majority's gratuitous observation that "probable cause had never been established to search the home" is utterly irrelevant.

Oral Argument Ordered on the Application for Leave to Appeal April 22, 2022:

WOODMAN v DEPARTMENT OF CORRECTIONS and JOSEPH v DEPARTMENT OF CORRECTIONS, Nos. 163382 and 163383; Court of Appeals Nos. 353164 and 353165.

The appellants shall file a supplemental brief within 42 days of the date of this order addressing whether: (1) they prevailed in full, and are thus statutorily entitled to attorney fees under MCL 15.240(6); (2) the Court of Claims abused its discretion when it reduced by 90% the attorneys' fees awarded to the appellants based solely on the pro bono nature of Honigman LLP's representation, notwithstanding the Court of Claims' factual findings that Honigman's hourly rates and the number of hours worked were reasonable; and (3) the Court of Claims clearly erred in denying the appellants punitive damages under MCL 15.240(7). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellants' brief. A reply, if any, must be filed by the appellants within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

WILSON v MEIJER GREAT LAKES LIMITED PARTNERSHIP, No. 163412; Court of Appeals No. 349078. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether he was disqualified from receiving unemployment benefits because he was considered to have voluntarily left employment without good cause attributable to the employer under MCL 421.29(1)(a). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

PINSKY v KROGER CO OF MICHIGAN, No. 163430; Court of Appeals No. 351025. The appellants shall file a supplemental brief within 42 days of the date of this order addressing whether: (1) there is a question of fact concerning whether the cable used to close off the checkout lane was open and obvious; (2) there is a question of fact concerning whether the condition was unreasonably dangerous; (3) under *Estate of Livings v Sage's Investment Group, LLC*, 507 Mich 328 (2021), *Lugo v Ameritech Corp, Inc*, 464 Mich 512 (2001), and 2 Restatement Torts, 2d, § 343A, the open and obvious doctrine does not preclude relief where a land possessor should anticipate the harm; and (4) liability should be precluded in Michigan even if the danger posed by a condition on land is open and obvious without special aspects as defined by *Lugo*, or whether

the open and obvious nature of a condition should be a consideration for the jury in assessing the comparative fault of the parties as set forth in the Restatement Torts, 3d. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellants' brief. A reply, if any, must be filed by the appellants within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

We further direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *Kandil-Elsayed v F & E Oil, Inc* (Docket No. 162907).

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

BECKER v ENTERPRISE LEASING COMPANY OF DETROIT LLC, No. 163702; Court of Appeals No. 351312. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the evidence, when viewed in the appellant's favor, created a genuine issue of material fact as to whether "an average person with ordinary intelligence would have discovered [the danger] upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461 (2012). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

VIVIANO, J., not participating due to a familial relationship with the presiding circuit court judge in this case.

Leave to Appeal Denied April 22, 2022:

PEOPLE v CLIFFORD MCKEE and PEOPLE v RODNEY MCKEE, No. 157581 and 157646; Court of Appeals No. 336598 and 333720. Following oral argument on the applications for leave to appeal the February 27, 2018 judgment of the Court of Appeals, the parties were directed to file supplemental briefs by order of November 23, 2021. The supplemental briefs having been received, the applications are again considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J. (*dissenting*). I respectfully dissent from the Court's order denying leave to appeal. These defendants objected to being tried jointly with their codefendant, but the trial court joined the trials on the condition that the codefendant's other acts and statements made to the police would be excluded. As the trial played out, the trial court violated

its own condition for joinder by allowing the other acts and statements into evidence, and it denied the defendants' motion for mistrial and severance. While I acknowledge that there are preservation issues in this case, I would reverse and remand for a new trial.

Defendants Clifford McKee and Rodney McKee[1] were tried jointly with Cortez Butler for the death of Frances Craig. Clifford and Rodney were both convicted of solicitation of first-degree murder, first-degree murder, conspiracy to commit first-degree murder, and first-degree home invasion. Butler was convicted of first-degree murder, conspiracy to commit first-degree murder, and first-degree home invasion. All three received sentences of life without parole, as well as concurrent lesser sentences.

Craig was found dead in the bedroom of the Jackson home she shared with her fiancé, Eric Wolfe. Wolfe was initially the police's primary suspect but Wolfe had a strong alibi. The focus of the investigation shifted when two plastic zip ties taken from Craig's body were swabbed for DNA, and a database search returned a hit for Butler. Butler's DNA was on file because he was on parole and had a criminal history that included a second-degree-murder conviction.

During the investigation into Craig's death, Butler was jailed in Detroit in connection with an unrelated murder. Police investigating Craig's death spoke to Butler on several occasions. On one occasion, an investigator told Butler that they did not intend to use his statements against him, and Butler admitted to killing Craig. Butler told the investigator that he had been hired to carry out a hit on Ryan Marshall,[2] and Butler believed that Marshall lived at Craig's home. Marshall and his mother had lived with Craig and Wolfe at one point, but were no longer living there at the time of Craig's death. Craig happened to be home when Butler arrived. Butler identified one of the men who hired him as "Dorito Johnson," a man he knew from prison. Butler identified the other as a very big man, approximately 6 feet 6 inches tall and 400 pounds. Clifford went by the name "Dorito Johnson" and had a phone registered under that name. Rodney is 6 feet 6 inches tall and heavyset.

The police obtained Butler's cellphone records, and those records showed several calls between Butler and Clifford. The records also showed that, in the days surrounding the killing, Butler was present in the area of Jackson where Clifford lived. The prosecution's theory was that Clifford acted as a middleman between Rodney and Butler in a plan to murder Marshall because Marshall was a witness against Rodney in a pending arson case. Aside from the evidence of the arson, the prosecution's case centered on phone records and the statements Butler made to the police.

Before trial, Butler moved to suppress the statements he made to the police. Prior to the interrogation, the police had assured Butler that their conversations were not being recorded and that they were not

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[1] For ease of reference, defendants will be referred to as "Clifford" and "Rodney" respectively.

[2] Marshall was a witness against Rodney in an arson case.

intending to use anything he said against him. Butler argued that the statements were obtained in violation of *Miranda v Arizona*, 384 US 436 (1966), which holds that criminal defendants have a right to be informed, among other things, that their statements may be used against them. The trial court denied Butler's motion. The prosecutor moved to admit Butler's statement against Clifford and Rodney, arguing that it was admissible under MRE 804(b)(3). Clifford moved to sever his trial and opposed the prosecution's motion to admit Butler's statement against him. The trial court ruled that Butler's statement was given during an ongoing emergency, so it was not testimonial for purposes of the Sixth Amendment's Confrontation Clause and was admissible. There was also pretrial discussion about Butler's connection to other murders in Detroit. The court held that evidence of other murders could not come in, and the defense motion to sever was denied. The joint trial commenced.

Before Butler testified, the specter of *Bruton v United States*, 391 US 123 (1968), loomed large. Under *Bruton*, the confession of a nontestifying codefendant cannot be admitted, because doing so would violate a defendant's right to confront witnesses against them. But the trial court ruled that Butler's confession was not testimonial for Confrontation Clause purposes and was therefore admissible.

Ultimately, Butler elected to testify, creating the possibility that Butler's involvement in homicides unrelated to Clifford and Rodney would be put before the jury. Clifford's trial counsel argued that if that happened, it would "probably prejudice[] us to a point we can't get a fair and impartial jury." The trial court agreed:

> *The Court*: I agree with you.
>
> [*Defense Counsel*]: And so if we're that far down the road I am assuming—
>
> *The Court*: That's why I barred it in the—or that was a factor in barring it—
>
> [*Defense Counsel*:] I understand.
>
> *The Court*: —in the first place.
>
> [*Defense Counsel*]: Exactly.
>
> *The Court*: Right.
>
> [*Defense Counsel*]: Exactly. But now we're left with the very thing the court was trying not to . . .

The court also stated:

> Oh, boy. This creates quite a dilemma in the sense that if your client gets up there and as part of cross-examination it's clear that there was—well, based on the testimony we've heard so far, that there were admissions about bodies in various counties, the problem is, allowing that statement to come in is too prejudicial, at least in the court's opinion, against the McKees. It has nothing to do with their involvement in this particular case. It's not an admission adopted by either one of them. And you don't know what your client's gonna testify to, right?

As anticipated by the trial court, Butler's testimony did trigger admission of evidence of other homicides, and Clifford's trial counsel subsequently moved for a mistrial on the basis that the evidence was inadmissible against him and that prejudice could not be cured with a limiting instruction. Counsel for Rodney joined the motion. The court denied the motion, concluding that an instruction would be sufficient to remedy the harm to Clifford and Rodney. The court instructed the jury as follows:

> Certain information has been presented to you showing that Cortez Butler may have been involved in certain crimes in the past. Because this evidence has nothing to do with either Rodney or Clifford McKee you are not to consider it against either of them.
>
> Now, the defendants[']statements can be used against the other defendants if their statement mentions the other defendants. If the statement does not mention the other defendants it should be—it should not be used against them.

As described earlier, both Clifford and Rodney were convicted along with Butler. The Court of Appeals affirmed the convictions of all three defendants. With regard to Butler's confession, the Court of Appeals disagreed with the trial court's conclusion that Butler's confession was involuntary, concluding that it was given based on false assurances that it would not be used against him. While the Court of Appeals concluded that the confession should not have been admitted, it held that the error was harmless in light of the other evidence of Butler's guilt. With regard to Clifford and Rodney, the Court of Appeals held that the limiting instruction cured any problem that might have arisen with regard to Butler's other acts. As to the admission of Butler's statement, the Court of Appeals noted that Clifford conceded he could not challenge the admission of Butler's statement, in part because he could not assert Butler's constitutional rights.

We ordered argument on the applications of Clifford and Rodney, and after oral argument ordered supplemental briefing to address:

> (1) whether the trial court reversibly erred in denying defendants' motion for mistrial after the admission of evidence of Cortez Butler's other acts; (2) whether the trial court reversibly erred in failing to grant defendants' motion for separate trials based on Butler's confession, see *Zafiro v United States*, 506 US 534, 539 (1993), and *People v Hana*, 447 Mich 325, 346-347 (1994); and (3) whether Butler's confession was obtained in violation of *Miranda v Arizona*, 384 US 436 (1966), and whether defendants may challenge the admission of Butler's confession against them as third parties, see *People v Wood*, 447 Mich 80, 89 (1994). [*People v McKee*, 508 Mich 982 (2021).]

The situation now is difficult to sort out. There is no need to evaluate whether the trial court was correct about Butler's statement being testimonial, as the Confrontation Clause was satisfied when Butler testified. Therefore, there is no *Bruton* problem. But I believe the trial

court, in attempting to cure its possible error regarding the testimonial nature of Butler's confession, committed another error regarding joinder.

In this procedural context, Clifford and Rodney were as entitled to the suppression of the statement as Butler was because of the *Miranda* violation. I recognize that generally a defendant may not suppress evidence by invoking someone else's right. *Wood*, 447 Mich at 89. In *Wood*, the defendant sought to invoke his daughter's statutory right to confidentiality in her statements to a social worker. The rationale there was clear—the daughter's statutory right to confidentiality was for her benefit, not the defendant's. But the same is not true here. Involuntary statements have long been inadmissible because they are simply unreliable. In *Hopt v Utah*, 110 US 574, 585 (1884), the United States Supreme Court said:

> But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.

The right that is at stake for Clifford and Rodney is not Butler's right, but their own right to not have an unreliable, involuntary statement considered by their fact-finders. This argument was not raised below and might have been affirmatively waived.[3] Still, this casts a dark shadow on the legitimacy of the verdict.

The trial court's handling of Butler's other criminal involvement is also troubling. Both before and during trial, the trial court described on the record its belief that this evidence was unfairly prejudicial to Clifford and Rodney, and that a fair trial would be impossible if the jury were to consider it. However, the court allowed the evidence to be presented to the jury and then, after the fact, concluded that a limiting instruction was somehow sufficient to remedy the harm. I tend to agree with Clifford that the trial court erred by treating the presumption that jurors follow their instructions as absolute instead of recognizing this as a situation in which prejudice is so great that a limiting instruction is patently insufficient. We have recently acknowledged that sometimes "evidence is too compelling for a jury to ignore even with a limiting instruction." *People v Bruner*, 501 Mich 220, 228 (2018).

The joinder of these trials resulted in a cascade of overlapping errors. It is true that Clifford and Rodney may not have made the precisely

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[3] In either event, given the Court's decision to deny leave to appeal, Clifford and Rodney may be able to challenge counsel's effectiveness in a motion for relief from judgment.

correct objections at the precisely correct times. But that is a high standard to hold them to, given the trial court's role in creating a significant portion of these problems. For these reasons, I believe a new trial is warranted, and I respectfully dissent from the order denying leave to appeal.

BERNSTEIN, J., joins the statement of CAVANAGH, J.

In re GLASER, No. 163921; Court of Appeals No. 357331.

In re KARNES/GLASER, No. 163923; Court of Appeals No. 357345.

Summary Disposition April 27, 2022:

PEOPLE v ERICKSON, No. 163932; reported below: 339 Mich App 309. On order of the Court, the application for leave to appeal the November 18, 2021 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration of the defendant's argument that MCL 791.229 prohibits the prosecutor from using his statements in the presentence investigation report as impeachment evidence at trial. Although this argument was raised by the defendant and the Court of Appeals opinion contains a section discussing it, the opinion does not definitively resolve it. With respect to the defendant's remaining argument, leave to appeal is DENIED, because we are not persuaded that the question presented should be reviewed by this Court. We do not retain jurisdiction.

Oral Argument Ordered on the Application for Leave to Appeal April 27, 2022:

SELLIMAN v COLTON, No. 163226; Court of Appeals No. 352781. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the one most relevant specialty test as articulated in *Woodard v Custer*, 476 Mich 545 (2006), and as applied in this case, is consistent with the requirements of MCL 600.2169(1); (2) whether the Court of Appeals properly applied the requirements of MCL 600.2169(1) in this case; and (3) whether the Court of Appeals properly applied the abuse of discretion standard of review. In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

We further direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *Stokes v Swofford* (Docket No. 162302).

Leave to Appeal Denied April 27, 2022:

ML CHARTIER EXCAVATING, INC v DEPARTMENT OF TREASURY, No. 163360; Court of Appeals No. 353163.

PEOPLE v DAVID SKINNER, No. 163462; Court of Appeals No. 351771.

PEOPLE v GATES, No. 163723; Court of Appeals No. 357730.

PEOPLE v BARBARA NELSON, No. 163863; Court of Appeals No. 358354.

PEOPLE v MARLON DAVIS, No. 163904; Court of Appeals No. 352381.

In re REINSTATEMENT PETITION OF GREGORY BARTKO, No. 163907.

PEOPLE v ONTIVEROZ, No. 163909; Court of Appeals No. 351277.

PEOPLE v ALLEN, No. 163954; Court of Appeals No. 357451.

Leave to Appeal Denied April 29, 2022:

In re GUARDIANSHIP OF VERSALLE, Nos. 162434 and 162435; reported below: 334 Mich App 173.

WELCH, J. (*concurring*). I concur with the majority's decision to deny leave because, as the parties agree, the Court of Appeals correctly interpreted MCL 700.5204(2)(b). The statute allows a court to create a guardianship when "[t]he parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed." The parties agree that those requirements were satisfied at the time petitioner filed her guardianship petitions. The parties also agree, and the legislative history is clear, that the Legislature intended courts to analyze the requirements on the basis of the facts existing at the time of filing. The only dispute remaining between the parties is whether MCL 700.5204(2)(b) complies with the constitutional rule that "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel v Granville*, 530 US 57, 68-69; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (opinion of O'Connor, J.). I agree with the majority and the dissent that respondent's facial challenge to the constitutionality of MCL 700.5204(2)(b) fails. I write separately to express my concerns that, even though it is *facially* valid, MCL 700.5204(2)(b) presents a substantial risk of unconstitutional application.

I. FACTS AND PROCEDURAL HISTORY

In May 2019, Barbara Versalle petitioned for guardianship of her two granddaughters under MCL 700.5204(2)(b). The petitions alleged that, from 2009 to 2014, respondent father Adam Versalle was in prison

for domestic-violence and drug convictions. In 2015, the children's mother died. The children often stayed with petitioner while respondent struggled to establish a stable living situation. In September 2017, respondent was evicted from his apartment, and the children came to live with petitioner full time. Respondent did not give petitioner any written legal authority to care for the children. He told her to "sign his name" on school enrollment paperwork. Respondent moved to Texas in December 2017. He refused a subsequent request for written legal authority by stating, "You are not going to take my daughters away from me." According to petitioner, respondent did not provide consistent financial support for the children. At times, he provided up to $150 per week, but months went by when he provided nothing.

Petitioner prepared the petitions in January 2019, asserting that she was having trouble taking the children to the doctor. She did not file until May 2019. When asked if the children were denied necessary medical care between January and May, petitioner admitted that they did not need any medical care but stated that they were due for checkups. According to petitioner, respondent had not, in any way, revoked permission for the girls to live with her until June 2019—a month after the petition was filed. In June 2019, he took the girls to Texas, telling petitioner they would be back in two or three weeks. The children have remained with respondent in Texas ever since, despite the subsequent court orders in this case requiring their return.

In August 2019, the trial court held a hearing on the petitions. Petitioner testified as outlined earlier. Respondent's counsel reported that respondent had "chosen not to be present" because counsel had "no written documentation requiring him to be here." He therefore did not place any evidence in his favor on the record.

The trial court granted the guardianships, finding that petitioner had established statutory grounds under MCL 700.5204(2)(b). The court found that the children began living with petitioner with respondent's permission in September 2017 and that he had not given petitioner legal authority to care for the children. However, the court found that it was respondent's "clear intention" to revoke permission for the children to live with petitioner when he took them to Texas in June 2019. Nonetheless, the court concluded that the requirements of MCL 700.5204(2)(b) were satisfied at the time the petition was filed. As to respondent's argument that MCL 700.5204(2)(b) does not comply with *Troxel*, the trial court agreed "that there is a presumption that [respondent] has a right that is superior to all others." But, the court noted, the *Troxel* presumption has a best-interest component. As a result of respondent's failure to present evidence in his favor, the court had "no idea if this serves the best interest of these children . . . to be in his care and custody at this time." The court therefore concluded that the *Troxel* presumption had been rebutted.

The Court of Appeals affirmed in a published opinion, holding that MCL 700.5204(2)(b) adequately incorporated the "traditional presumption that a fit parent will act in the best interest of his or her child." *In re Versalle Guardianship*, 334 Mich App 173, 178 (2020) (quotation marks and citation omitted). The Court of Appeals held that that first

prong of MCL 700.5204(2)(b)—"the parent or parents permit the minor to reside with another person"—incorporates the *legal* definition of residence: "a place of abode accompanied with the intention to remain." *Id*. at 181 (quotation marks and citation omitted). MCL 700.5204(2)(b) further requires that "[t]here must also be no grant of legal authority for a child's care and maintenance . . . ." *Id*., citing MCL 700.5215(c) (outlining the legal duties of a guardian). Therefore, the Court of Appeals concluded, "[t]he requirements of MCL 700.5204(2)(b) essentially demonstrate a situation in which a parent has stopped providing adequate care for a child and a guardian needs to step in to provide for the child." *Versalle*, 334 Mich App at 183. The court further concluded that the requirements of MCL 700.5204(2)(b) were satisfied in this case, noting that "[b]ecause respondent decided not to attend the hearing to present his own evidence, petitioner's testimony is uncontradicted." *Id*. at 186.

This Court granted oral arguments on respondent's application, directing the parties to address (1) whether MCL 700.5204(2)(b) is constitutional under *Troxel*, and (2) whether the trial court erred by granting a guardianship in this case. *In re Versalle Guardianship*, 507 Mich 995 (2021). Following those oral arguments, this Court ordered supplemental briefing on "whether the requirements of MCL 700.5204(2)(b) must be met when the guardianship petition is filed or at the time the guardianship determination is made . . . ." *In re Versalle Guardianship*, 508 Mich 1005, 1005 (2021).

II. ANALYSIS

I respectfully disagree with the dissent that the Legislature intended the requirements of MCL 700.5204(2)(b) to be met both at the time a guardianship petition is filed and at the time of the hearing on the petition. Again, the statute provides that a court may create a guardianship if:

> The parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed. [MCL 700.5204(2)(b).]

This language permits two plausible interpretations. Either (1) the court may grant a guardianship if all three requirements are met "when the petition is filed," or (2) that phrase only applies to the third requirement while the first two requirements must also be satisfied at the time the trial court makes its ruling. As the parties agree, the legislative history clearly resolves the ambiguity in favor of the first interpretation. The House Fiscal Agency's analysis of SB 1210 begins by identifying an "apparent problem" with MCL 700.5204(b) brought to the Legislature's attention by the Lieutenant Governor's Children's Commission:

> Many courts have interpreted a provision of the law allowing for appointment of a guardian when a child has been left with a

> third party without that person having been given legal authority over the child as only applying while the child is in the custody of the third party. In some cases, this results in the court refusing to consider appointment of a guardian if the parent or parents retrieved the child before the hearing on the petition could be held, even if the same situation has occurred previously. *It has been suggested that the law should be changed to make it clear that a court may continue a proceeding to appoint a guardian even after the parents have retrieved the child.* [House Legislative Analysis, SB 1210 (December 9, 1998), p 1 (emphasis added).]

The analysis explained that an amendment was needed to fix the problem:

> [T]he [amendment] would provide that a court could appoint a guardian where the parent or parents had permitted the minor to reside with another party without providing that person with legal authority for the care and maintenance of the minor, even if the parents had taken the child back after the petition had been filed. [*Id*.]

By providing that a court may only grant a guardianship if "the minor is not residing with his or her parents when the petition is filed," the Legislature provided that the parent may, by retaking physical custody, revoke permission for the minor to reside with a third party. However, whether a parent revokes permission by retaking physical custody after a petition is filed is irrelevant to the trial court's ability to grant a guardianship. I do not think the Legislature chose language that achieved its stated goal to "make it clear," but the legislative history resolves any ambiguity. The Legislature unequivocally intended to prevent what respondent did here—attempting to defeat a guardianship petition by retaking physical custody of the children after the petition had been filed.

The vagaries of the statutory language pile up from there. What does it mean to "permit the minor to reside with another person"? And how does that vague requirement interact with the vague constitutional presumption that "there will *normally* be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children"? *Troxel*, 530 US at 68-69 (opinion of O'Connor, J.) (emphasis added). The Court of Appeals correctly recognized that MCL 700.5204(b) would be unconstitutional if a third party could legally displace a parent simply because the parent allows a child to stay with the third party on a temporary basis without providing legal authority. *Versalle*, 334 Mich App at 178-181. Therefore, "permit the minor to reside with another person" must incorporate the legal sense of "residence"—a place of abode with the third party, coupled with the parent's intention that the child remain there. *Id*. at 181. I agree with Court of Appeals that this is the interpretation of the "permission to reside" requirement intended by the Legislature and required by the Constitution.

I also agree that respondent's facial challenge to the constitutionality of MCL 700.5204(b) fails. Throughout this litigation, respondent has led with the argument that MCL 700.5204(b) does not protect the presumption that a parent is fit. In other words, he has argued that the statute is unconstitutional because it allows a guardianship to be granted without a fitness determination. However, in *Hunter v Hunter*, 484 Mich 247, 267 (2009), this Court expressly rejected the argument that a custody statute must provide for a parental-fitness determination in order to comply with *Troxel*. Rather, *Troxel* requires a presumption "that fit parents act in the best interests of their children." *Troxel*, 530 US at 68 (opinion of O'Connor, J.). Although a showing that a parent is unfit will always be *sufficient* to rebut that presumption, it is not *necessary*. See *Hunter*, 484 Mich at 271 ("[W]e hold that due process does not require a fitness determination where the statute does not mandate it . . . ."). A heightened showing that a parental decision is not in a child's best interests is also sufficient to rebut the presumption. See *id*. at 266 (holding that the requirement in the Child Custody Act (CCA), MCL 722.21 *et seq*., that there be a showing *by clear and convincing evidence* that custody with a parent is not in the child's best interests "satisfies constitutional scrutiny under *Troxel*").

To restate, a statute can satisfy *Troxel* in two ways, either one of which is sufficient: (1) by requiring a showing that the parent is unfit, or (2) by requiring a heightened showing that a parental act or decision is not in the child's best interests. I agree with the Court of Appeals that MCL 700.5204(2)(b) incorporates Method 1 closely enough to survive respondent's facial challenge. In many cases, the act of leaving a child with a third party long-term without some indication of when the parent will retake custody, and without providing the third party with legal authority to respond to emergencies, will be functionally identical to an enumerated ground of unfitness under the juvenile code—leaving a child "without proper custody or guardianship." MCL 712A.2(b)(1)(C) (defining "without proper custody or guardianship" in the negative by stating that it "does not mean a parent has placed the juvenile with another person who is *legally* responsible for the care and maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance").

Respondent attempts to split apart the "permit to reside" and "legal authority" prongs of MCL 700.5204(2)(b) and argues that neither, on its own, shows parental unfitness. Respondent argues that a responsible parent facing a difficult situation might have the child live with another person long-term without an express plan to retake physical custody. I agree. Respondent also argues that a parent should not be penalized for failing to sign over their authority to make child-rearing decisions to another person. Again, I agree. But when the two prongs are *combined* as they are in MCL 700.5204, they will, *in many cases*, describe a parent who has "essentially stopped providing adequate care for the children, i.e., became unfit." *Versalle*, 334 Mich App at 182. Therefore, I conclude that respondent has failed to "establish that no set of circumstances exists under which the act would be valid." *League of Women Voters of Mich v Secretary of State*, 508 Mich 520, 534 (2022) (quotation marks, citations, and brackets omitted).

However, there is still enough of a gap between the statute's requirements and parental fitness that I consider MCL 700.5204 constitutionally hazardous, even if it is *facially* valid. We can easily imagine a single parent who strives to financially support a child, but makes a tough decision—in the child's best interests—that a third party, perhaps a retired grandparent, is better able to meet the child's need for day-to-day attention. Unless the parent is a lawyer or can afford to consult one, they are unlikely to recognize that a formal grant of legal authority is necessary to protect their parental rights. Further, such a parent might fear, as respondent did in this case, that providing legal authority will somehow waive the right to change their mind about where the child lives. The parties might informally agree that the parent will always be available to make legal decisions. If such a parent financially supports the child and abides by the verbal agreement to always be available for legal decisions, emergency or otherwise, can a court really say that the parent is legally unfit?

I recognize that those are not the facts of this case. But I also recognize that "*Troxel* established a floor or *minimum* protection against state intrusion into the parenting decisions of fit parents." *Hunter*, 484 Mich at 262 (emphasis added). In *Hunter*, this Court held that *Troxel* was satisfied by the *express* parental presumption contained in the CCA. See MCL 722.25(1) ("If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence."). This Court explained:

> The clear and convincing evidence standard is the most demanding standard applied in civil cases. This showing must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.
>
> We agree with the Court of Appeals in *Heltzel* [*v Heltzel*, 248 Mich App 1 (2002)] that, given the unique constitutional considerations in custody disputes involving natural parents, it is not sufficient that the third person may have established by clear and convincing evidence that a marginal, though distinct, benefit would be gained if the children were maintained with him. A third party seeking custody must meet a higher threshold. He or she must establish by clear and convincing evidence that it is not in the child's best interests under the factors specified in MCL 722.23 for the parent to have custody. [*Hunter*, 484 Mich at 265 (cleaned up).]

Furthermore, this Court held, "[i]n order to protect a fit natural parent's fundamental constitutional rights, the parental presumption in MCL

722.25(1) must control over the presumption in favor of an established custodial environment in MCL 722.27(1)(c)." *Id*. at 263.

MCL 700.5204(2)(b) does not include an express parental presumption like that in the CCA; it is unclear why it does not, given the similar concerns raised with child custody and guardianships. In this case, it is doubtful that petitioner would have been able to rebut such a presumption by clear and convincing evidence. Even though respondent did not present evidence in his favor, petitioner did not present *clear* evidence that her household was a better environment for the children.

I do not suggest that only a presumption like that in the CCA can satisfy *Troxel*. Again, *Troxel* is vague and provides a "floor or minimum protection . . . ." *Hunter*, 484 Mich at 262. It is unclear whether the requirements of MCL 700.5204(2)(b), as imperfect as their overlap with parental fitness is, provide more or less protection than the parental presumption in the CCA. See *Hunter*, 484 Mich at 267 (holding that "*Troxel* does not require a threshold determination of parental fitness in custody cases if no statutory requirement exists") (formatting altered). Given the facts of this case and the lack of congruence between the requirements of MCL 700.5204(2)(b) and parental fitness, I conclude that there will be cases in which the CCA provides more protection than MCL 700.5204(2)(b).

This is troubling because a guardianship under MCL 700.5204(2)(b) can function as the practical equivalent of a full transfer of custody to a third party under the CCA. Once a guardianship is established, a parent must petition to terminate the guardianship under MCL 700.5208. Doing so subjects the parent to a best-interest determination (with no presumption in favor of the parent), under which a guardian's superior resources and concerns for maintaining the children's custodial environment can have a dramatic influence. This can potentially occur even in cases where there is a poor fit between the requirements of MCL 700.5204(2)(b) and the parent's fitness. As has been noted, a parent who is inferior to the guardian only in financial resources could find themselves facing this quagmire without the assistance of counsel. See *In re Orta Guardianship*, 508 Mich 913, 914 (2021) (CAVANAGH, J., concurring). Furthermore, such a parent may, at the court's discretion, be ordered to pay support to a guardian with superior resources or be denied the parenting time necessary to maintain a bond with the children—a bond that will factor into a best-interest analysis should the parent petition for termination of the guardianship. I therefore share the dissent's concern that MCL 700.5204(2)(b) may subject a parent to a de facto termination of parental rights without the protections and services that termination proceedings entail.

In this case, respondent was able to obtain counsel. As the children have remained in his care since June 2017, he will likely be successful in petitioning to terminate the guardianship. Other parents will not be so fortunate. And years of divisive and uncertain litigation of constitutional magnitude likely could have been avoided if MCL 700.5204(2)(b) contained an express parental presumption like that in the CCA. I urge

our Legislature to consider that simple option for avoiding future cases like this one—cases that *will not* be in the best interests of the children involved.

CAVANAGH, J. (*dissenting*). I respectfully dissent from this Court's denial order. While I agree that respondent's constitutional challenge to MCL 700.5204(2)(b) falls short, I would hold that the probate court's decision to grant the guardianships was an abuse of discretion because the conditions of the statute were not met at the time of the guardianship hearing.

The minor guardianships at issue in this case are governed by MCL 700.5204(2)(b) of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. This section provides:

> (2) The court may appoint a guardian for an unmarried minor if any of the following circumstances exist:
>
> * * *
>
> (b) The parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed.

We review a probate court's findings of fact for clear error. *In re Redd Guardianship*, 321 Mich App 398, 403 (2017). A probate court's dispositional ruling is reviewed for an abuse of discretion. *Id*.

The facts of this case are not in dispute. Respondent-father, Adam Versalle, was the sole custodian of the minor children after their mother passed away in 2015. In September 2017, the children went to live full-time with petitioner, Barbara Versalle, their paternal grandmother, because Adam was unable to provide a stable home. While Adam allowed the children to live with Barbara, he refused to give her power of attorney over the children because he feared that Barbara would "take [his] daughters away." At some point, Adam moved to Texas, and the children would travel there to visit him on school breaks.

On May 9, 2019, while the children, then ages 14 and 12, were living with her in Michigan, Barbara filed petitions seeking to be appointed their legal guardian. Shortly thereafter, and following the conclusion of the school year, Adam retrieved the children from Michigan and brought them to Texas. While Barbara testified that she believed the children would return after a two- to three-week visit, Adam did not bring the children back to Michigan. The Department of Health and Human Services (DHHS) conducted a study of Barbara's home and recommended that the probate court deny the guardianship, noting that "the children are currently residing with their biological father and are not without proper care and custody." Following a hearing on August 12, 2019, the probate court entered orders of temporary guardianship over the children. Adam filed an ex parte motion for relief from the temporary

guardianship orders, arguing that the court erred by granting them at a hearing without testimony in violation of MCR 5.403. He also filed a motion to dismiss.

Instead of ruling on the motions, the probate court held a full hearing on the guardianship petitions on August 28, 2019. Barbara appeared with counsel, while Adam elected to defend the case through counsel and did not appear in person. At the conclusion of the hearing, the probate court found that, at the time the petitions were filed, the children were residing with Barbara with Adam's permission and that Adam had not provided Barbara with legal authority over the children. Therefore, the probate court concluded that the petitions were legally sufficient at the time they were filed. The court, however, went on to recognize that Adam's "clear intention" when he returned to Michigan in June and took the children back to Texas was to regain custody. The probate court agreed that Adam was constitutionally entitled to a presumption that his right to the children was superior to the claims of others, but concluded that the presumption of parental fitness was rebuttable and that it had been rebutted because Adam did not appear at the hearing. The probate court acknowledged that it had "no idea" if it served the children's best interests to remain in Adam's care and custody, but that, based on the evidence presented, the children's welfare would be served by the appointment of Barbara as guardian. Accordingly, the court issued orders granting Barbara full guardianship over the children under MCL 700.5204(2)(b). A few days later, Adam moved to dismiss and filed a motion for relief from the guardianship orders. Those motions were denied, and on September 13, 2019, the court ordered that Adam return his children to Michigan. Adam has not complied with this order or any subsequent orders requiring the children's return, and it appears that the children remain with him in Texas.

On December 4, 2019, Adam filed a delayed application for leave to appeal in the Court of Appeals. He argued that his constitutional right as a presumptively fit parent were violated when the guardianship orders were entered pursuant to MCL 700.5204(2)(b) and that the probate court should have denied the petitions on the basis of the evidence presented at the hearing. In a published opinion, the Court of Appeals affirmed the probate court's guardianship orders. *In re Versalle Guardianship*, 334 Mich App 173 (2020). The Court of Appeals concluded that MCL 700.5204(2)(b) implicitly includes a presumption of parental fitness that, "in essence, protects a parent's decision regarding his or her child until that decision reflects that the parent is no longer adequately caring for the child." *Id*. at 180. Put another way, "in coming under the purview of MCL 700.5204(2)(b), respondent had essentially stopped providing adequate care for the children, i.e., became unfit." *Id*. at 182. The panel also concluded that there was sufficient evidence to grant a guardianship because, at the time the petitions were filed, Adam had given Barbara permission for the children to reside with her and he had not given her legal authority over the children. *Id*. at 186.

Adam appealed in this Court and we ordered oral argument on the application, *In re Versalle Guardianship*, 507 Mich 995 (2021), directing the parties to address whether MCL 700.5204(2)(b) is unconstitutional

because it fails to include a presumption that a fit parent's decision is in the best interest of the child, see *Troxel v Granville*, 530 US 57 (2000). We also asked whether the probate court erred by granting petitioner guardianship in this case. Following oral argument, we directed the parties to submit supplemental briefing on whether the requirements of MCL 700.5204(2)(b) must be met at the time the petition is filed or at the time the guardianship determination is made and whether the statutory requirements were met in this case. *In re Versalle Guardianship*, 508 Mich 1005 (2021). In addition to responses from the parties, we have received input from amici, including the State Bar of Michigan Family Law Section, the Legal Services Association of Michigan, and the State Bar of Michigan Children's Law Section. After all this, the Court denies leave to appeal. I respectfully dissent from this decision.

First, I agree with the Court of Appeals that Adam's constitutional challenge to MCL 700.5204(2)(b) must fail. To lodge a successful facial challenge to a statute, a litigant "must establish that no set of circumstances exists under which the act would be valid." *League of Women Voters of Mich v Secretary of State*, 508 Mich 520, 534 (2022) (quotation marks, citations, and brackets omitted). As this Court has explained, parents have a fundamental right and liberty interest in the care, custody, and control of their children. *In re Sanders*, 495 Mich 394, 409 (2014). There is a presumption that fit parents act in the best interests of their children. *Troxel*, 530 US at 68. "Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69. The Court of Appeals in this case concluded that MCL 700.5204(2)(b) adequately encompassed the required constitutional presumption because, by falling under the purview of the statute—that is, by allowing the child to reside with a third party without providing that third party with legal authority for the child—a parent may be considered unfit. I agree with the Court of Appeals that, at least in some instances, the statutory requirements of MCL 700.5204(2)(b) are a sufficient stand-in measure for parental fitness; therefore, Adam's facial challenge must fail.[1]

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[1] If a parent allows their child to live with a third party indefinitely and has no further involvement, the statutory requirements easily rebut the parent's presumptive fitness. However, I can envision scenarios where coming under the purview of MCL 700.5204(2)(b) would *not* be sufficient to rebut the presumption of parental fitness. For example, it is not hard to imagine a single parent who works in a healthcare setting during a global pandemic arranging for a neighbor or family member to care for their children indefinitely in order to lessen the children's exposure to a virus. In that hypothetical scenario, the parent permits the children to reside with a third party and, if they also fail to provide

While I believe that the statute is facially constitutional, I believe that the probate court abused its discretion when it granted the guardianship orders in this case because the statutory conditions were not satisfied at the time of the guardianship hearing. Again, MCL 700.5204(2)(b) grants the probate court the discretion to appoint a guardian if certain enumerated circumstances "exist," including that "[t]he parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed." There are several contextual clues that lead me to conclude that, contrary to the position taken by both petitioner and respondent, the statutory conditions must be met *both* when the petition is filed *and* at the time of the guardianship hearing.

"When interpreting a statute, courts must ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute, which requires courts to consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *In re AJR*, 496 Mich 346, 353 (2014) (quotation marks, citations, and brackets omitted). First, MCL 700.5213(2) provides that the trial court shall appoint a guardian only "[u]pon hearing" if the court finds that "the requirements of section 5204 . . . *are* satisfied." (Emphasis added.) This indicates that the conditions of MCL 700.5204(2)(b) must be present at the time the hearing is conducted. Second, MCL 700.5204(2) speaks to whether any of the listed circumstances "exist." This language indicates that the findings must be based on conditions that exist in the present tense at the time of the hearing. Third, MCL 700.5204(2)(b), while not artfully drafted, contains two separate clauses. The first requires that "the parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance." This clause does not provide a time-frame and, therefore, it makes sense to refer back to the fact that these conditions must "exist" at the time of the hearing. The second clause is set off from the first with the word "and" as well as with a comma and requires that "the minor is not residing with his or her parent or parents *when the petition is filed*." (Emphasis added.) This construction supports the view that "when the petition is filed" refers only to the antecedent "the minor is not residing with his or

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legal authority to the caregiver, the statutory requirements of MCL 700.5204(2)(b) are satisfied. Under these facts, if the statute was used to secure a guardianship against the parent's wishes, I think that the parent would have a strong likelihood of success in an as-applied challenge to the constitutionality of the statute. That being said, the intricacies of such a particular legal theory might be difficult for the parent to make in opposition to the guardianship proceedings without the assistance of counsel. See *In re Orta Guardianship*, 508 Mich 913, 914; 962 NW2d 844 (2021) (CAVANAGH, J., concurring).

her parent" and does not modify the timing for the other conditions that must exist at the time of the hearing.[2]

In this case, there is no debate that the statutory conditions existed when Barbara filed the guardianship petitions. The children were not residing with Adam at the time the petitions were filed, Adam was permitting his children to reside with Barbara, and Adam had refused to provide Barbara with legal authority for their care and maintenance. It is also undisputed, however, that by the time the probate court held the required hearing, the statutory conditions had materially changed. Specifically, Adam had revoked his permission for his children to reside with Barbara because he had taken them to live with him in Texas. As the court noted, it was clear that by doing this, Adam intended to reclaim custody of his children. Because the statutory conditions did not exist at the time of the hearing, the probate court abused its discretion by granting the petitions. See *Redd*, 321 Mich App at 403.

This case demonstrates why I believe it is important to read the statute's plain language to require that the conditions exist at the time of the hearing in order to save it from unconstitutionality. Adam is presumed to be a fit parent. See *Sanders*, 495 Mich at 412 ("[A]ll parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody."). Assuming that the existence of the statutory conditions was an adequate basis to rebut Adam's parental fitness at the time the petitions were filed, those conditions no longer existed once Adam took back custody of his children, and his presumption of fitness remained intact. As a presumably fit parent, Adam rightfully reestablished his constitutional right to direct the care, custody, and control of his children by retrieving them and bringing them to live with him in Texas. See *Sanders*, 495 Mich at 411. It is argued that this reading of the statute would allow a parent to defeat a petition for guardianship by taking back physical custody of the child postpetition or appearing at a guardianship hearing and revoking permission, even though the statutory conditions were met at the time the petition was filed. But a parent who has not been adjudged to be unfit retains the right to do exactly that. The presumption of parental fitness suggests that it should not be easy to alter a parent's constitutional right to care for their child. If a parent is alleged to be unfit but the statutory conditions for a guardianship are not established, the appropriate way to investigate if removal of the child from the parent's care is warranted is to institute a protective proceeding. This process comes with a myriad of procedural protections for both the parent and the child (appointment of counsel, appointment of a lawyer-guardian ad

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[2] While the minor must not be residing with their parent "when the petition is filed," despite the statutory language not explicitly stating as much, it seems that this condition must also continue to "exist" at the time of the hearing. If the minor is residing with their parent at the time of the hearing, it is unclear why a guardianship under MCL 700.5204(2)(b) is necessary. If a guardianship is needed in that instance, a parent can consent to a limited guardianship under MCL 700.5205.

litem, statutorily mandated reunification services, etc.) that are not available when a third party seeks to retain custody over a child in a guardianship proceeding. To impose a guardianship against a parent's wishes where the statutory requirements are not met—*both* when the petition is filed *and* when the hearing occurs—is an unacceptable shortcut around multiple laws that protect the constitutional rights of parents and children.[3]

Finally, even if the statute were properly construed as requiring that the conditions be met only at the time that the petition is filed, I would still conclude that the probate court abused its discretion in this case. MCL 700.5204(2)(b) provides that, if the relevant circumstances exist, the court "*may* appoint a guardian." This is permissive, not mandatory, language. In light of the change in circumstances between the petitions' filing date and the hearing, including the fact that the children were residing with their father in Texas and no longer in need of a guardian, I believe it was an abuse of discretion to grant the petitions in this case. For all these reasons, I respectfully dissent from this Court's denial

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[3] I acknowledge the statutory history presented by the parties which demonstrates that, soon after MCL 700.5204(2)(b) was enacted and before it became effective, the statute was amended to include the final clause. See *People v Pinkney*, 501 Mich 259, 276 n 41 (noting that statutory history is a proper contextual consideration). This sudden change to the statute, in conjunction with legislative history materials submitted by the parties, suggest that through this amendment the Legislature purposefully aimed to indicate that the relevant timing for all the requirements is "when the petition is filed." The Legislature, however, passed MCL 700.5204(2)(b) and its subsequent amendment without the benefit of the Supreme Court's decision in *Troxel*, 530 US at 68, which established the clear principles that parents are presumed to be fit and that fit parents are presumed to act in their children's best interests. This Court has a duty to construe statutes as constitutional whenever possible. *Sanders*, 495 Mich at 412-413; see also *People v Neumayer*, 405 Mich 341, 362 (1979) ("It is axiomatic that this Court will presume that all legislation is constitutional and will attempt to construe legislation so as to preserve its constitutionality."). Unlike my concurring colleague, I would not accept the admittedly clear statutory history to read the statute in such a way that it remains "constitutionally hazardous." Instead, I would observe this Court's duty to construe legislation in a way that preserves its constitutionality. In this case, that duty means reading the statute's plain language in a way that defers to and gives weight to the decisions of presumably fit parents; otherwise it irreconcilably conflicts with the presumption of parental fitness. That said, I share Justice WELCH's concerns that the Child Custody Act, MCL 722.21 *et seq*., appears to provide additional protections not included in the EPIC guardianship scheme, and I echo her invitation to the Legislature to consider amending the guardianship framework.

order. Instead, I would vacate the Court of Appeals' opinion and remand to the probate court to vacate the guardianship orders.

MCCORMACK, C.J., and BERNSTEIN, J., join the statement of CAVANAGH, J.

POZDERCA v MAPLE LANE GOLF CLUB, Nos. 163329 and 163330; Court of Appeals Nos. 349460 and 349486.

PEOPLE v CRAIGHEAD, No. 163882; Court of Appeals No. 356393.

ZAHRA, J., would grant oral argument on the application.

MCCORMACK, C.J., did not participate because of her prior involvement in this case as counsel for a party.

PEOPLE v HOCH, No. 164281; Court of Appeals No. 360524.

Petition for Interim Suspension Without Pay Denied April 29, 2022:

In re KAHLILIA Y DAVIS, JUDGE 36TH DISTRICT COURT, No. 161134. On order of the Court, the second petition for interim suspension is considered, and it is DENIED, because the Court is not persuaded that it should impose a suspension without pay. Pursuant to this Court's June 17, 2020 order, the Honorable Kahlilia Y. Davis, Judge of the 36th District Court, remains suspended with pay until further order of this Court.

The request by the Judicial Tenure Commission for the appointment of a Master is also considered, and the Honorable Cynthia Diane Stephens is hereby appointed Master to hear Formal Complaint No. 101.

The Commission was required by MCR 9.225(A)(2) to "set forth in the petition an approximate date for submitting a final recommendation to the Court." Having failed to do so in either the first or second petition for interim suspension, we ORDER the Judicial Tenure Commission and the Master to coordinate their schedules to ensure that the JTC recommendation of action, if any, will be submitted to this Court within five months of the date of this order. See MCR 9.220(E) and 9.225(A)(2).

Summary Disposition May 3, 2022:

PEOPLE v THURMAN, No. 163590; Court of Appeals No. 357632. By order of January 31, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the August 17, 2021 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Livingston Circuit Court for the ministerial task of correcting the judgment of sentence. On remand, the trial court shall indicate on the judgment of sentence that the defendant pleaded guilty to MCL 333.7401(2)(a)(iii) as a fourth habitual offender under MCL 769.12, not as a second offense under MCL 333.7413(2)(a). In all

other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Leave to Appeal Denied May 3, 2022:

PEOPLE v PARKMAN, No. 162796; Court of Appeals No. 340943.

PEOPLE v DEONTE HALL, No. 162882; Court of Appeals No. 347290.

PEOPLE v PATTEN, No. 163088; Court of Appeals No. 349597.

PEOPLE v BANGURAH, No. 163264; Court of Appeals No. 356220.

PEOPLE v BOWLING, No. 163349; Court of Appeals No. 354545.

PEOPLE v NOBLE, No. 163362; Court of Appeals No. 356390.

PEOPLE v MOTT, No. 163390; Court of Appeals No. 356426.

PEOPLE v VONTZ, No. 163426; Court of Appeals No. 346473.

TURNER v AUTO-OWNERS INSURANCE COMPANY, No. 163466; Court of Appeals No. 352904.

PEOPLE v BEVERLY, No. 163499; Court of Appeals No. 356800.

PEOPLE v TAVARIS WILLIAMS, No. 163541; Court of Appeals No. 350726.

WHITE v MICHIGAN STATE UNIVERSITY UNEMPLOYMENT COMPENSATION DIVISION, No. 163548; Court of Appeals No. 356513.

SIMONE v BARBERIO, No. 163549; Court of Appeals No. 351424.

In re JAMES EDWARD WHITE, No. 163562; Court of Appeals No. 356364.

PEOPLE v ORTIZ-NIEVES, No. 163566; Court of Appeals No. 357118.

TONER v DELONG, No. 163573; Court of Appeals No. 353546.

PEOPLE v JAMAL BOWMAN, No. 163637; Court of Appeals No. 358112.

In re LENTZ, No. 163668; Court of Appeals No. 357187.

PEOPLE v BATTS, No. 163669; Court of Appeals No. 357444.

PEOPLE v DARREN JOHNSON, No. 163681; Court of Appeals No. 358309.

PEOPLE v FORD, No. 163687; Court of Appeals No. 357562.

PEOPLE v YAGER, No. 163699; Court of Appeals No. 350926.

UNIVERSITY PEDIATRICIANS v WILSON, No. 163701; Court of Appeals No. 353462.

LENTZ v DEPARTMENT OF CORRECTIONS, No. 163706; Court of Appeals No. 357189.

PEOPLE v DAQUAVIS MARTIN, No. 163709; Court of Appeals No. 357630.

JPMORGAN CHASE BANK, NA v ERWIN PROPERTIES, LLC, No. 163724; Court of Appeals No. 351512.

PEOPLE v CROSBY, No. 163751; Court of Appeals No. 350959.

PEOPLE v DEREK CUNNINGHAM, No. 163757; Court of Appeals No. 350961.

PEOPLE v EARICK, No. 163773; Court of Appeals No. 358551.

PEOPLE v BOONE, No. 163784; Court of Appeals No. 357718.

PEOPLE v PAULS, No. 163790; Court of Appeals No. 357719.

OAKES v TEAM ONE CREDIT UNION, No. 163811; Court of Appeals No. 358926.

PEOPLE v WOODMAN, No. 163813; Court of Appeals No. 358831.

PEOPLE v CARROLL, No. 163822; Court of Appeals No. 357968.

PEOPLE v GARDINER, No. 163831; Court of Appeals No. 357740.

PEOPLE v WILBOURN-LITTLE, No. 163855; Court of Appeals No. 349737.

GREAT LAKES CAPITAL FUND FOR HOUSING LIMITED PARTNERSHIP XII v ERWIN COMPANIES, LLC, No. 163856; Court of Appeals No. 358911.

PEOPLE v MACK, No. 163857; Court of Appeals No. 358775.

PEOPLE v ZUCHNIK, No. 163861; Court of Appeals No. 359209.

PEOPLE v SWILLING, No. 163871; Court of Appeals No. 352860.

ECHOLS v KABZA, No. 163872; Court of Appeals No. 355876.

PEOPLE v SHAW, No. 163890; Court of Appeals No. 358626.

MORLEY v MICHIGAN SUGAR COMPANY, No. 163900; Court of Appeals No. 354085.

PEOPLE v NOWAK, No. 163908; Court of Appeals No. 350653.

KLOCK v VAUGHN, No. 163920; Court of Appeals No. 354778.

PEOPLE v FICHT, No. 163924; Court of Appeals No. 357936.

PEOPLE v GUNN, No. 163929; Court of Appeals No. 357916.

PEOPLE v NIXON, No. 163931; Court of Appeals No. 353438.

PEOPLE v WADE, No. 163935; Court of Appeals No. 358330.

PEOPLE v DRAKILE JONES, No. 163938; Court of Appeals No. 358079.

PEOPLE v EVANS, No. 163940; Court of Appeals No. 353746.

PEOPLE v PENA, No. 163943; Court of Appeals No. 358488.

PEOPLE v MARK WILLIAMS, No. 163944; Court of Appeals No. 358088.

NEHR v NEHR, No. 163950; Court of Appeals No. 358122.

PEOPLE v YASMEEN TAYLOR, No. 163951; Court of Appeals No. 355360.

PEOPLE v KOSINSKI, No. 163953; Court of Appeals No. 354067.

PEOPLE v CAMPBELL, No. 163955; Court of Appeals No. 353690.

PEOPLE v WALDEN, No. 163957; Court of Appeals No. 357673.

PEOPLE v HARDAWAY, No. 163965; Court of Appeals No. 353304.

CHAHINE v MEMBERSELECT INSURANCE COMPANY, No. 163969; Court of Appeals No. 356350.

PEOPLE v TURNPAUGH, No. 163970; Court of Appeals No. 358160.

PEOPLE v BLANTON, No. 163974; Court of Appeals No. 358682.

PEOPLE v PETTWAY, No. 163975; Court of Appeals No. 358515.

PEOPLE v CHIN, No. 163976; Court of Appeals No. 356154.

LOUGHIN v ESURANCE PROPERTY AND CASUALTY INSURANCE COMPANY, No. 163977; Court of Appeals No. 352944.

PEOPLE v LOCKETT, No. 163980; Court of Appeals No. 359253.

TUBBERGEN v DYKEMA GOSSETT, PLLC, No. 163986; Court of Appeals No. 355795.

BLACKWELL v CITY OF LIVONIA, No. 163988; reported below: 339 Mich App 495.

PEOPLE v MOSS, No. 163992; Court of Appeals No. 359023.

PEOPLE v NAPP, No. 164034; Court of Appeals No. 358910.

PEOPLE v ZEMKE, No. 164035; Court of Appeals No. 359055.

PEOPLE v DAVEON WRIGHT, No. 164036; Court of Appeals No. 353161.

PEOPLE v KENNETH WRIGHT, No. 164040; Court of Appeals No. 358274. VIVIANO, J., did not participate because he presided over this case in the circuit court at an earlier stage of the proceedings.

PEOPLE v AMBROSE, No. 164042; Court of Appeals No. 358390.

SPECTRUM HEALTH HOSPITALS v ESURANCE PROPERTY AND CASUALTY INSURANCE COMPANY, No. 164047; Court of Appeals No. 352488.

PEOPLE v HEINEY, No. 164064; Court of Appeals No. 359289.

PEOPLE v MARCUS WALKER, No. 164067; Court of Appeals No. 351789.

PEOPLE v EUGENE TURNER, No. 164070; Court of Appeals No. 353939.

PEOPLE v RUIZ, No. 164075; Court of Appeals No. 352431.

PEOPLE v CHILDS, No. 164078; Court of Appeals No. 358603.

JAMES RIVER INSURANCE COMPANY v CITIZENS INSURANCE COMPANY OF AMERICA, No. 164086; Court of Appeals No. 355140.

STATE TREASURER v HILLS, No. 164087; Court of Appeals No. 357235.

STATE TREASURER v BURCH, No. 164089; Court of Appeals No. 357258.

In re GUARDIANSHIP AND CONSERVATORSHIP OF LARRY JOHN POBANZ, No. 164095; Court of Appeals No. 356546.

PEOPLE v TJ SUTTON, No. 164096; Court of Appeals No. 358416.

TAYLOR v OUTDOOR ADVENTURES OF DAVISON, LLC, Nos. 164099 and 164100; Court of Appeals Nos. 355035 and 355036.

PEOPLE v TIMOTHY JONES, No. 164108; Court of Appeals No. 358338.

Superintending Control Denied May 3, 2022:

In re STACY ERWIN OAKES, No. 163582.

Reconsideration Denied May 3, 2022:

PEOPLE v STRINGER, No. 162109; Court of Appeals No. 353696.

DONALDSON v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 163421; Court of Appeals No. 356296.

In re APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES, No. 163528; reported below: 338 Mich App 239.

PEOPLE v STANLEY, No. 163530; Court of Appeals No. 348240.

In re CONSERVATORSHIP OF BLOSSOM LANIER, No. 163650; Court of Appeals No. 352123.

Summary Disposition May 6, 2022:

PEOPLE v SCOTT, No. 161417; Court of Appeals No. 336815. By order of November 29, 2021, the prosecuting attorney was directed to answer the application for leave to appeal the January 30, 2020 judgment of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to that court for reconsideration in light of *People v Washington*, 508 Mich 107 (2021). On remand, the Court of Appeals shall address whether this Court's decision in *Washington* applies to the interlocutory appeal at

issue in this case. Cf. *Alice L v Dusek*, 492 F3d 563, 564-565 (CA 5, 2007); *Quick-Sav Food Stores, Ltd v Estate of Mattis*, unpublished per curiam opinion of the Court of Appeals, issued January 19, 2010 (Docket No. 285414), pp 2-3, citing 5 Am Jur 2d, Appellate Review, § 387, p 174.

Leave to Appeal Denied May 6, 2022:

WOODS v RE INVESTMENT, INC, No. 163870; Court of Appeals No. 351972.

Leave to Appeal Denied May 11, 2022:

In re MICHAEL EYDE TRUST, Nos. 164274 and 164275; Court of Appeals Nos. 355947 and 356500.

Summary Disposition May 13, 2022:

SCHAUMANN-BELTRANE v GEMMETE and SCHAUMANN-BELTRANE v UNIVERSITY OF MICHIGAN REGENTS, Nos. 162507 and 162508; reported below: 335 Mich App 41. On April 6, 2022, the Court heard oral argument on the application for leave to appeal the December 10, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals. Under MCR 2.311(A), a trial court has the authority to "order [a] party to submit to a physical or mental . . . examination by a physician" and, when doing so, "must specify the time, place, manner, conditions, and scope of the examination . . . ." A "condition" is defined as "[o]ne that is indispensable to the appearance or occurrence of another; a prerequisite" or as "[o]ne that restricts or modifies another; a qualification[.]" *The American Heritage Dictionary of the English Language* (5th ed). An order that an examination is to be videorecorded if it is to be conducted undoubtedly establishes a "prerequisite" or "qualification" for conducting the examination, meaning that whether to videorecord the examination is plainly a "condition[]" of the exam and is therefore within the authority of the circuit court to direct.

The Court of Appeals, in reaching the opposite conclusion, relied on *Nemes v Smith*, 37 Mich App 124 (1971), and *Feld v Robert & Charles Beauty Salon*, 435 Mich 352 (1990), to construe the final clause of MCR 2.311(A)—providing that a trial court "may provide that the attorney for the person to be examined may be present at the examination"—as a grant of power to a trial court which may only be exercised in the manner stated. *Schaumann-Beltran v Gemmete*, 335 Mich App 41, 49-53 (2020). This is wrong for two reasons. First, neither *Nemes* nor *Feld* addressed the scope of a tribunal's authority to establish the conditions of an exam; rather, in both cases, the party being examined argued that they were entitled to the presence of additional individuals whom the

tribunal had not authorized, and the appellate courts rejected those arguments.[1] Second, this is not the function of the language in MCR 2.311(A) permitting a trial court to provide that an examinee's attorney may be present. Since 1941 PA 18 was enacted, Michigan statutory law has conferred a right to the presence of an attorney when an individual is directed to submit to certain examinations by court order. When the Revised Judicature Act, 1961 PA 236, was enacted, this right was included within it, see MCL 600.1445(1). The contemporaneously drafted General Court Rules of 1963 conformed to the statute and required that a trial court "specify the time, place, manner, conditions, and scope of the examination, . . . and *shall provide* that the attorney for the person to be examined may be present at the examination." GCR 1963, 311.1 (emphasis added). However, "[m]any physicians objected to this practice, most complaining that the presence of the attorney impaired or destroyed their ability to conduct an adequate and thorough examination," 2 Longhofer & Quick, Michigan Court Rules Practice (7th ed), § 2311.7, p 415, so when the Michigan Court Rules of 1985 were enacted, the last clause was changed to state that the trial court "*may provide* that the attorney for the person to be examined may be present," MCR 2.311(A) (emphasis added). Since the statute confers a right to an attorney's presence, while the court rule confers discretion on the trial court, the "discretion is in conflict with the absolute statutory right," meaning "the statute is superceded by the rule." Longhofer & Quick, pp 415-416. The function of the clause, then, is not to confer power upon a trial court to make a binary decision about the presence of an attorney or not; rather, it simply supersedes MCL 600.1445(1) and does nothing to limit a trial court's authority to establish the "conditions" of an examination.

In light of our holding that a trial court possesses the authority under MCR 2.311(A) to direct that an exam be videorecorded, we reverse the decision of the Court of Appeals. Defendants separately argue that, even if the trial court had discretionary power to issue the order, it was an abuse of discretion to do so on the facts of this case. The Court of Appeals did not reach that argument, and plaintiff's counsel acknowledged at oral argument that a remand to the Court of Appeals to consider that preserved argument is warranted. As a result, we REMAND this case to the Court of Appeals for it to consider the arguments made by defendants not previously considered.

BERNSTEIN, J., did not participate due to a familial relationship.

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[1] On the other hand, we disagree with plaintiff's suggestion that the Court of Appeals erred by treating *Nemes* as precedential in light of its age. *Nemes* construed GCR 1963, 311.1, the predecessor to MCR 2.311(A), and as a published opinion of the Court of Appeals, it "has precedential effect under the rule of stare decisis." MCR 7.215(C)(2). While subsequent panels are not bound under MCR 7.215(J)(1) to follow a rule established in a published opinion against their better judgment if it predates November 1, 1990, this does not change the status of older opinions as "precedential . . . under the rule of stare decisis."

Order Directing Supplemental Briefing Entered May 13, 2022:

PEOPLE v TRAVIS JOHNSON, No. 163073; reported below: 336 Mich App 688. On April 6, 2022, the Court heard oral argument on the application for leave to appeal the April 8, 2021 judgment of the Court of Appeals. We DIRECT the parties to file supplemental briefs within 21 days of the date of this order addressing: (1) whether MCL 769.1k(1)(b)(*iii*) violates separation of powers by assigning the judicial branch " 'tasks that are more properly accomplished by [the Legislature],' " *Mistretta v United States*, 488 US 361, 383 (1989), quoting *Morrison v Olson*, 487 US 654, 680-681 (1988); see also *Houseman v Kent Circuit Judge*, 58 Mich 364, 367 (1885); (2) whether MCL 769.1k(1)(b)(*iii*) violates due process by creating a " 'potential for bias' " or an "objective risk of actual bias," *Caperton v A T Massey Coal Co, Inc*, 556 US 868, 881, 886 (2009), quoting *Mayberry v Pennsylvania*, 400 US 455, 465-466 (1971); see also, e.g., *Williams v Pennsylvania*, 579 US 1, 8-9 (2016); and (3) should we find MCL 769.1k(1)(b)(*iii*) facially unconstitutional under either theory, what remedy follows.

The application for leave to appeal remains pending.

Summary Disposition May 20, 2022:

PEOPLE v ANTONIO JACKSON, No. 162908; Court of Appeals No. 344242. On April 6, 2022, the Court heard oral argument on the application for leave to appeal the February 25, 2021 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE that part of the judgment of the Court of Appeals affirming the 15-point score assigned to Offense Variable (OV) 1 of the judicial sentencing guidelines, we VACATE the sentence of the Wayne Circuit Court, and we REMAND this case to the trial court for resentencing. On remand, the trial court shall score OV 1 at 0 points because the jury acquitted the defendant of the charges alleging that he possessed a firearm, and the facts do not establish that he possessed another type of weapon. See *People v Beck*, 504 Mich 605 (2019). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

LONG LAKE TOWNSHIP v MAXON, No. 162946; reported below: 336 Mich App 521. By order of April 1, 2022, the Court directed supplemental briefing from the parties. On order of the Court, the briefs having been received, we VACATE our order of March 16, 2022 directing the Clerk to schedule oral argument on the application. The application for leave to appeal the March 18, 2021 judgment of the Court of Appeals is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and REMAND this case to that court to address the additional issue of whether the exclusionary rule applies to this dispute. See, e.g., *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357, 364 (1998) (declining to extend the operation of the exclusionary rule beyond the criminal trial context); *Kivela v Dep't*

of Treasury, 449 Mich 220 (1995) (declining to extend the exclusionary rule to a civil tax proceeding). We do not retain jurisdiction.

LAW OFFICES OF JEFFREY SHERBOW v FIEGER & FIEGER, No. 164152; Court of Appeals No. 360582. On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal prior to decision by the Court of Appeals is treated as an application for leave to appeal the April 28, 2022 order of the Court of Appeals. The application is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

Order Directing Briefing Entered May 20, 2022:

In re EXECUTIVE MESSAGE OF THE GOVERNOR REQUESTING THE AUTHORIZATION OF A CERTIFIED QUESTION, No. 164256. On order of the Court, the motions for immediate consideration and motions for leave to respond or reply are GRANTED. The Executive Message of the Governor pursuant to MCR 7.308(A)(1) was received on April 7, 2022, requesting that this Court direct the Oakland Circuit Court to certify certain questions for immediate determination by this Court. Having received responses from several county prosecutors, as well as amici briefs, we direct the Governor to file a brief with this Court within 14 days of the date of this order, providing a further and better statement of the questions and the facts. MCR 7.308(A)(1)(b). Specifically, the Governor shall address: (1) whether the Court of Claims' grant of a preliminary injunction in *Planned Parenthood v Attorney General*, 22-000044-MM, resolves any need for this Court to direct the Oakland Circuit Court to certify the questions posed for immediate determination; (2) whether there is an actual case and controversy requirement and, if so, whether it is met here; (3) given the infrequent application of the Executive Message process by current and former governors, what is required under MCR 7.308(A) and, specifically, whether the question is of "such public moment as to require an early determination"; (4) whether the Executive Message process limits the Governor's power to defending statutes, rather than calling them into question; and (5) whether the questions posed should be answered before the United States Supreme Court issues its decision in *Dobbs v Jackson Women's Health Organization*, No. 19-1392, and whether a decision in that case would serve as binding or persuasive authority to the questions raised here.

The county prosecutors may file responsive briefs. Amici who have filed briefs with the Court to date are invited to file supplemental briefs addressing the questions identified in this order. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. All responsive and amicus curiae briefs shall be filed within 14 days of the Governor's brief.

The Executive Message, motion to intervene, and motion to dismiss remain pending.

BERNSTEIN, J. (*concurring*). Given the gravity of the issues presented in this case, I believe we should strive to open the courtroom doors to as many voices as possible. In the interest of fairness, I strongly prefer to allow the county prosecutors, as well as any other persons or groups interested in these issues, the same two-week briefing period that we are giving the Governor. While I believe an expedited briefing schedule is warranted under the circumstances, the schedule we have set in our order balances our interest in timely considering these issues while giving everyone a full and fair opportunity to participate.

CAVANAGH, J. (*concurring in part and dissenting in part*). I join the Court's order granting further briefing in this case on these important threshold procedural questions. I dissent only with regard to the briefing schedule. Given the potential urgency underlying the issues in this case, I would have ordered that the supplemental briefing be completed within two weeks. If the injunction issued by the Court of Claims gives the Governor the relief she seeks, the timing will not matter. If not, and if this Court believes we should grant the Governor's request to authorize the circuit court to certify the questions posed by the Governor in the pending lawsuit, the schedule the majority has set here may leave insufficient time to determine the merits of the case. Although I echo Justice BERNSTEIN's sentiment that we should strive to allow all interested persons the opportunity to have their voices heard, operating on an expedited basis—as we are often called on to do—in no way closes the courtroom doors to any interested voices. Because I believe the Court's order today fails to treat this case with the urgency it deserves, I respectfully dissent from the majority's refusal to expedite this supplemental briefing schedule.

MCCORMACK, C.J., and WELCH, J., join the statement of CAVANAGH, J.

Summary Disposition May 25, 2022:

LEKLI v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 163225; Court of Appeals No. 350942. On order of the Court, the application for leave to appeal the May 20, 2021 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE Part III of the Court of Appeals judgment, regarding the Michigan Automobile Insurance Placement Facility's motion for summary disposition, and REMAND this case to that court to address the merits of the plaintiff's claim that the Macomb Circuit Court erred by granting that motion. The Court of Appeals erred by holding that the plaintiff waived this issue. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

Oral Argument Ordered on the Application for Leave to Appeal May 25, 2022:

SUNRISE RESORT ASSOCIATION, INC v CHEBOYGAN COUNTY ROAD COMMISSION, No. 163949; reported below: 339 Mich App 440. On order of the

Court, the application for leave to appeal the December 2, 2021 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address: (1) whether the appellees' claims accrued in 2015 and are barred by the applicable statute of limitations; and (2) whether the appellees' claim for injunctive relief is barred by the governmental tort liability act, MCL 691.1401 *et seq*., and/or other applicable law, or is otherwise not obtainable as the functional equivalent of a claim for a writ of mandamus.

Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v YEAGER, No. 164055; Court of Appeals No. 346074. On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the December 21, 2021 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address whether: (1) the appellant's trial attorney engaged in sound strategy by failing to request a voluntary manslaughter instruction; (2) the appellant's fear of the decedent, based on the decedent's physical assault of the appellant, carjacking of the appellant, and threats to the appellant, constituted adequate "heat of passion," justifying a voluntary manslaughter instruction; (3) the decision in *People v Raper*, 222 Mich App 475 (1997), precludes a finding of prejudice from the absence of a voluntary manslaughter instruction where the appellant was convicted of first-degree murder and the jury was instructed on second-degree murder; and (4) if so, whether *Raper* was wrongly decided.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 25, 2022:

PEOPLE v MONTAGUE, Nos. 163483 and 163484; reported below: 338 Mich App 29.

PEOPLE v SUTTLES, No. 164060; Court of Appeals No. 350744.

Summary Disposition May 27, 2022:

PEOPLE v NORTHROP, No. 162989; Court of Appeals No. 354543. By order of November 2, 2021, the prosecuting attorney was directed to answer the application for leave to appeal the January 5, 2021 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE

the June 23, 2020 order of the Sanilac Circuit Court that denied the defendant's motion for relief from judgment, and we REMAND this case to the trial court for reconsideration of the defendant's motion under MCR 6.504(B). The trial court failed to consider the defendant's new evidence provided with his first motion for relief from judgment. On remand, the trial court shall determine whether the new evidence is credible and whether the impact of the new evidence, in conjunction with the evidence that would be presented on retrial, which may include newly discovered evidence presented in previous motions for relief from judgment, would make a different result probable on retrial. *People v Johnson*, 502 Mich 541, 566-567 (2018). The motion to remand for an evidentiary hearing is DENIED. However, the trial court shall conduct such a hearing if it is required to appropriately resolve the defendant's motion. See MCR 6.508(C). We do not retain jurisdiction.

Oral Argument Ordered on the Application for Leave to Appeal May 27, 2022:

PEOPLE v WELCH, No. 163833; Court of Appeals No. 355030. By order of March 11, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the October 14, 2021 judgment of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address whether the trial court abused its discretion by granting the prosecution's motion in limine precluding the defendant from introducing evidence of inclement weather, roadway conditions, or the fishtailing of another vehicle, as causes of the collision that resulted in the victim's injuries.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v SAMUELS, No. 164050; reported below: 339 Mich App 664. On order of the Court, the application for leave to appeal the December 28, 2021 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address: (1) whether a trial court is required to hold an evidentiary hearing on the voluntariness of a guilty plea that is induced in part by an offer of leniency to a relative, see *People v James*, 393 Mich 807 (1975); and if so, (2) how a trial court is to determine whether an offer of leniency to a relative "rendered the defendant's plea involuntary in fact." *Id*.

The motion to appoint counsel is GRANTED. We ORDER the Wayne Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint the State Appellate Defender Office to represent the defendant in this Court.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 27, 2022:

PEOPLE v BEARDEN, No. 163415; Court of Appeals No. 352303.

CAVANAGH, J., (*concurring*). I concur in the order denying leave to appeal because I agree the unnecessarily suggestive identification in this case was nonetheless reliable under *Neil v Biggers*, 409 US 188 (1972). However, I write separately to note that this is yet another instance of police conducting a showup without any apparent reason.

Aline Barker and Dylan Williams negotiated to buy an SUV from a man calling himself "Geno Beatden" on Facebook. After agreeing to a price of $1,700, Barker and Williams went to a house where they were greeted by a man they recognized from the Facebook profile picture. Barker and Williams went inside where there were also two other men. Barker and Williams spoke with the seller for about 20 minutes before he left the room, and the two other men came in wearing masks and carrying guns. The gunmen demanded Barker and Williams turn over their belongings, and they turned over about $1,700 in cash, a cell phone, a cell phone charger, a tablet, and a debit card from H & R Block.

Barker and Williams were allowed to leave, and they flagged down a passing motorist. Barker and Williams told the motorist what had happened and where they had been robbed. The motorist told them he knew the man who lived in the house—Eugene Bearden. They called the police, who were also familiar with Bearden.

The police came to Bearden's house, which was actually next door to where the robbery had taken place. Bearden answered the door and let the police come inside and search. The police found two other men, Argina Colman and Derrion Spivey; a cell phone charger; a tablet; a debit card from H & R Block; and $1,662 in cash. The police then arrested Bearden and took him outside where he was identified by the complainants.

Defendant argues that the identification was unnecessarily suggestive and that the trial court erred by denying his motion to suppress the complainants' identification of him at trial. "Exclusion of evidence of an identification is required when (1) the identification procedure was suggestive, (2) the suggestive nature of the procedure was unnecessary, and (3) the identification was unreliable." *People v Sammons*, 505 Mich 31, 41 (2020). The parties and the Court of Appeals agree the identification was suggestive. As this Court has said, "all we need to observe in order to conclude that the procedure was suggestive is that defendant was shown singly to the witness." *Id*. at 44. Such was the case here.

I agree with the Court of Appeals panel that this suggestive procedure was unnecessary. Although this Court has not had the occasion to

draw clear boundaries regarding necessity, the panel's analysis does an excellent job of connecting the existing dots in the caselaw:

> In the instant matter, the police located defendant and Spivey in defendant's home approximately 20 to 30 minutes after the robbery occurred. Additionally, Barker and Williams identified defendant and Spivey approximately 30 minutes after the robbery occurred. Although a prompt identification procedure would allow the police to determine whether defendant and Spivey committed the robbery or whether the actual gunmen were still at large, the showup identification procedure was not necessary. Before arriving at defendant's home, Oakland County Sherriff's [sic] Sergeant Todd Hunt had heard over the police radio that defendant was involved in the robbery. Defendant allowed the police to search his home, and the police found several items in defendant's living room that had been taken from Barker and Williams. Given this set of facts, the police had good reason to believe that defendant and Spivey were involved in the robbery such that it was unlikely that there were other armed individuals at large nearby. Unlike the example provided in *Sammons*, there was no indication that Barker and Williams were unable or unwilling to identify the individuals involved in the robbery at a later time. Accordingly, it was not necessary for the police to utilize a suggestive identification procedure in this instance. [*People v Bearden*, unpublished per curiam opinion of the Court of Appeals, issued June 17, 2021 (Docket No. 352303), p 3.]

I also agree that under our existing caselaw this identification was reliable. The factors to consider in this regard are "(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation." *Sammons*, 505 Mich at 50-51 (citation and quotation marks omitted). The third factor is debatable. Barker and Williams said the SUV seller was wearing a multicolored bandana, and Bearden was also wearing a multicolored bandana. However, Barker and Williams described the bandana as having a motorcycle on it, and Bearden's did not. Even if this factor weighed against reliability, the other four factors weigh in favor of reliability. I agree that the trial court properly denied the motion to suppress under the standard currently provided by our caselaw.

However, as the Court noted in *Sammons*, the constitutional floor set by the United States Supreme Court on this point rests on the prediction that "[t]he police will guard against unnecessarily suggestive procedures under the totality rule, as well as the *per se* one, for fear that their actions will lead to the exclusion of identifications as unreliable." *Manson v Brathwaite*, 432 US 98, 112 (1977). That prediction proved to be inaccurate in *Sammons*, where the police conducted a showup as a matter of course. That prediction proved to be inaccurate in *People v Johnson*, 506 Mich 969 (2020) (CAVANAGH, J., concurring), where the

police conducted a showup as a matter of course. That prediction proved to be inaccurate in *People v Moore*, 509 Mich 859 (2022) (CAVANAGH, J., dissenting), where police conducted a showup as a matter of course. Once again, the police appear not to have been correctly incentivized to not use an unnecessarily suggestive identification procedure. As I have noted, "[o]ther jurisdictions have charted different courses than the constitutional floor set by *Manson*." *Id*. at 863. See also *Sammons*, 505 Mich at 50 n 13. Once again, we have not been asked to reach that question in this case.

MCCORMACK, C.J., joins the statement of CAVANAGH, J.

In re ROSSIER, No. 164030; Court of Appeals No. 357270.

Rehearing Denied May 27, 2022:

FOSTER v FOSTER, No. 161892; Court of Appeals No. 324853. On order of the Court, the motion for rehearing of the Court's April 5, 2022 opinion is considered and, in lieu of granting rehearing, we AMEND the opinion of the Court by replacing the sentence in section I stating, "In February 2010, defendant became eligible for, and elected to receive, increased disability benefits, which included Combat-Related Special Compensation (CRSC)" with the following: "In February 2010, defendant began receiving increased disability benefits, which included Combat-Related Special Compensation (CRSC)." In all other respects, the motion for rehearing is DENIED. MCR 7.311(F).

Summary Disposition May 31, 2022:

PEOPLE v KROPIEWNICKI, No. 163821; Court of Appeals No. 358442. By order of March 11, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the October 19, 2021 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied May 31, 2022:

PEOPLE v MICQUEL THOMAS, No. 163231; Court of Appeals No. 349711.

HULLIBARGER v ARCHDIOCESE OF DETROIT, No. 163439; Court of Appeals No. 354439.

PEOPLE v CANALES, No. 163534; Court of Appeals No. 350536.

WEAVER v KRACKE, No. 163568; Court of Appeals No. 353251.

LANG v STERLING HEIGHTS EMPLOYEES RETIREMENT SYSTEM, No. 163572; Court of Appeals No. 352497.

NOWAK v MEEMIC INSURANCE COMPANY, No. 163594; Court of Appeals No. 357091.

ATTORNEY GENERAL v GELMAN SCIENCES, INC, No. 163603; Court of Appeals No. 357598.

PEOPLE v POE, No. 163640; Court of Appeals No. 357824.

MILFORD HILLS PROPERTIES, INC v CHARTER TOWNSHIP OF MILFORD, No. 163648; Court of Appeals No. 353489.

RHOTON v ZILKA, No. 163694; Court of Appeals No. 350739.

PEOPLE v PEREZ-AGUILAR, No. 163758; Court of Appeals No. 352055.

PEOPLE v NICHOLS, No. 163764; Court of Appeals No. 358005.

PEOPLE v LABARON DAVIS, No. 163772; Court of Appeals No. 357921.

PEOPLE v ANDERSON, No. 163781; Court of Appeals No. 352523.

PEOPLE v DERYL NELSON, No. 163809; Court of Appeals No. 357351.

PEOPLE v SOLOMON, No. 163853; Court of Appeals No. 349015.

PEOPLE v BRANDON CAIN, No. 163864; Court of Appeals No. 357985.

PEOPLE v BRANDON CAIN, No. 163865; Court of Appeals No. 357933.

PEOPLE v RUFUS THOMAS, No. 163877; Court of Appeals No. 357806.

PEOPLE v EDDIE THOMAS, No. 163880; Court of Appeals No. 358157.

In re CHAUNO LAVALE HARRIS, JR, No. 163886; Court of Appeals No. 351611.

PEOPLE v MERKEL, No. 163933; Court of Appeals No. 352217.

PEOPLE v LARRY WILLIAMS, No. 163962; Court of Appeals No. 358895.

TUTTLE v TUTTLE, No. 163964; Court of Appeals No. 358035.

In re APPLICATION OF DTE ELECTRIC COMPANY TO INCREASE RATES, No. 164025; Court of Appeals No. 353767.

PEOPLE v MORAGNE, No. 164029; Court of Appeals No. 359132.

PEOPLE v JUSTIN HOWARD, No. 164038; Court of Appeals No. 359192.

PEOPLE v LAMARQUE, No. 164048; Court of Appeals No. 351588.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

GRIEVANCE ADMINISTRATOR v BAZZO, No. 164052.

PEOPLE v YUHASEY, Nos. 164057 and 164058; Court of Appeals Nos. 353144 and 353145.

MR SUNSHINE v DETROIT INSTITUTE OF ARTS BOARD OF DIRECTORS, No. 164082; Court of Appeals No. 354708.

PEOPLE v CARLTON, No. 164103; Court of Appeals No. 358955.

PEOPLE v HAYES, No. 164106; Court of Appeals No. 359194.

PEOPLE v MCGOWAN, No. 164109; Court of Appeals No. 358679.

PEOPLE v BOARD, No. 164112; Court of Appeals No. 352371.

PEOPLE v HARDIMAN, No. 164116; Court of Appeals No. 359569.

PEOPLE v MATTHEWS, No. 164129; Court of Appeals No. 358683.

PEOPLE v THOMAS HOWARD, No. 164136; Court of Appeals No. 358528.

TUCKER v DOLMAN, No. 164139; Court of Appeals No. 358429.

XIONG v GORSLINE, No. 164144; Court of Appeals No. 354702.

EVERSON v HEARD and EVERSON v WILLIAMS, Nos. 164146 and 164147; Court of Appeals Nos. 352663 and 352692.

PEOPLE v HARRISON, No. 164148; Court of Appeals No. 359716.

PEOPLE v MORAN, No. 164161; Court of Appeals No. 358583.

CALLAHAN v MAROTA, No. 164167; Court of Appeals No. 359879.

CALLAHAN v MAROTA, No. 164169; Court of Appeals No. 359880.

PEOPLE v DEANDRE MARTIN, No. 164174; Court of Appeals No. 358414.

PEOPLE v GERMAIN, No. 164177; Court of Appeals No. 360146.

PEOPLE v BRIGGS, No. 164178; Court of Appeals No. 359450.

JOHNSON v BUTTERWORTH, No. 164182; Court of Appeals No. 358852.

GOMERY v STANLEY, No. 164233; Court of Appeals No. 358635.

PEOPLE v MAURICE JACKSON, No. 164241; Court of Appeals No. 359568.

Superintending Control Denied May 31, 2022:

JACOBS v ATTORNEY DISCIPLINE BOARD, No. 163050.

MILLER v BOARD OF LAW EXAMINERS, No. 164031.

JR'S BAIL BONDS AGENCY, LLC v SHIAWASSEE CIRCUIT JUDGES, No. 164225.

Reconsideration Denied May 31, 2022:

PEOPLE v TIMOTHY HORTON, No. 162704; Court of Appeals No. 348236.

AYOTTE v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 163075; Court of Appeals No. 350666.

PEOPLE v MCCLINTON, No. 163141; Court of Appeals No. 356544.

PEOPLE v CHRISTENSEN, Nos. 163227 and 163228; Court of Appeals Nos. 350877 and 350878.

PEOPLE v KENYON CLINTON, No. 163242; Court of Appeals No. 356410.

CAN IV PACKARD SQUARE, LLC v SCHUBINER, No. 163367; Court of Appeals No. 352510.

PEOPLE v NADJA KIOGIMA, No. 163455; Court of Appeals No. 353815.

PEOPLE v CAMERON WRIGHT, No. 163473; Court of Appeals No. 348251.

In re APPLICATION OF CONSUMERS ENERGY COMPANY FOR ONE-TIME REVENUE REFUND, No. 163512; Court of Appeals No. 356076.

CAN IV PACKARD SQUARE, LLC v PACKARD SQUARE, LLC, Nos. 163555 and 163556; Court of Appeals Nos. 348857 and 350519.

PEOPLE v JEROME BANKSTON, No. 163577; Court of Appeals No. 352604.

AYESH v CHAALAN, No. 163736; Court of Appeals No. 354966.

PEOPLE v STANLEY DANIELS, No. 163740; Court of Appeals No. 350446.

BURNETT v AHOLA, Nos. 163753 and 163754; Court of Appeals Nos. 356502 and 356505.

BURNETT v AHOLA, No. 163762; Court of Appeals No. 356505.

PEOPLE v RYAN BAILEY, No. 163768; Court of Appeals No. 347548.

REID v HURLEY MEDICAL CENTER, No. 163808; Court of Appeals No. 357379.

In re REQUEST FOR INVESTIGATION PURSUANT TO MCR 9.131(A), No. 163895.

Leave to Appeal Denied June 2, 2022:

PEOPLE v GUTIERREZ, No. 163078; Court of Appeals No. 355749.

PEOPLE v KELSEY, Nos. 163509 and 163510; Court of Appeals Nos. 351719 and 354239.

PEOPLE v CADDEN, No. 163917; Court of Appeals No. 356112.

PEOPLE v ESPIE, No. 163972; Court of Appeals No. 355920.

FRIED v PICKENS, No. 163984; Court of Appeals No. 354503.

PEOPLE v DOWNING, No. 163993; Court of Appeals No. 358301.

PEOPLE v ISROW, No. 164023; reported below: 339 Mich App 522.

PLATINUM PROCESSING SERVICES LLC v JARBO, No. 164083; Court of Appeals No. 359228.

Summary Disposition June 3, 2022:

ROWLAND v INDEPENDENCE VILLAGE OF OXFORD, LLC, No. 161007; Court of Appeals No. 345650. On December 8, 2021, the Court heard oral argument on the application for leave to appeal the January 14, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and we VACATE the Oakland Circuit Court's June 26, 2018 opinion and order granting summary disposition to the defendants. We REMAND this case to the Oakland Circuit Court for further proceedings consistent with this order.

The Court of Appeals erroneously concluded that the defendants did not owe the decedent, Virginia Kermath, a common-law duty of care. A common-law duty of care exists when "the relationship between the actor and the injured person gives rise to [a] legal obligation on the actor's part for the benefit of the injured person." *Moning v Alfono*, 400 Mich 425, 438-439 (1977). "[I]n negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in the light of the apparent risk." *Id*. at 443, quoting Prosser, Torts (4th ed), § 53, p 324 (brackets in original).

> While the court decides questions of duty, general standard of care and proximate cause, the jury decides whether there is cause in fact and the specific standard of care: whether defendants' conduct in the particular case is below the general standard of care, including—unless the court is of the opinion that all reasonable persons would agree or there is an overriding legislatively or judicially declared public policy—whether in the particular case the risk of harm created by the defendants' conduct is or is not reasonable. [*Moning*, 400 Mich at 438.]

We consider numerous factors in determining whether a common-law duty of care exists, including the following: (1) foreseeability of the harm, (2) degree of certainty of injury, (3) closeness of connection between the conduct and injury, (4) moral blame attached to the conduct, (5) policy of preventing future harm, and (6) the burdens and consequences of imposing a duty and the resulting liability for breach. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86 (2004).

As we recognized in *Clark v Dalman*, 379 Mich 251, 260-261 (1967):

> Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. The duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others. This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another.

The existence of a relationship between the parties is critical because generally "there is no duty that obligates one person to aid or protect another," *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499 (1988), citing 2 Restatement Torts, 2d, § 314, p 116, and the duty to protect is imposed upon the person in control because that person is best able to provide a place of safety, *Williams*, 429 Mich at 499. The parties do not dispute that Ms. Kermath and defendant Independence Village of Oxford, LLC, had a landlord-tenant relationship at the time of her death. We have long recognized that there is a special relationship between a landlord and its tenants. See *Bailey v Schaaf*, 494 Mich 595, 604-606 (2013); *Williams*, 429 Mich at 499-500. A landlord has a duty "to maintain the physical premises over which they exercise control." *Bailey*, 494 Mich at 604. In *Bailey* we recognized that a landlord's duty extends beyond maintaining the premises to include an obligation of reasonable care to expedite police involvement where the landlord has notice of a specific situation on the property that "would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee." *Id*. at 614. The landlord-tenant relationship weighs in favor of imposing a common-law duty of care.[1]

The harm at issue was objectively foreseeable. Ms. Kermath was injured and later passed away after she exited a door in a common area of the building, which was under the exclusive control of the landlord, and she was locked out in the cold due to the door having an automatic

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[1] In addition to declining to recognize a new special relationship that plaintiff advocated for, the Court of Appeals also gave no weight to the existence of an undisputed landlord-tenant relationship when assessing whether defendants owed a duty of care under our common-law standards. While this decision may have been premised on the Court of Appeals' conclusions about foreseeability, *Moning*, *Williams*, and *Bailey* make clear that the existence of a relationship between the parties is always legally relevant to whether a duty of care exists at common law, even when a party is not bringing a claim based on a landlord's duty to maintain the common areas of the property for premises-liability purposes.

lock. A reasonable person could anticipate that an elderly resident living in an unlicensed independent-living facility where the average age of the residents exceeds 80 years old could become locked out of a building after exiting an automatically locking door on a cold winter morning. See *Iliades v Dieffenbacher North America Inc*, 501 Mich 326, 338 (2018) ("Under Michigan common law, foreseeability depends on whether a reasonable person could anticipate that a given event might occur under certain conditions.") (quotation marks and citation omitted). Tenants of any age may become locked out of their apartment building from time to time, regardless of age or mental capacity, and this possibility becomes more likely in a residential complex specifically catering to the elderly. The average age of the residents at the facility in question coupled with frequent below-freezing temperatures during winter months in Michigan also increases the risk of hypothermia or other serious injury when a lockout occurs.

The other factors also weigh in favor of imposing a common-law duty of reasonable care. The moral blame attached to the conduct and the policy of preventing future harm weigh in favor of imposing a duty of reasonable care on the defendants. The record shows that Independence Village of Oxford intentionally marketed and catered to elderly individuals who are in need of greater support than the general population. A substantial premium is charged for tenancy at the facility, which includes two hot meals a day, biweekly housekeeping, and laundry services. The record shows that the facility also provided daily check-in calls, a pull-cord alert mechanism in units, and an on-site third-party contractor who offers additional homecare and medical services for a fee, measures that strongly suggest the landlord had some knowledge that certain residents would require additional assistance beyond that of an average tenant. The potential burden associated with taking reasonable measures to prevent residents from being locked out and unable to alert staff, such as installing a buzzer or cameras, appears minimal when compared to the potential harm that could befall residents. Finally, imposition of a legal duty of care will reduce the chance of elderly or cognitively impaired residents from being injured should they become locked outside on a cold, wintry Michigan day.[2]

It was reversible error for the Court of Appeals to hold that, as a matter of law, no defendant owed Ms. Kermath a common-law duty of reasonable care. As the defendants' counsel agreed at oral argument, under the circumstances of this case, whether the landlord's failure to take specifically alleged precautions that might have prevented the lockout or Ms. Kermath's injuries raises questions of breach and

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[2] While not binding, at least one other court has held that an independent senior living facility had the specific common-law duty to monitor its automatic locking doors under similar facts. See *Washnock v Brookdale Senior Living, Inc*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued February 6, 2014 (Case No. 12-11607).

causation, not duty. We express no opinion on the questions of breach or causation and leave those issues to be determined in the first instance on remand.[3]

ZAHRA, J. (*dissenting*). The majority incorrectly holds that defendants owed a duty of care at common law to decedent Virginia Kermath. I write to point out three flaws in the majority's holding and analysis. First, the majority has allowed plaintiff to reframe her position from that advocated for below, leading the majority to answer a question that neither lower court answered. Second, a prerequisite for the imposition of such a duty of care on a defendant is that the harm be reasonably foreseeable. But the harm to Kermath was *not* reasonably foreseeable; therefore, no duty can be imposed on these defendants. Third, the majority incorrectly applies two additional factors used to determine whether a common-law duty of care exists. If properly applied, these factors would further support the conclusion that no duty can be imposed on defendants. I would deny leave to appeal.

First, in this Court, plaintiff argued that the Court of Appeals erred by not recognizing the existence of the landlord-tenant relationship or the legal effect of such a relationship. The question of whether a landlord-tenant relationship existed was not at issue below, as plaintiff did not premise her argument that Independence Village owed Kermath a duty on the parties' landlord-tenant relationship.[1] Quite simply, the lower courts did not focus on the landlord-tenant relationship because its existence was irrelevant to plaintiff's theory of the case. The reframing of the issues in this case leads the majority to misstate the holdings of the lower courts. The lower courts did not broadly hold that defendants did not owe a duty to Kermath. Rather, they held that the defendants did not owe the duty to Kermath that plaintiff asked them to recognize: a duty to monitor the exit doors at Independence Village untethered to its status as a landlord.

Second, in 2012, this Court explained the critical importance of foreseeability to the proper analysis of whether a defendant owes a duty of care:

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[3] The circuit court held that "Defendants are entitled to summary disposition because they did not breach any duty owed to Kermath." The circuit court's summary disposition decision contained no citation of legal authority other than MCR 2.116(C)(8) and (10), and we cannot determine from its statements whether the circuit court determined that the defendants owed no duty or that the defendants did not breach any duty owed as a matter of law. Therefore, we leave this to the parties and the circuit court to address on remand.

[1] See *Rowland v Independence Village of Oxford, LLC*, unpublished per curiam opinion of the Court of Appeals, issued January 14, 2020 (Docket No. 345650), p 6 n 2 (acknowledging that "[a] special relationship generally exists between a landlord and its tenants," but observing that "[p]laintiff does not claim that Virginia's special relationship with defendants arose from a landlord-tenant relationship").

> Factors relevant to the determination whether a legal duty exists include the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. We have recognized, however, that the most important factor to be considered in this analysis is the relationship of the parties and also that *there can be no duty imposed when the harm is not foreseeable*. In other words, *before a duty can be imposed*, there must be a relationship between the parties *and the harm must have been foreseeable*.[2]

Said another way, "When the harm is not foreseeable, no duty can be imposed on the defendant."[3]

Both the trial court and the Court of Appeals specifically found that the harm in this case was *not* reasonably foreseeable. The trial court granted summary disposition to defendants under MCR 2.116(C)(8) and (10) because it found that they did not owe Kermath a duty of care and that the harm to her was not foreseeable. The Court of Appeals was more precise about the connection between duty and foreseeability, holding that even if it "were to decide that Independence Village had a special relationship with their residents, there still would be no duty because it was not foreseeable that Kermath would wander outside at night in December, wearing just her nightgown and without her keys" and be harmed in the process.[4] I am inclined to agree with those courts' analyses and conclusions. As tragic as Kermath's death is, on these facts, I cannot say that the harm she suffered was reasonably foreseeable, which also means that defendants did not owe her a duty of care.[5]

Whether a harm is reasonably foreseeable "depends on whether a reasonable person 'could anticipate that a given event might occur under certain conditions.' "[6] The factual circumstances of the case—i.e., the parties' relationship to each other—define the risk.[7] The foresee-

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[2] *Hill v Sears, Roebuck & Co*, 492 Mich 651, 661 (2012) (emphasis added; quotation marks, citations, and brackets omitted). See also *In re Certified Question From the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 508-509 (2007).

[3] *In re Certified Question*, 479 Mich at 508. See also *Buczkowski v McKay*, 441 Mich 96, 101 (1992) (stating that because "the foreseeability of the risk" alone can be dispositive, it is often "the first component examined by the court").

[4] *Rowland*, unpub op at 7. See also *id*. at 4-6 (analyzing foreseeability).

[5] *Hill*, 492 Mich at 661; *In re Certified Question*, 479 Mich at 508-509.

[6] *Iliades v Dieffenbacher North America, Inc*, 501 Mich 326, 338 (2018), quoting *Samson v Saginaw Prof Bldg, Inc*, 393 Mich 393, 406 (1975).

[7] *Bertin v Mann*, 502 Mich 603, 620 (2018).

ability test is objective in nature; it "focuses on what risks a reasonable participant, under the circumstances, would have foreseen."[8] "*Notice* is critical to [a] determination whether a landlord's duty is triggered[.]"[9] "[I]n order to show notice, [a] plaintiff ha[s] to demonstrate that [the] defendant knew about the alleged [dangerous condition] or should have known of it because of its character or the duration of its presence."[10] A landlord "has a duty to exercise reasonable care to protect invitees from *an unreasonable risk of harm caused by a dangerous condition of the land*."[11] In other words, to say that a landlord owes a duty of care to their tenant on the basis of reasonably foreseeable harm is to say that they owe a duty of care when a reasonable person would have notice of an unreasonable risk of harm caused by a dangerous condition or defect on the premises.[12] That is not this case.

Here, defendants were not on notice regarding any sort of potential harm to Kermath, let alone the fact-specific harm presented by this case. Kermath's own children testified that they did not foresee the occurrence of this harm and also that they did not make Independence Village—an independent senior-living facility—aware of any concerns that they had regarding Kermath's safety, state of mind, overall health, or general behavior.[13] As the Court of Appeals explained, "Even though

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[8] *Id*.

[9] *Bailey v Schaaf*, 494 Mich 595, 615 (2013).

[10] *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 11 (2016).

[11] *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499 (1988) (emphasis added). Accord *Lowrey*, 500 Mich at 8 ("A premises owner breaches its duty of care when it knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect.") (quotation marks and citation omitted).

[12] Defendants did not owe Kermath a duty of care at common law because the harm that befell her was not reasonably foreseeable. On that ground alone, leave to appeal should be denied: There is no duty of care where the harm is not reasonably foreseeable. But the majority also misconstrues the relevance of *Moning v Alfono*, 400 Mich 425 (1977), as to the issue of duty. *Moning* teaches that while the Court "decides questions of duty [and the] general standard of care," the jury decides "the specific standard of care: whether defendants' conduct in the particular case is below the general standard of care . . . ." *Id*. at 438. Rather than apply *Moning* to determine whether defendants owed Kermath a duty of reasonable care, the majority presumes a duty by discussing the potential burden on defendants of taking measures to prevent residents from being locked out and unable to alert staff.

[13] See Defendants-Appellees' Answer, p 9 (citing deposition testimony of Kermath's two children, Cosette Rowland and Chris Kermath, that

[Kermath's] health had deteriorated, her family found it unforeseeable that [she] would wander outside in only her nightgown on a December morning."[14] And besides, doors that automatically lock from the outside (for the safety of residents) cannot reasonably be classified as a "dangerous condition" or a "defect" on the premises that pose an "unreasonable risk of harm."

"It is sometimes useful for courts to emphasize that common sense, as well as precedent, recommends a particular course of action."[15] Such is the reality here. Simply put, it cannot be fairly said that Independence Village reasonably should have foreseen that Kermath might be harmed by something as commonplace as exterior locking doors that were installed for the safety of the residents. This is all the more true given that Kermath's *own children*, as well as her personal caretaker, did not anticipate that this harm, or any harm even in the same ballpark, would befall her.[16] I do not believe that plaintiff has shown that the harm to Kermath was reasonably foreseeable, which means that defendants did not owe Kermath a duty of care.

Third, the majority misapplies two other factors courts consider to determine whether a duty exists: moral blame and preventing future harm.[17] The majority contends that defendant Independence Village catered to the elderly and provided them with additional services beyond those typically offered to average tenants. But the majority fails

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they did not believe that their mother would wander out of the building and be hurt); *id*. at 9-10 (citing testimony that neither of Kermath's children shared their observation with Independence Village that their mother's health was declining and that she was becoming more forgetful by the end of 2013); *id*. at 10 (citing deposition testimony of Octavia Jones, the independent caretaker hired by Kermath's children to assist Kermath while she lived at Independence Village, who stated that she shared her concerns about Kermath's safety only with Rowland, not with Independence Village).

[14] *Rowland*, unpub op at 6. It is certainly possible to quibble with the Court of Appeals' formulation of what needed to have been foreseeable. But, even pitched at a higher level of generality, it is incorrect to say that the harm was reasonably foreseeable for the reasons I have given.

[15] *Bailey*, 494 Mich at 619 (MCCORMACK, J., concurring).

[16] Because the harm is not foreseeable, the majority's analysis of various other factors that comprise a common-law duty of care is unnecessary. See *Buczkowski*, 441 Mich at 101 (stating that because "the foreseeability of the risk" alone can be dispositive, it is often "the first component examined by the court"). See also *Hill*, 492 Mich at 661; *In re Certified Question*, 479 Mich at 508-509.

[17] See *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86 (2004) (listing "moral blame attached to the conduct" and "policy of preventing future harm" as among the factors) (quotation marks and citations omitted).

to acknowledge that the lease expressly provided that Independence Village had no responsibility for security measures.[18] The additional services that Independence Village offered in no way affected residents' freedom to come and go as they pleased, and the fact that Kermath had to contract with a third party, rather than Independence Village, for additional assistance demonstrates that Independence Village bore no responsibility for providing additional assistance for residents who were not able to live independently. Thus, the idea that any moral blame lies with defendants is not supported by the record. The majority's policy basis is also unclear. If, as the majority contends, the policy of preventing future harm weighs in favor of requiring an *independent* living facility to install a buzzer or cameras for when its tenants lock themselves out, one would be hard pressed to explain why traditional apartment complexes—or even an individual renting out a room to an elderly tenant—would not also be required to take these precautions. The majority points to no caselaw that would support such an extreme expansion of a landlord's duty to maintain the premises over which it exercises control.

For these reasons, I believe that defendants did not owe Kermath a duty of care. Because a majority of this Court holds otherwise, I respectfully dissent.

VIVIANO, J., joins the statement of ZAHRA, J.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

PEOPLE v PIPPEN, No. 161723; Court of Appeals No. 347729. On November 10, 2021, the Court heard oral argument on the application for leave to appeal the April 30, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REMAND this case to the Wayne Circuit Court for a new trial.

In the early morning hours of July 21, 2008, Brandon Sheffield was parked outside a friend's home on the east side of Detroit in a car with three passengers. Defendant and at least two other people allegedly approached Sheffield before Sheffield was shot and killed. Approximately three months later, defendant was apprehended with a firearm and was ultimately charged and brought to trial on the theory that he was the shooter responsible for Sheffield's death.

At trial, the only direct evidence that tied defendant to the shooting was the testimony of the prosecution's witness, Sean McDuffie, who agreed to testify against defendant in exchange for release from proba-

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[18] To the extent the majority's order extends a duty contrary to that which the parties had agreed to, it raises troubling implications for the right of freedom of contract. See *Rory v Continental Ins Co*, 473 Mich 457, 468-469 (2005) (explaining that a court undermines the freedom of contract when it abrogates an unambiguous contractual provision to impose its own assessment of reasonableness).

tion. McDuffie initially testified that he was not sure whether he remembered being with defendant that night or witnessing the shooting. However, this information conflicted with statements McDuffie had previously made to police in which he asserted that he was with defendant and another man named Michael Hudson that night. In that statement, McDuffie told police that defendant "walked over to [Sheffield's] truck, like he was going to talk to the guy, and he pulled out a gun and shot him." Because McDuffie's testimony conflicted with this prior statement, the prosecution sought to treat him as a hostile witness and showed him the statement, which McDuffie then adopted as his version of events.

After charges were filed but before trial was complete, a private investigator hired by defendant's family interviewed Hudson. Hudson, whom McDuffie had placed at the scene of the crime with defendant, told the investigator that McDuffie was lying, and Hudson was willing to testify to this under oath. The investigator contacted trial counsel with the suggestion that Hudson could be a defense witness at trial. However, trial counsel never called Hudson—or any other witnesses—to testify.

Defendant was convicted by a jury of first-degree murder, MCL 750.316(1)(b); possession of a firearm during the commission of a felony, MCL 750.227b; and felon in possession of a firearm, MCL 750.224f. He appealed his convictions, arguing that trial counsel provided ineffective assistance by failing to call Hudson as a witness. The Court of Appeals affirmed. *People v Pippen*, unpublished per curiam opinion of the Court of Appeals, issued January 14, 2016 (Docket No. 321487) (*Pippen I*). Defendant sought leave to appeal to this Court. We reversed the Court of Appeals in part, holding that trial counsel's failure to investigate Hudson as a witness was not objectively reasonable. We then remanded this case to the Wayne Circuit Court to determine whether there was a reasonable probability that trial counsel's deficient performance affected the outcome of the trial. *People v Pippen*, 501 Mich 902 (2017) (*Pippen II*).

On remand, the trial court declined to grant defendant a new trial, concluding that Hudson was not a believable witness and that, in any event, McDuffie's testimony was corroborated by other witnesses. The trial court thus held that the totality of the evidence did not indicate a reasonable probability of a different outcome. On appeal, the Court of Appeals affirmed. *People v Pippen*, unpublished per curiam opinion of the Court of Appeals, issued April 30, 2020 (Docket No. 347729) (*Pippen III*). Defendant again sought leave to appeal to this Court.

Whether defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579 (2002). A trial court's findings of fact are reviewed for clear error, while constitutional issues are reviewed de novo. *Id*. A trial court's factual findings are clearly erroneous "if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Reese*, 491 Mich 127, 139 (2012) (quotation marks and citation omitted). In *Strickland v Washington*, 466 US 668, 687 (1984), the United States Supreme Court held that to

establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient and (2) that the defendant was prejudiced as a result of that deficient performance. Because this Court already concluded that trial counsel's performance was deficient, only the prejudice prong of *Strickland* is at issue. To establish prejudice, a defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694; *People v Randolph*, 502 Mich 1, 9 (2018).

The Court of Appeals erroneously concluded that defendant failed to establish the prejudice prong of his ineffective-assistance claim. The Court of Appeals found that defendant did not suffer prejudice as a result of his trial counsel's failure to present Hudson's testimony. *Pippen III*, unpub op at 5. Because McDuffie was declared a hostile witness as a result of his conflicting testimony, the Court of Appeals concluded that Hudson's testimony was not necessary to impeach McDuffie. Thus, there was not "a reasonable probability that a different result would have been likely had Hudson testified." *Id*. at 6. The Court of Appeals also determined that Hudson would not have been a credible witness because Hudson was unable to recall some details surrounding defendant's arrest and because of Hudson's past criminal history. *Id*. at 4-5. But these findings misunderstand the trial proceedings and the value of Hudson's testimony.

The only direct evidence that tied defendant to the crime was McDuffie's testimony. The dissent places unfounded weight on the fact that defendant was apprehended with a firearm that was used in the crime. Through ballistics testing, experts determined that the firearm used in the crime was the same firearm found in defendant's possession at the time of his arrest. But McDuffie himself testified that he knew that the firearm in defendant's possession at the time of his arrest had belonged to two different individuals, and McDuffie did not know when the firearm had changed hands. Possession of the same firearm as the one used in a crime approximately three months earlier, especially when McDuffie testified that the seized firearm had changed ownership more than once, is hardly convincing evidence of defendant's guilt. Accordingly, the jury's consideration hinged entirely on McDuffie's account.

Hudson, however, was prepared to testify that no such crime occurred and that McDuffie's version of events never transpired.[1] Trial

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[1] The dissent dismisses the value of Hudson's testimony because Hudson's testimony is uncorroborated by other evidence, even though testimony need not be corroborated to serve as compelling evidence. The dissent's view misunderstands our application of *Strickland*, which asks us to consider whether there is a reasonable probability that, had trial counsel called Hudson to testify, the outcome of the trial would have been different. Given our doubts about the strength of the prosecution's case-in-chief, we are convinced that Hudson's testimony—which would

counsel knew about Hudson's proposed testimony but did not present it, so the jury never had the opportunity to consider Hudson's testimony or credibility. At trial, McDuffie's testimony was impeached by noting various inconsistencies with other witnesses regarding the factual details of the crime, such as the number of passengers in the shooter's vehicle or whether those passengers wore masks or displayed guns. Still, these inconsistences could be attributed to the passage of time or the trauma of experiencing a crime—they are not enough, alone, to cast serious doubt on McDuffie's credibility. Similarly, Hudson's inability to recall details from that night would not have rendered his proposed testimony completely incredible. To the extent the trial court and the Court of Appeals held that Hudson could have been impeached with his past criminal history, it is unclear that the prosecution could have done so, given how old these past crimes were. See MRE 609(c). Moreover, even the Court of Appeals acknowledged that " '[t]heft crimes are minimally probative on the issue of credibility . . . .' " *Pippen III*, unpub op at 4, quoting *People v Meshell*, 265 Mich App 616, 635 (2005). Put simply, we believe that the lower courts clearly erred in holding that a reasonable jury would not credit Hudson's testimony. The lower courts cited no evidence or circumstance that casts such serious doubt on Hudson's credibility to support the contention that no reasonable jury would credit Hudson's testimony.

Instead, Hudson's testimony would have directly contradicted McDuffie's entire account of that night. This is especially compelling because McDuffie's own testimony placed Hudson at the scene of the crime. If believed, Hudson's testimony would have established that McDuffie was lying about more than minor facts. Hudson has unwaveringly maintained that he never saw defendant shoot anyone. This clear, exculpatory evidence directly contradicts McDuffie's testimony, which was central to the prosecution's case. McDuffie was the *only* witness who testified that defendant shot and killed Sheffield. See generally *People v Trakhtenberg*, 493 Mich 38, 56 (2012) ("Where there is relatively little evidence to support a guilty verdict to begin with (e.g., the uncorroborated testimony of a single witness), the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt.") (cleaned up). Put simply, the jury had to consider whether McDuffie was lying under oath at trial or in his prior statements to police. Had Hudson's testimony been presented at trial, it might have affected which version of McDuffie's account of that night the jury chose to believe. Hudson's testimony would have presented the jury with corroboration for what McDuffie initially said under oath at trial—that McDuffie did not recall witnessing defendant kill Sheffield.

Having already concluded that the decision to neither investigate nor call Hudson to testify was deficient, the only question we are left to decide is whether defendant was prejudiced by that deficiency. We

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have offered an explanation to the jury that McDuffie's version of events never transpired—would have been enough to create a reasonable probability of a different outcome.

conclude that he was.[2] Hudson's testimony would have bolstered McDuffie's initial testimony in a way that no other evidence could have. Hudson's testimony was particularly crucial for the defense because no witness other than McDuffie told the jury that defendant was at the crime scene. No other physical evidence definitively placed defendant there. For these reasons, there is a reasonable probability that, had defense counsel called Hudson as a witness, the jury would have believed that defendant did not shoot and kill the victim, which would be consistent with McDuffie's initial trial testimony. We hold that there is a reasonable probability that but for trial counsel's failure to call Hudson as a witness, the result of the proceeding would have been different. *Strickland*, 466 US at 694. Accordingly, the Court of Appeals committed error requiring reversal, and defendant is entitled to a new trial.

ZAHRA, J. (*dissenting*). This case has an extensive appellate history. Defendant was charged with first-degree murder, possession of a firearm during the commission of a felony, and possession of a firearm by a felon. The trial judge who initially presided over the case granted defendant's motion to dismiss the charges. The prosecution appealed and our Court of Appeals reversed this decision.[1] On remand, the case was reassigned to Third Circuit Court Judge Timothy M. Kenny, a seasoned and respected jurist, who presided over defendant's jury trial. The jury convicted defendant as charged, and defendant was sentenced to life without parole. Defendant moved for a new trial, arguing that defense counsel was ineffective for failing to investigate or present testimony from Michael Hudson, whom defendant believed would have impeached Sean McDuffie's testimony identifying defendant as the individual who shot and killed the victim. Following a *Ginther*[2] hearing, Judge Kenny found that defendant had not established that defense counsel was ineffective. Defendant appealed in the Court of Appeals, which affirmed his convictions.[3]

Thereafter, this Court reversed the Court of Appeals' determination that defense counsel's performance was objectively reasonable and vacated as dicta the Court of Appeals' conclusion that defendant failed to establish he was prejudiced by counsel's performance.[4] We remanded

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[2] The dissent characterizes our conclusion as summary, despite the fact that an application for leave to appeal was first filed in this Court in 2016 and we have heard oral argument twice in this case.

[1] *People v Pippen*, unpublished per curiam opinion of the Court of Appeals, issued December 13, 2011 (Docket No. 300171) (*Pippen I*), lv den 491 Mich 943 (2012).

[2] *People v Ginther*, 390 Mich 436 (1973).

[3] *People v Pippen*, unpublished per curiam opinion of the Court of Appeals, issued January 14, 2016 (Docket No. 321487) (*Pippen II*), rev'd in part and vacated in part 501 Mich 902 (2017).

[4] *People v Pippen*, 501 Mich 902, 903 (2017).

the case to the trial court with directions to determine "whether, considering the totality of the evidence presented, there is a reasonable probability that the outcome of the trial was affected."[5] On remand, Judge Kenny reviewed the totality of the circumstances and concluded that defendant did not establish a reasonable probability that the outcome of defendant's trial would have been different. Specifically, Judge Kenny found that Hudson was not a believable witness and that, in any event, McDuffie's testimony was corroborated by other witnesses. Accordingly, the trial court sustained defendant's convictions and sentences. Defendant again appealed in the Court of Appeals, and a different panel of appellate judges unanimously affirmed the trial court.[6] Defendant again appeals in this Court, and today a majority of the Court sees fit to again reverse the judgments of the lower courts and set aside the jury's guilty verdict.

I dissent.

This Court's summary reversal order shows absolutely no deference to our lower courts' review, and it inexplicably rejects the trial judge's finding that Hudson, who testified at the *Ginther* hearing, lacked credibility. I see no principled reason to reject the trial court's credibility determination or the appellate court's legal conclusions on appeal. I would affirm defendant's convictions.

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[5] *Id*.

[6] The Court of Appeals panel concluded:

> [U]nder the totality of the circumstances, there is not a reasonable probability that a different result would have been likely had Hudson testified. McDuffie's testimony was already significantly impeached to the point where Hudson's general proclamation that McDuffie's testimony was false and his general denial of ever seeing Pippen shoot someone, would not have resulted in a massive loss of credibility. Moreover, the fact that Pippen and Hudson were together approximately three months later when Pippen was arrested for discarding the murder weapon bolstered the prosecution's case. Hudson's testimony at the evidentiary hearing that he did not see Pippen discard his gun was found to be patently incredible, given that a police officer testified that the two men were in close proximity and discarded their guns under the same vehicle. Finally, Hudson's history of theft crimes would have further impeached his veracity, and his status as a parole absconder willing to risk incarceration to testify for his friend shows that he was a loyal and biased friend. Thus, viewing the totality of the circumstances, the court did not err by finding Pippen had failed to establish the prejudice prong of his ineffective-assistance claim. [*People v Pippen (After Remand)*, unpublished per curiam opinion of the Court of Appeals, issued April 30, 2020 (Docket No. 347729), p 5.]

I. BASIC FACTS AND PROCEEDINGS

A. THE TRIAL

Defendant's convictions stem from the shooting of 19-year-old Brandon Sheffield in the early hours of July 21, 2008. Sheffield, Adam McGrier, Camry Larry, and Kyra Gregory were seated in Sheffield's new black SUV in front of Gregory's home on Roxbury Street in Detroit. The four were watching music videos in the SUV when a dark four-door car[7] carrying at least three people approached the SUV and stopped. The front-seat passenger got out of the car, approached the front driver's side of the SUV, and shot Sheffield in the head. The car moved a few feet before it hit a tree and came to a stop. Larry, seeing that Sheffield had been shot, ran to safety. After the shot was fired, Gregory slid out of the car and fled to her home.

McGrier, who was in the front passenger seat at the time of the shooting, testified that a car pulled up alongside of the SUV. A man about six feet tall exited the car. He was dressed in black and was wearing a garment that prevented McGrier from seeing the man's face. This person approached the driver's door and stuck a gun into the open window. The man ordered everyone out of the car. As McGrier opened his door, Sheffield threw the SUV into drive. McGrier ran and heard a gunshot as he fled the scene. McGrier and Larry each testified that there were two or three other people in the car from which the gunman emerged, all of whom had bandannas or scarves covering their faces. The police had no leads beyond a shell casing found in the SUV.

Three months later, on October 18, 2008, at around 1:00 a.m., Sergeant Eric Bucy was patrolling Seven Mile and Fairport Road with three partners in a semi-marked police car when he saw defendant with two other men, Michael Hudson and Norman Clark. Defendant was dressed in dark clothing at that time: a black hoodie, blue jean shorts, a black hat, and gloves, which was odd as the low temperature was 76 degrees that day. Bucy testified that when defendant saw him, he started walking east. Bucy noticed the butt of a handgun protruding from defendant's waistband. Bucy observed defendant and Hudson step between two parked cars. While the men were between the cars, Sergeant Bucy saw defendant take a handgun with a large magazine from his waistband and kick it under the car. He also saw Hudson drop and kick a different handgun under the car. Thereafter, defendant and Hudson parted ways. Bucy testified that defendant removed his gloves as he was walking across Seven Mile.

Police apprehended defendant, Hudson, and Clark, and recovered two handguns from under the car: a Glock nine-millimeter semiauto-

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[7] Testimony about the make, model, and color of the car varied. The consensus of the witnesses seemed to be that the car was a black or dark-colored four-door Chevrolet or Dodge sedan such as a Lumina, Malibu, or Neon.

matic pistol with an extended magazine and a Bersa Thunder 380. Defendant and Hudson were arrested, and Clark was released without charges. Defendant admitted under oath that he was in possession of a firearm on October 18, 2008, in the area of Fairport and East Seven Mile Road in the City of Detroit. Meanwhile, police test-fired the Glock nine-millimeter pistol obtained during defendant's arrest and entered the resulting scan of the spent shell casing into the Integrated Ballistics Identification System, which compared the markings on the spent casing against previously fired shell casings entered into the system. Police determined that the tested shell casing and the spent casing found at the crime scene were fired from the same gun.[8]

Police investigated defendant's known contacts and learned that Sean McDuffie was friends with defendant, Hudson, and Clark. McDuffie had been sentenced under the Holmes Youthful Trainee Act (HYTA)[9] for carrying a concealed weapon (CCW), and there was an open warrant for his arrest for having violated the terms of his HYTA sentence. In August 2009, the police took McDuffie into custody and interviewed him regarding several open cases. At some point during this interview, McDuffie told police that in the summer of 2008 he and defendant were riding around in a car driven by Hudson. McDuffie described Hudson and defendant as "his longtime friends." Defendant was in the front passenger seat and McDuffie in the back seat. At some point during the ride, defendant asked Hudson to stop the car near a dark green SUV parked on the street.

According to McDuffie, defendant got out of the car, walked over to the driver of the SUV as if he was going to talk to him, and shot him. McDuffie saw people run and estimated that there were four people in the SUV. McDuffie averred that defendant got back in the car and they drove to Hudson's cousin's house. McDuffie claimed that the car Hudson was driving that evening was a dark-colored Malibu or Neon. McDuffie

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[8] The jury focused on this critical piece of evidence. The trial judge solicited written questions from the jurors after the direct and cross examination of a ballistics expert presented by the prosecution. The trial judge paraphrased one of inquiries as follows:

> *The Court*: . . . You talked about the comparison that you make with regards to the spent casing that was found [at the murder scene] with the test fired casing [from the gun defendant possessed at the time of his arrest], and at some point you drew a conclusion that both of them had been fired from the same weapon?
>
> [*Ballistics Expert*]: That's correct.
>
> *The Court*: And you . . . [found] points of match or points of comparison that were there on both [shell casings]?
>
> [*Ballistics Expert*]: Correct.

[9] MCL 762.11 *et seq*.

knew that the event happened near Morang Avenue, Kelly Road, or Houston Whittier Avenue, and that it was sometime after 10:00 p.m. The crime scene on Roxbury is very close to the major roads identified by McDuffie.

McDuffie was incarcerated on a material-witness warrant at the time of trial. He admittedly did not want to be in court. On direct examination, he first testified that he did not see defendant shoot anyone. The prosecution was permitted to treat McDuffie as a hostile witness, and after being shown prior statements given to police, McDuffie inculpated defendant for the murder of Sheffield. In exchange for his trial testimony, McDuffie was released from his HYTA probation.

McDuffie testified that defendant fired one shot and did not take anything from the SUV. He testified that the victim was in a new dark green "regular car truck," i.e., an SUV. He also testified that the person defendant shot was light-skinned and was sitting in the driver's seat. This description matched that of Sheffield. When asked if he knew what defendant did with the gun, McDuffie responded, "He got locked up with it." McDuffie testified that defendant used a "Glock 9."

The jury convicted defendant as charged after deliberating for merely an hour and seven minutes. He was sentenced to life without parole.

B. THE *GINTHER* HEARING AND RELATED POSTTRIAL PROCEEDINGS

A *Ginther* hearing was held to consider defendant's claims of ineffective assistance of counsel. Defendant first presented testimony from his trial counsel. Counsel viewed the case as a credibility contest and noted "strong issues with Mr. McDuffie's credibility." When defense counsel was asked why he did not talk to Hudson before trial, he replied:

> I had no intention of calling him as a witness. So I thought that in this case the way that the facts looked, anybody who allegedly could have been placed in that car by Mr. McDuffie needed to be quiet.[10]

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[10] On cross-examination, trial counsel elaborated:

> Well, there are a number [of] down-sides to calling him.
>
> Mr. Hudson was arrested with [defendant] three months later when the alleged murder weapon was recovered. There were two guns recovered underneath the car.
>
> One of the officers specifically said that he saw [defendant] with an extended clip from his waistband, something like that. And as he began to approach them, the two individuals were walking away and heard some noise, and two guns were recovered underneath a car.

Defendant then presented the testimony of Miguel Bruce, a former Detroit police officer and private investigator retained by defendant's family. Bruce testified that he reviewed McDuffie's statement, which indicated that Hudson was the driver of the car involved in the incident. He interviewed McDuffie and later interviewed Hudson before trial and asked him about McDuffie's version of events. Hudson told Bruce he was not involved and that McDuffie was lying. Bruce testified that he found Hudson credible despite having a criminal history, noting that "everybody makes mistakes." Bruce relayed this information to defense counsel before and during trial.

Defendant next presented Hudson, who testified that he had known defendant for roughly 16 or 17 years. He also knew McDuffie in "[s]ort of the same way, kind of grew up together." He described McDuffie as a longtime friend. Hudson admitted that he and defendant had both been charged with and pleaded guilty to CCW in October 2008. He admitted that after he and defendant were confronted by the police, they both walked toward a parked car and he threw a weapon underneath the car. He claims that he did not see defendant throw a gun under the same car, but he did admit that defendant pleaded guilty to a concealed-weapon charge arising from the event. He also admitted that defendant often carried a gun, though he offered no recollection of a particular type. Hudson also admitted to having previous felony convictions, at least four of which involved theft.

Hudson testified that he learned from defendant's sister that defendant had been arrested and charged with a homicide. He testified that he learned that McDuffie had told the police that he saw defendant

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> He didn't see anybody drop a gun or throw a gun, anything like that.
>
> What you have here, this gun with the extended clip has been implicated in a number of other shootings. My strategy at trial was to at least try to poke a hole or raise some type of doubt as to who actually had that weapon.
>
> Now if Mr. Hudson is on the stand, I would assume that he would say that no, the gun with the extended clip wasn't in his possession. It was in [defendant]'s possession. That is a demerit that I didn't want to argue. I'm not going to try to concede that point.
>
> My whole point at trial was to say no, the murder weapon wasn't in [defendant]'s possession. It was in someone else's possession. That he never had the gun.
>
> Now if I put Mr. Hudson on the stand, and this question has to come up, why in the world would I bring another witness to come in to say well, no, the murder weapon wasn't in my possession. It was in [defendant]'s possession. That makes no sense at all in my opinion.

commit the crime during defendant's trial. Hudson claimed that he was not involved in the crime and that he had never seen defendant shoot anyone. He also claimed that he told Bruce and defense counsel during a break in the trial that McDuffie was lying.[11]

Hudson also testified that he was in violation of parole when he arrived at court. He claimed on redirect examination that he "had a prior violation" and that "I knew coming to court today that I was going to jail." The prosecution in rebuttal, however, called a member of the Michigan Department of Corrections' Absconder Recovery Unit, who testified that the prosecution had notified him that Hudson would be in court. He arrived and approached Hudson in the court's hallway. He testified that Hudson appeared startled when he was told he was in violation of parole. Defense counsel had no questions for this witness.

Defendant did not testify.

On April 16, 2015, the trial court issued its decision from the bench and denied defendant's motion for a new trial. Judge Kenny found that trial counsel's performance was not objectively unreasonable and did not address the prejudice prong of the standard set forth in *Strickland v Washington*[12] at that time.

C. PROCEEDINGS ON REMAND

The Court of Appeals affirmed defendant's conviction.[13] Thereafter, this Court reversed the Court of Appeals' determination that defense counsel's performance was objectively reasonable, vacated the Court of Appeals' conclusion that defendant had failed to establish that he was prejudiced by the deficient performance,[14] and remanded the case to the trial court with directions to determine "whether there is a reasonable probability that the outcome of the trial was affected."[15]

On remand, Judge Kenny considered the demeanor of the witnesses who testified at trial and weighed the evidence in light of all the trial testimony and evidence presented at the *Ginther* hearing. The learned trial judge found that "Hudson was not a believable witness and based upon his testimony regarding the circumstances of the discarding of the firearm, his five theft-related, felony convictions[16] and his lengthy friendship with the defendant, a reasonable jury would not credit his

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[11] Notably, this testimony is arguably inconsistent with Bruce's testimony that he and Hudson had discussed "McDuffie's version of events" *before* trial commenced.

[12] *Strickland v Washington*, 466 US 668 (1984).

[13] *Pippen II*, unpub op at 1, 4.

[14] *People v Pippen*, 501 Mich 902, 902 (2017).

[15] *Id*. at 903.

[16] The trial court apparently included Hudson's conviction for receiving and concealing stolen property, a crime that, though related to theft,

testimony." The court further found that the testimony of McDuffie was "corroborated by other surviving witnesses at the scene," and there was "evidence that less than 90 days after the murder, defendant . . . was in possession of the murder weapon." Ultimately, the trial judge concluded that the totality of the evidence presented did not create a reasonable probability of a different outcome had Hudson's testimony been presented at trial. Accordingly, the court affirmed defendant's convictions and sentences. Defendant again appealed in the Court of Appeals, which affirmed the trial court.[17]

II. ANALYSIS

Ineffectiveness-of-counsel claims present mixed questions of law and fact.[18] Questions of law are reviewed de novo.[19] Questions of fact are reviewed for clear error.[20] A trial court's decision to grant or deny a new trial is reviewed for an abuse of discretion.[21]

The question before the trial court on remand was whether, "considering the totality of the evidence presented, there is a reasonable probability that the outcome of the trial was affected."[22] To answer this question, the trial court was compelled to make factual findings that are reviewed for clear error. *Strickland* stated that a reasonable probability is "probability sufficient to undermine confidence in the outcome."[23] A reasonable probability need not rise to the level of making it more likely than not that the outcome would have been different.[24] "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."[25]

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does not actually require the prosecution to prove that a person stole property. See MCL 750.535. Still, the offense clearly contains an element of dishonesty and may be relied on as impeachment evidence, MRE 609(a)(1), and the court's inclusion of this offense likely means it was a felony.

[17] *Pippen (After Remand)*, unpub op at 2.

[18] *Strickland*, 466 US at 698; *People v LeBlanc*, 465 Mich 575, 579 (2002).

[19] *Strickland*, 466 US at 698; *LeBlanc*, 465 Mich at 579.

[20] *Strickland*, 466 US at 698; *LeBlanc*, 465 Mich at 579; MCR 2.613(C).

[21] *People v Johnson*, 502 Mich 541, 564 (2018).

[22] *People v Pippen*, 501 Mich 902, 903 (2017), citing *Strickland*, 466 US 668.

[23] *Strickland*, 466 US at 694.

[24] *Id*. at 693.

[25] *Strickland*, 466 US at 695.

Here, the trial court was well within its discretion to determine that no reasonable jury would find Hudson's testimony credible. The majority order does not identify any reason why a reasonable jury would accept Hudson's testimony. Instead, the majority order appears to accept the notion that McDuffie's testimony is fabricated. Defendant offers nothing to corroborate Hudson's testimony, and the majority order likewise offers no genuine and material evidence to corroborate Hudson's story.[26] For this reason, this case stands in sharp contrast to *People v Johnson*.[27]

In *Johnson*, the new witness was a res gestae witness who offered testimony regarding the crime itself. Here, Hudson merely denies his involvement with the crime and, by extension, defendant's involvement in the crime. Even accepting Hudson's claim that he had nothing to do with the events leading to this murder, it seems quite unlikely that defendant also had nothing to do with the murder. Further, Hudson's testimony is highly dubious, given that he was later found with a weapon along with defendant, who was found in possession of the only weapon that could have made the markings on the single fired shell casing found at the crime scene. The fact remains that defendant and Hudson were found in this compromising situation.

Moreover, Hudson's testimony is self-serving. Clearly, he has incentive to not place himself at the scene of the murder and claim that McDuffie is lying. And of course, as the trial court noted, "[a]t the time of his testimony, Mr. Hudson was a parole absconder and someone with five theft-related convictions[,] which seriously impacted his credibility."

Defendant counters by arguing that Hudson's prior theft-related convictions were 9 to 11 years old at the time of defendant's trial and that given their age and nature, they are only minimally probative of Hudson's credibility (or lack thereof). Still, a jury would consider that Hudson's prior convictions spanned from 2003 to 2005 and that the instant case occurred in 2008. As the Court of Appeals stated, "[u]nder MRE 609(c), Hudson's 2003, 2004, and 2005 theft-related convictions were relevant to the trial court's credibility determination, since it is possible that no more than ten years would have elapsed from the date of his convictions, or his release from the confinement imposed for those

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[26] The majority order takes the curious position that McDuffie's initial testimony that he did not see defendant shoot anyone, corroborates Hudson's testimony. But McDuffie recanted this testimony when confronted with his prior statement to police. This occurred only after the trial court declared McDuffie a hostile witness. After recanting his general denial that he knew nothing, McDuffie provided in-depth and detailed facts relating to this homicide. To take the position that this recanted testimony—testimony that provided the basis for the trial court to declare McDuffie to be hostile to the prosecution—meaningfully corroborates Hudson's testimony is, at best, naïve.

[27] *Johnson*, 502 Mich 541.

convictions, at the time of [defendant]'s trial."[28] Further, the prosecution would likely cast Hudson as defendant's accomplice, making sure the jury understood that Hudson's self-serving testimony is not corroborated and contradicts evidence presented at trial that was corroborated. Ultimately, it was the duty of the trial judge to assess credibility of the witnesses who testified at the *Ginther* hearing. Considering the totality of the evidence presented at trial, there is no clear error in the trial court's finding that the same jury that convicted defendant in a little over an hour would reasonably reject Hudson's testimony in part because of his prior convictions.[29]

Further, Hudson's testimony has no substance; he simply says that McDuffie is lying. Thus, defendant's claim that Hudson's testimony is credible because it has remained consistent over time is unpersuasive.

Similarly, I see no merit in the claim that Hudson should be believed because he came to court to testify, knowing that he would be arrested because he violated parole. This testimony was impeached at the *Ginther* hearing by the officer who testified that Hudson was startled when he approached and informed him that he would be going to jail. And even if Hudson was aware of the potential consequence of his testimony, his violation of parole conditions and subsequent months of hiding and evading police further demonstrates his lack of credibility. In sum, a reasonable jury would only have reason to reject Hudson's self-serving testimony and no sound basis to accept it.

The majority apparently embraces defendant's specious claim that "the trial court failed to consider whether Mr. Hudson was sufficiently credible when considered in combination with the evidence presented at trial, instead viewing the new evidence in isolation." Defendant and the majority understate the strength of the prosecution's case. It is true that McDuffie—the prosecution's star witness—was himself convicted of CCW and admitted that he received some benefit for testifying. But there is little doubt that McDuffie witnessed the victim's murder.[30]

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[28] *Pippen (After Remand)*, unpub op at 4. As previously mentioned, defendant's jury trial was delayed by pretrial interlocutory proceedings. See *Pippen I*.

[29] Moreover, Bruce's testimony in regard to Hudson's credibility is as questionable as it is irrelevant. Bruce offers no reason why he believes Hudson and disregards every basis to question his credibility.

[30] Other than the possibility, which has not been raised in this case, that police fed McDuffie facts about the murder during the interview, there is no other explanation for his detailed knowledge of the facts and circumstances surrounding this homicide.

The majority's reversal order makes the incredible assertion that "[p]ossession of the same firearm as the one used in a crime approximately three months prior, especially when the seized firearm had not been in defendant's sole possession, is hardly convincing evidence of defendant's guilt." Significantly, however, there is absolutely no evi-

Specifically, McDuffie knew the general date and location of a murder; he knew that the victim was a light-skinned young black man seated in the driver's seat of a new dark SUV; he knew that there were three other passengers in the SUV; and he knew that the SUV passengers ran after the shooting. His testimony of the murder largely tracked the testimony of the victim's friends: that a dark car with at least three men approached the SUV and that the front passenger of the car got out of the vehicle and shot the victim. McDuffie also knew the exact weapon that was used and that only one shot was fired. Significantly, none of this evidence would have been affected by the presentation of Hudson's testimony.[31]

It is simply implausible that McDuffie did not witness the victim's murder. He knew too many details that were corroborated by fact and by the witnesses in the victim's vehicle—McGrier, Larry, and Gregory. And since McDuffie identified defendant as the shooter and described the

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dence that another person possessed the firearm during the three months from when defendant used it to murder Sheffield to when defendant was found attempting to discard it. To be clear, McDuffie only testified that the firearm had changed hands before he witnessed defendant use it to murder Sheffield, not afterwards. Of course it is possible that the firearm had not been in defendant's sole possession during this interim period, but there is simply no record evidence to support the factual assertion advanced in the majority's order. Further, defendant was not just found in illegal possession "of the same firearm as the one used in a crime." The majority itself acknowledges earlier in its order that "[t]hrough ballistics testing, experts determined that the firearm used in the [murder] was the same firearm found in defendant's possession at the time of his arrest." In other words, defendant was found in illegal possession of the "murder weapon."

More significantly, the majority fails to acknowledge undisputed evidence that makes defendant's possession of the murder weapon highly probative of his guilt. There is no dispute that McDuffie provided a statement reflecting that defendant used a Glock nine-millimeter handgun with an extended magazine to murder Sheffield. And when asked if he knew what defendant did with the handgun, McDuffie replied, "He got locked up with it." As mentioned, ballistics testing verified that the Glock nine-millimeter handgun with an extended magazine that defendant "got locked up with" was the murder weapon, just as McDuffie's statement said it was. These facts are uncontroverted and form the foundation of a compelling case establishing defendant's guilt. For these reasons, no reasonable jury would be swayed from their guilty verdict as a result of Hudson's uncorroborated testimony that no such crime occurred. In short, it is not the dissent that misunderstands the proper application of *Strickland*; it is the majority.

[31] *Strickland*, 466 US at 695.

murder weapon later found in defendant's possession, it is extremely unlikely that the jury would have been swayed by Hudson's self-serving testimony.

Defendant's attempt to tarnish McDuffie's testimony as uncorroborated also fails.[32] Corroboration need not be perfect. Yes, McDuffie could not specifically remember the type or color of the car, but he clearly knew it was a dark four-door sedan. He may not have remembered the exact location of the murder, but he clearly identified the scene by reference to major crossroads. More significant, however, is what McDuffie did know. As previously described, he knew a great amount of detail relating to this murder, and all the facts relating to the murder to which McDuffie testified were corroborated by other witnesses. When considered in totality, these corroborated facts provide a compelling narrative that, in all reality, must have occurred. In other words, given these facts, one could readily distinguish this single murder from every other murder in the city of Detroit that took place in 2008. McDuffie witnessed this murder and implicated defendant, who was later found with the very weapon used in the murder. The jury's guilty verdict should not be set aside.

III. CONCLUSION

The action of the majority is extremely troubling in that it is wholly inconsistent with longstanding applicable standards of appellate review. There has been no showing that the trial court's factual findings at the *Ginther* hearing or on remand are clearly erroneous. Credibility determinations made in evidentiary hearings rest in the sound discretion of the trial court. I see nothing in the record to support the notion that the trial judge here abused his discretion when he found Hudson's testimony lacking in credibility, while also finding McDuffie's testimony credible and corroborated. For this reason, I cannot conclude that the trial court abused its discretion in denying defendant's motion for a new trial. In sum, I am dumbfounded by the actions of the majority. In awarding relief to defendant and reversing the lower courts' rejection of defendant's argument, a narrow majority of this Court finds prejudice that not one of the seven prior jurists who reviewed this case believed sufficient to supplant a unanimous jury verdict. Clearly, the lower courts

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[32] Specifically, defendant points to the following: (1) McDuffie could not remember the type or color of car that he alleged Hudson was driving or whose car it was; (2) McDuffie could not remember what he, or defendant, or Hudson were wearing; (3) McDuffie could not remember where or when this event happened, but stated that he believed it was near the streets of Morang, Kelly, or Houston Whittier and that it was sometime after 10:00 p.m. sometime during the summer of 2008; (4) McDuffie could not say how far Hudson's car was from the victim's car when the shooting occurred; and (5) McDuffie did not remember the victim's car rolling into a tree.

on remand proceeded with the knowledge of these proceedings and the specter of further review from this Court. Yet the lower courts remained convinced that defense counsel's failure to present the testimony of Hudson did not result in prejudice to defendant. It is not surprising that no other judge in the history of this case has questioned the jury's verdict. When the totality of the evidence presented to the jury is considered, it is implausible that "the factfinder would have had a reasonable doubt respecting guilt."[33] The prosecution presented testimony from the three surviving passengers in the victim's vehicle at the time of the shooting. Their testimony corroborated McDuffie's testimony that defendant murdered the victim, and it is not affected by Hudson's putative testimony. Because the lower courts have properly rejected defendant's claim of ineffective assistance of counsel, I dissent. I would affirm the Court of Appeals' decision and sustain the jury's verdict.

VIVIANO and CLEMENT, JJ., join the statement of ZAHRA, J.

Oral Argument Ordered on the Application for Leave to Appeal June 2, 2022:

In re JOSEPH & SALLY GRABLICK TRUST and *In re* JOSEPH GRABLICK TRUST, Nos. 163981 and 163982; reported below: 339 Mich App 534. On order of the Court, the application for leave to appeal the December 16, 2021 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address whether divorce terminates a relationship by "affinity" under MCL 700.2806(e), thus causing "a disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse" to be revoked under MCL 700.2807(1)(a)(*i*). See *Shippee v Shippee's Estate*, 255 Mich 35, 37 (1931). See also *In re Bordeaux Estate*, 37 Wash 2d 561, 565 (1950).

The Family Law Section and the Probate and Estate Planning Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 3, 2022:

WILLIAMS v STATE OF MICHIGAN, DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 163834; Court of Appeals No. 355203.

JOHNSON v BOARD OF STATE CANVASSERS, No. 164461; Court of Appeals No. 361564.

MCCORMACK, C.J. (*concurring*). I concur with denying leave to appeal because there is nothing here meriting our further time or attention.

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[33] *Strickland*, 466 US at 695.

The plaintiff's mandamus action plainly lacks merit because he cannot show that the Board of State Canvassers had a clear legal duty to certify his name to the ballot.

A finding that the signatures supporting the plaintiff's petitions were sufficient is a matter of the Board's judgment that requires some expertise. Therefore, it is not a ministerial task subject to mandamus. A writ of mandamus shall issue only where (1) the plaintiff has a clear legal right to the performance of a specific duty; (2) the defendant has a clear legal duty to perform the requested act; (3) *that act is ministerial*; and (4) the plaintiff has no other legal or equitable remedy. *Taxpayers for Mich Constitutional Gov't v Michigan*, 508 Mich 48, 82 (2021). Although mandamus "will lie to require a body or an officer charged with a duty to take action in the matter, *notwithstanding the fact that the execution of that duty may involve some measure of discretion* . . . , mandamus will lie to compel the exercise of discretion, *but not to compel its exercise in a particular manner*." *Teasel v Dep't of Mental Health*, 419 Mich 390, 410 (1984) (emphasis added).

The plaintiff quarrels with the Board's methodology—he does not claim the Board's decision was ministerial. Oral argument won't change this deficiency in his application.

ZAHRA, J., joins the statement of MCCORMACK, C.J.

ZAHRA, J. (*concurring*). I concur in the Court's decision to deny the application. I write separately to request that the Legislature amend the Michigan Election Law, MCL 168.1 *et seq*., to require petitions to be filed with the Bureau of Elections and determinations made by the Board of State Canvassers at least six weeks earlier in the election cycle than currently required by law, thereby providing the judicial branch a better opportunity to provide meaningful judicial review to those allegedly aggrieved by decisions of the Bureau of Elections and the Board of State Canvassers. Election-law cases have very concrete deadlines that are necessary to facilitate the printing and distribution of ballots. The current process provides very little time between decisions of the Board of State Canvassers and the date ballots must be finalized for printing. In the present case, there were only eight days between the vote of the Board of State Canvassers and the date a disposition was needed from this Court. These cases can present substantial and complex questions of law, which generally require extensive briefing and cannot properly be resolved in a matter of days. As discussed at length in Justice VIVIANO's concurring statement, there is a question whether "the Court of Appeals erred to the extent it held that the Board has discretion to dispense with the statutory requirement to verify petition signatures by comparing them to the digitized signatures in the qualified voter file." Fortunately, in the present case, the action filed by Johnson is plainly deficient and is properly denied in short order. Johnson has filed a mandamus action asking the Court to order his name placed on the ballot. To obtain an order of mandamus, a plaintiff must show that the defendant had a clear legal duty to act in accordance with plaintiff's demands. See *Taxpayers for Mich Constitutional Gov't v Michigan*, 508 Mich 48, 82 (2021). Here, even if Johnson is correct that the Bureau of Elections erred by failing to check every signature against

the qualified voter file, Johnson would only be entitled to that relief, not the placement of his name on the ballot. Chief Justice MCCORMACK is correct to conclude that "[o]ral argument won't change this deficiency in his application." The next case involving access to the ballot under the Michigan Election Law may not be so easily resolved. The people of Michigan deserve thoughtful, cogent, and well-reasoned decisions from this Court. The Legislature should amend the Michigan Election Law to ensure that the judicial system has ample time to meaningfully review such matters, which are vitally important to the people of Michigan.

VIVIANO, J., joins the statement of ZAHRA, J.

VIVIANO, J. (*concurring*). I agree with the Court's decision to deny leave in this case but write separately to highlight a point on which I believe the Court of Appeals may have erred in its published opinion. The Court of Appeals correctly observed that the Board of State Canvassers (the Board) may disqualify obviously fraudulent signatures without checking them against local registration records. MCL 168.544c(11)(a). However, the Court of Appeals held that this provision also relieved the Board of a different duty: the duty under MCL 168.552(13) to check petition signatures against the digitized signatures in the qualified voter file before disqualifying them for lack of genuineness. I question whether this interpretation is correct.

MCL 168.552(8) establishes the Board's duties to canvass nominating petitions and the procedures the Board is to take when a candidate's petitions are challenged. It states, in relevant part:

> Upon the receipt of the nominating petitions, the board of state canvassers shall canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors. Subject to subsection (13), for the purpose of determining the validity of the signatures, the board of state canvassers may cause a doubtful signature to be checked against the qualified voter file or the registration records by the clerk of a political subdivision in which the petitions were circulated. If the board of state canvassers receives a sworn complaint, in writing, questioning the registration of or the genuineness of the signature of the circulator or of a person signing a nominating petition filed with the secretary of state, the board of state canvassers shall commence an investigation. Subject to subsection (13), the board of state canvassers shall verify the registration or the genuineness of a signature as required by subsection (13). If the board is unable to verify the genuineness of a signature on a petition, the board shall cause the petition to be forwarded to the proper city clerk or township clerk to compare the signatures on the petition with the signatures on the registration record, or in some other manner determine whether the signatures on the petition are valid and genuine.

Thus, regardless of whether the Board reviews signatures for validity as part of its initial canvass or does so in response to a sworn complaint, it must do so in compliance with Subsection (13). That provision states, in relevant part:

> The qualified voter file may be used to determine the validity of petition signatures by verifying the registration of signers. . . . The qualified voter file shall be used to determine the genuineness of a signature on a petition. Signature comparisons shall be made with the digitized signatures in the qualified voter file. The county clerk or the board of state canvassers shall conduct the signature comparison using digitized signatures contained in the qualified voter file for their respective investigations. If the qualified voter file does not contain a digitized signature of an elector, the city or the township clerk shall compare the petition signature to the signature contained on the master card.

Accordingly, under MCL 168.552(13), the qualified voter file "may be used" to determine validity but "shall be used" to check the genuineness of signatures.[1] But if the qualified voter file does not contain the digitized signature for the elector in question, Subsections (8) and (13), when read together, require the Board to forward the petition to the appropriate city or township clerk for the clerk to compare the signature in question to the signature on the local registration record, which is the master registration card.[2]

MCL 168.544c(11)(a) creates a partial exception to this process. The Board can "[d]isqualify obviously fraudulent signatures . . . without checking the signatures against local registration records." The Court of Appeals interpreted this provision to mean that the Board was not required to compare each signature collected by what the Bureau of Elections found to be "fraudulent-petition circulators" against the digitized signatures in the qualified voter file to determine whether they are genuine. But the qualified voter file is a different resource than the "local registration records." The qualified voter file is the official *statewide* file used "for the conduct of all elections held in this state."[3] Thus, MCL 168.544c(11)(a) is not an exception to the requirement in MCL 168.552(13) that the qualified voter file must be used to determine the genuineness of a signature. Under this reading, if the Board is considering whether to disqualify a signature on the ground that it is obviously fraudulent because it is not genuine, the Board must still compare the

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[1] The use of "shall" indicates a mandatory act. See *People v Allen*, 507 Mich 597, 616 (2021). While the terms "validity" and "genuineness" may have some overlap, as used in the statute they appear to be distinct concepts. See *Merriam-Webster's Collegiate Dictionary* (7th ed) (defining "valid" as "having legal efficacy or force; *esp* : executed with the proper legal authority and formalities" and defining "genuine" as "actually produced by or proceeding from the alleged source or author").

[2] See MCL 168.501 (setting forth how the master registration cards (termed the "master file") must be filed and what they must contain); MCL 168.502 (specifying that the master file must remain "in the custody of the township or city clerk").

[3] MCL 168.509o(1); see also MCL 168.509m(2)(b).

signature to the digitized signature in the qualified voter file. However, if the qualified voter file does not contain the digitized signature for the elector in question, MCL 168.544c(11)(a) allows the Board to disqualify that signature without forwarding the petition to the local city or township clerk for comparison of the signature in question to the master card.[4]

If this interpretation is correct, the Court of Appeals erred to the extent it held that the Board has discretion to dispense with the statutory requirement to verify petition signatures by comparing them

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[4] The statutory history of the relevant provisions in MCL 168.544c and MCL 168.552 supports this interpretation. The Legislature made a number of revisions to these statutes in 1999. 1999 PA 219; 1999 PA 220. Prior to the passage of these acts, the process under MCL 168.552(8) for checking the validity or genuineness of a signature was for the Board to forward the petition to the appropriate city or township clerk for the clerk to make the determination; the statute did not call for the Board to make this determination itself. 1999 PA 220 added to MCL 168.552 Subsection (13), which provided that "[t]he qualified voter file may be used to determine the validity of petition signatures," but it did not contain the requirement that the qualified voter file be used to determine the genuineness of a signature that is found in the current version of MCL 168.552(13). 1999 PA 219 added to MCL 168.544c the provision that the Board can "[d]isqualify any obviously fraudulent signatures . . . without checking the signatures against local registration records." MCL 168.544c(9)(a), as added by 1999 PA 219. (This provision was later moved to Subsection (11)(a).) Since the only process for checking the genuineness of a signature at the time was to forward the petition to the appropriate city or township clerk for that clerk to check the signature against the local registration records, the effect of this addition to MCL 168.544c was that the Board could disqualify an obviously fraudulent signature without any signature comparison taking place. In 2005 the Legislature amended MCL 168.522. 2005 PA 71. It changed MCL 168.552(8) so that after a complaint is filed, the Board has a duty to verify the registration or genuineness of a signature, and only if the Board is unable to verify the genuineness must it forward the petition to the appropriate city or township clerk. It also added to MCL 168.552(13) the requirement that the qualified voter file must always be used to determine a signature's genuineness. But the Legislature did not amend MCL 168.544c(11)(a). Thus, while the Board could still disqualify obviously fraudulent signatures without checking them against local registration records, checking a signature against the local record was no longer the default method for determining validity and genuineness; the local records would only be checked if a question as to the signature's validity or genuineness remained after the Board checked the qualified voter file.

to the digitized signatures in the qualified voter file. In short, it does not appear that the Board complied with the statutorily mandated process for disqualifying signatures for lack of genuineness.

Ultimately, however, it is unnecessary to decide the interpretive question for purposes of this appeal. Even if the Board lacked authority to disqualify the signatures without verification against the qualified voter file, this conclusion would not entitle plaintiff to the relief he requests, i.e., placement of his name on the ballot. To obtain mandamus, plaintiff must show, among other things, that defendants have a clear legal duty to take some action.[5] Here, plaintiff has not demonstrated that defendants are under a clear legal duty to take the steps necessary to having his name placed on the ballot. Rather, the Board's clear legal duty would be to "canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors," which in this case would at most include checking each of the challenged signatures against the qualified voter file.[6] But plaintiff has not provided any supporting evidence that would indicate that a proper review of all the signatures he submitted would lead to a determination that he has a sufficient number of valid signatures to satisfy the statutory requirements.[7] Indeed, plaintiff has not even made such an argument. Any remand to the Board would likely be futile, rendering mandamus inappropriate.[8] For these reasons, I agree that denial of leave to appeal is warranted.

ZAHRA, J., joins the statement of VIVIANO, J.

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[5] To obtain a writ of mandamus, a plaintiff must show that "(1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result." *Taxpayers for Mich Constitutional Gov't v Michigan*, 508 Mich 48, 82 (2021) (citation and quotation marks omitted).

[6] MCL 168.552(8).

[7] Nor is it clear that a proper review of the signatures could be accomplished in the time remaining before the ballots must be printed, although plaintiff might have been entitled to placement on the ballot if he had raised at least a colorable claim that he had collected sufficient signatures but there was not enough time for the Board to conduct the statutorily mandated review. See, e.g., *Wingert v Urban*, 250 NW2d 731 (Iowa, 1977) (excusing compliance with mandatory petition signature requirements in exceptional circumstances).

[8] See 55 CJS, Mandamus, § 15, p 34 (explaining that a writ of mandamus is only appropriate when it "will be effectual as a remedy" and noting that "courts generally will not issue a writ of mandate to enforce an abstract right that [is] of no practical benefit to the petitioner"); cf. *New York Mtg Co v Secretary of State*, 150 Mich 197, 205 (1907) (holding that the "naked right" alone to a writ of mandamus is

BERNSTEIN, J. (*dissenting*). Because of my strong belief in the importance of elections to our democracy, I would order expedited oral argument in this case. I take no position on the merits of this case. However, plaintiff raises serious concerns about ballot access and whether the current process implemented by the state appropriately balances real concerns about fraud against the possibility of disenfranchising both candidates and voters. Although the Secretary of State must certify eligible candidates by June 3, see MCL 168.552(14), a swift decision by this Court could allow for a certification decision to be reversed in time for county clerks to receive corrected absentee ballots by June 18, see MCL 168.714(1). Because I believe this case presents significant legal issues worth further consideration, I would order full briefing in this case and hold oral argument next week to ensure that the interests of Michigan voters are fully considered.

MARKEY v SECRETARY OF STATE, No. 164468; Court of Appeals No. 361580.

VIVIANO, J. (*concurring*). I concur in the denial of leave to appeal for the reasons stated in my concurrence in *Johnson v Bd of State Canvassers*, 509 Mich ____ (2022) (Docket No. 164461).

BERNSTEIN, J., would order oral argument.

Leave to Appeal Before Decision by the Court of Appeals Denied June 3, 2022:

CRAIG v BOARD OF STATE CANVASSERS, No. 164475; Court of Appeals No. 361631.

VIVIANO, J. (*concurring*). I concur in the denial of leave to appeal. To the extent that plaintiff has raised arguments regarding the Board of State Canvassers disqualifying signatures on his petitions for lack of genuineness without checking them against the qualified voter file, while I believe this argument may have some merit, I ultimately believe mandamus is inappropriate for the reasons stated in my concurrence in *Johnson v Bd of State Canvassers*, 509 Mich 1015 (2022).

BERNSTEIN, J., would grant the bypass and order oral argument.

Reconsideration Denied June 3, 2022:

In re BMGZ, No. 163703; reported below: 339 Mich App 28.

Mandamus Denied June 7, 2022:

BRANDENBURG v BOARD OF STATE CANVASSERS, No. 164462.

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insufficient to warrant its issuance and that the Court may exercise its discretion not to issue a writ of mandamus on public policy grounds).

CLEMENT, J. (*concurring*). I concur with the Court's order denying plaintiff's complaint. The Michigan Election Law, MCL 168.1 *et seq*., provides that "[a] person who filed a nominating petition with the secretary of state and who feels aggrieved by a determination made by the board of state canvassers may have the determination reviewed by mandamus, certiorari, or other appropriate process in the supreme court," MCL 168.552(12). That describes this exact situation, suggesting that this Court is an appropriate forum in which plaintiff can file.

As the dissent notes, two decades ago we held in two peremptory orders that MCR 3.305(A) and MCR 7.203(C)(5) controlled over this statutory provision. See *Callahan v Bd of State Canvassers*, 646 NW2d 470 (Mich, 2002); *Schwarzberg v Bd of State Canvassers*, 649 NW2d 73 (Mich, 2002). However, I believe there is substantial reason to question whether those orders were rightly decided. If MCL 168.552(12) were simply read as a provision conferring jurisdiction on this Court, it would confer a jurisdiction we already possess. See Const 1963, art 6, § 4 (giving us "power to issue, hear and determine prerogative and remedial writs," such as mandamus and certiorari). This would make the provision nugatory. The alternatives under MCR 3.305(A) and MCR 7.203(C)(5) are to file in either the Court of Appeals or the Court of Claims, and if their jurisdiction is purely a function of statute—see *People v Milton*, 393 Mich 234, 245 (1974) ("[T]he jurisdiction of the Court of Appeals is entirely statutory."); *Manion v State Hwy Comm'r*, 303 Mich 1, 20 (1942) ("The 'court of claims' . . . derives its powers only from the act of the legislature and subject to the limitations therein imposed.")—then MCL 168.552(12) could easily be read as depriving them of jurisdiction and leaving this Court as the exclusive forum for litigating such issues. I would not relish such a rule, because "[r]easons of policy dictate that such complaints be directed to the first tribunal within the structure of Michigan's one court of justice having competence to hear and act upon them," *People v Flint Muni Judge*, 383 Mich 429, 432 (1970), and such a rule would deviate from those "reasons of policy," but that is not plaintiff's fault. While orders of this Court certainly establish precedent binding on both this Court and the lower courts if they "contain[] a concise statement of the applicable facts and the reason for the decision," *People v Crall*, 444 Mich 463, 464 n 8 (1993), "[a] short per curiam opinion that summarily [resolves a case] is entitled to less precedential weight than a signed opinion," Garner et al, *The Law of Judicial Precedent* (St. Paul: Thomson/West, 2016), p 214. I do not believe my commitment to stare decisis is called into question today when this Court's order does not even overrule *Callahan* and *Schwarzberg*, but merely denies plaintiff's complaint without substantive explanation.

Moreover, regardless of whether *Callahan* and *Schwarzberg* were rightly or wrongly decided, *this Court* has been the author of a nontrivial amount of confusion on this topic in recent years. Similarly to disputes over nominating signatures, the Michigan Election Law also uses almost identical language to direct disputes over initiative and referendum petitions to this Court. See MCL 168.479. Yet in recent years, we have entertained original actions relating to initiative and referendum

petitions without holding plaintiffs to compliance with MCR 3.305(A), MCR 7.203(C)(5), *Callahan*, or *Schwarzberg*. *Comm to Ban Fracking in Mich v Bd of State Canvassers*, 505 Mich 1137 (2020); *Unlock Mich v Bd of State Canvassers*, 506 Mich 947 (2020); *Unlock Mich v Bd of State Canvassers*, 507 Mich 1015 (2021); *Fair & Equal Mich v Bd of State Canvassers*, 508 Mich 967 (2021). Indeed, had this Court cited the dissent's theory in *Comm to Ban Fracking*, it is highly unlikely that the Court of Appeals would have held in subsequent litigation that this Court is the exclusive venue for disputes over initiative and referendum petitions—a conclusion in substantial tension with *Callahan* and *Schwarzberg*. See *Comm to Ban Fracking in Mich v Bd of State Canvassers*, 335 Mich App 384, 395-398 (2021).[1] I do not support

[1] As the dissent notes, while MCL 168.479(1) parallels MCL 168.552(12) almost verbatim—both providing, in superficially permissive terms, that individuals aggrieved by different actions of the Board of State Canvassers "may have the determination reviewed . . . in the supreme court"—MCL 168.479(2) provides that a party aggrieved by a decision of the board relating to an initiative or referendum "must file . . . in the supreme court" in various time frames, which makes the intended exclusivity of this Court's jurisdiction particularly inescapable. However, I do not think MCL 168.479(2) is necessary to construe MCL 168.479(1) as intending to confer exclusive jurisdiction on this Court, and I therefore do not believe MCL 168.552(12) needs a similar companion to be read as conferring exclusive jurisdiction on this Court. If MCL 168.479(2) is necessary to make jurisdiction in this Court exclusive, then—as noted—MCL 168.552(12) is nugatory, as it would purport to confer jurisdiction on this Court that it already possesses (and much the same could be said of MCL 168.479(1)). While the Court of Appeals in *Comm to Ban Fracking* certainly construed MCL 168.479(1) in light of the presence of MCL 168.479(2), I do not read its analysis as depending on MCL 168.479(2) (the Court certainly did not hold that MCL 168.479(2) was necessary to distinguish the case from *Callahan* and *Schwarzberg*). Rather, the Court construed MCL 168.479 as it found it. Moreover, regardless of what MCL 168.479(2) says, the court rule this Court cited in *Callahan* and *Schwarzberg* provides that the Court of Appeals "may entertain an action for . . . any original action *required by law* to be filed in the Court of Appeals *or Supreme Court*." MCR 7.203(C)(5) (emphasis added). That is to say, the court rules purport to require that even if a statute *requires* a case to be originally filed in this Court, it is *still* to be filed in the Court of Appeals—a principle that is equally applicable (or not) to proceedings under MCL 168.552(12) and MCL 168.479. I do not believe MCL 168.479(2) is different enough to approach cases involving initiative or referendum in some other manner than disputes about candidate signatures under MCL 168.552(12).

faulting plaintiff for failure to comply with tangled authority that may well have provoked legitimate confusion. At the time she filed, plaintiff of course did not have the benefit of the Court of Appeals' recent decision in *Johnson v Bd of State Canvassers*, 341 Mich App 671, 684 (2022), in which the Court of Appeals did accept jurisdiction over a dispute apparently covered by MCL 168.552(12), and in any event the question of how to juxtapose *Johnson* against *Comm to Ban Fracking* and our orders in *Callahan* and *Schwarzberg* has apparently not yet been litigated.[2]

I am not persuaded that the Court should grant plaintiff the relief she has requested. But in light of my qualms over whether *Callahan* and *Schwarzberg* were rightly decided and this Court's complicity in causing confusion over whether we will entertain original actions under statutes like MCL 168.552(12) or MCL 168.479, I do not believe it appropriate to fault her on procedural grounds for noncompliance with MCR 3.305(A), MCR 7.203(C)(5), *Callahan*, or *Schwarzberg*. Therefore, I concur with the Court's order.

VIVIANO, J. (*dissenting*). By denying plaintiff relief today without providing any specific legal grounds for doing so rather than dismissing the case based on controlling caselaw, the majority chooses to flatly ignore our Court's precedent. Plaintiff filed her complaint for mandamus under MCL 168.552(12) in this Court rather than the lower courts. In *Schwarzberg v Bd of State Canvassers*, 649 NW2d 73 (Mich, 2002), we stated that "[d]espite the language of MCL 168.552(12), a mandamus action against the Board of State Canvassers is properly filed in the Court of Appeals or the circuit court. MCR 7.203(C)(5), MCR 3.305(A)."[1] We reached the same result in *Callahan v Bd of State Canvassers*, 646 NW2d 470 (Mich, 2002).[2] This precedent is binding and on point, and

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[2] It also is apparently unresolved whether it is constitutional for the Legislature to indirectly confer exclusive original jurisdiction on this Court via this sort of jurisdiction-stripping of the lower courts. The parties in *Comm to Ban Fracking* apparently made no such argument.

[1] MCR 3.305(A) was amended in 2018 to reflect that an action for mandamus against a state officer may be brought in the Court of Appeals or the Court of Claims, instead of the circuit court. 501 Mich ccxvii, ccxxi (2018).

[2] The Court of Appeals recently reached a different conclusion in a case involving a different statute with language that is materially distinct, MCL 168.479. See *Comm to Ban Fracking in Mich v Bd of State Canvassers*, 335 Mich App 384 (2021). There is some similar language in the statutes. Compare MCL 168.552(12) ("A person who filed a nominating petition with the secretary of state and who feels aggrieved by a determination made by the board of state canvassers may have the determination reviewed by mandamus, certiorari, or other appropriate process in the supreme court.") with MCL 168.479(1) ("Notwithstanding any other law to the contrary and subject to subsection (2), any person

plaintiff has not even mentioned these cases, much less asked us to overrule them. A straightforward application of *Schwarzberg* and *Callahan* requires us to dismiss plaintiff's complaint. I would do so and remain faithful to our precedent, rather than simply denying relief without any explanation of why it is not being applied.

From the parties' standpoint, the technical distinction between dismissal and denial of leave may make little difference because it does not change the outcome. But the distinction is of considerable moment to the institutional integrity of our Court. A court that shows so little respect for its own precedent can hardly expect it to be respected by others. Binding precedent that is on point can be overruled in certain, limited circumstances. But, short of that, it must be followed. The majority's decision to simply ignore our precedent is stunning.[3] I therefore dissent.

BERNSTEIN, J., would order oral argument.

Leave to Appeal Denied June 7, 2022:

ROCHA v SECRETARY OF STATE, No. 164483; Court of Appeals No. 361578.

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who feels aggrieved by any determination made by the board of state canvassers may have the determination reviewed by mandamus or other appropriate remedy in the supreme court."). But MCL 168.479(2) also states in relevant part, "If a person feels aggrieved by any determination made by the board of state canvassers regarding the sufficiency or insufficiency of an initiative petition, the person *must file* a legal challenge to the board's determination in the supreme court within 7 business days . . . ." (Emphasis added.) The Court of Appeals relied on this second subsection in concluding that MCL 168.479 required a plaintiff to file a complaint for mandamus in our Court. Even assuming that MCL 168.479 is not distinguishable from MCL 168.552(12), *Comm to Ban Fracking* could not overrule our precedent with regard to the latter statute.

[3] Justice CLEMENT's concurrence acknowledges that the orders are binding but suggests that they are entitled to "less" precedential weight. Whether they have *more* or *less* weight, they have to at least have *some*. But not applying them in like circumstances does not give them *any*. If they do not apply here, then the orders do not apply anywhere.

Similarly unavailing is the concurrence's resort to the supposed confusion caused by a lower court opinion, *Comm to Ban Fracking*, concerning a different statute, along with a handful of denial orders from this Court in cases involving that same statute. None of those authorities could be read to legitimately call *Schwarzberg*'s and *Callahan*'s binding nature into doubt. And even if they could, I know of no "confusion" exception to procedural rules that would allow us not to apply our precedents that are clearly on point.

ZAHRA, J. (*concurring*). I concur in the order denying relief in this matter. MCL 168.558(4) provides that an affidavit of identity (AOI) "must include a signed and notarized statement that as of the date of the affidavit, all . . . late filing fees, and fines required of the candidate or any candidate committee organized to support the candidate's election under the Michigan campaign finance act . . . have been . . . paid[.]" Plaintiff's 2022 Annual Report was due on January 31, 2022, but he did not file it until February 7, 2022. As a result, he owed a late filing fee. In his February 18 AOI, plaintiff averred that he had paid all late filing fees. But that was not true, because he did not pay his late filing fee until March 7. Therefore, his February 18 AOI included a false statement and defendants are precluded from certifying him.

Plaintiff argues that he did not violate MCL 168.558(4) because he did not know that he owed a late filing fee. However, the Bureau sent his campaign committee an e-mail on February 3 informing it that plaintiff's annual report was late and that he would be charged a late fee. In addition, the Bureau sent an e-mail on February 16 indicating that plaintiff owed a $250 late fee. Therefore, plaintiff should have known when he signed his AOI on February 18 that he owed a late fee that had to be paid.

The dissent adopts a reasonable interpretation of MCL 168.558(4) to conclude that a late fee that is not yet due is not required of plaintiff. The dissent states, "It makes little sense to say that a fee that was assessed but not yet due is 'required' of the candidate." I am inclined to disagree on this point.

The late filing fee was indeed assessed, and plaintiff knew or should have known at the time he executed his AOI that this fee must be paid in order for him to comply with the Michigan Election Law, MCL 168.1 *et seq*. Thus I am hard-pressed to conclude that the imposed late fee was not required of plaintiff, even if the date for paying this late fee had not yet passed.

I again reiterate for the Legislature that the current time frame for courts to meaningfully address these types of election matters is woefully inadequate. See *Johnson v Bd of State Canvassers*, 509 Mich 1015, 1016 (2022) (ZAHRA, J., concurring). This case demonstrates my point. Perhaps I would interpret this statute differently with the benefit of additional briefing and time, but, as I pointed out in *Johnson*, we are denied the time needed to address election disputes in the manner and process typically followed by this Court. Given the briefing and time afforded the Court in this matter, I concur in the denial of leave.

VIVIANO, J. (*dissenting*). Plaintiff Jon Rocha is a prospective candidate for the Michigan House of Representatives in the 78th district, but the Bureau of Elections (the Bureau) disqualified him from the ballot for making a false statement on his affidavit of identity (AOI) regarding an outstanding fee. Because I do not believe that plaintiff made a false statement in his AOI, I would grant his request for mandamus relief to be placed on the August primary ballot.

On February 16, 2022, the Bureau sent plaintiff's committee a notice of late filing fee. The notice stated that the fee was due roughly a month

later, on March 18, 2022. Two days after receiving the notice, on February 18, 2022, plaintiff executed his AOI, stating that, "[a]t this date, all statements, reports, late filing fees, and fines due from me or any Candidate Committee organized to support my election . . . have been filed or paid." The Bureau contended that MCL 168.558(4) required it to disqualify plaintiff. Plaintiff sought mandamus in the Court of Appeals, which was denied in an order stating that the fee was "required of" plaintiff when it was assessed, not when it later became due. Therefore, according to the Court of Appeals, plaintiff's statement in his AOI that there were no "late filing fees due" was false. Today, the majority lets that decision stand by denying relief.

I write because I believe that the Court of Appeals erred and that plaintiff is entitled to be placed on the ballot. MCL 168.558(4) provides in relevant part:

> An affidavit of identity must include a signed and notarized statement that as of the date of the affidavit, all statements, reports, late filing fees, and fines *required of the candidate* or any candidate committee organized to support the candidate's election under the Michigan campaign finance act, 1976 PA 388, MCL 169.201 to 169.282, have been filed or paid . . . . An officer shall not certify to the board of election commissioners the name of a candidate who fails to comply with this section, or the name of a candidate who executes an affidavit of identity that contains a false statement with regard to any information or statement required under this section. [Emphasis added.]

Here, at the time plaintiff submitted his AOI, he had been assessed a late filing fee that was not yet due. The issue in this case, then, is whether late filing fees that are assessed but not yet due are "fees . . . required of the candidate" when he or she files the AOI.

To "require" means "to impose a compulsion or command on[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). The action being required here is payment of a late filing fee. So the issue is whether, at the time a candidate files an AOI, there was a fee that plaintiff was commanded to pay "as of the date of the affidavit." It makes little sense to say that a fee that was assessed but not yet due is "required" of the candidate. No one would say, for example, that as of April 1 a tax return is generally required of a taxpayer. It is not until April 15 that this becomes true. The Legislature could have easily used the term "assessed" in the statute if it had intended to preclude candidates from filing an AOI if they were assessed fees that were not yet due. It appears that the Bureau of Elections, at least until this case, agreed that fines and fees "required of the candidate" meant those that were then due from the candidate: in the AOI form the Bureau provides to candidates, the word "due" is used rather than the word "required."[1] If the rule were otherwise—i.e., that fines and fees "required of the candidate" included

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[1] State of Michigan, *Affidavit of Identity and Receipt of Filing*, ED-104 (August 2019), available at <https://www.michigan.gov/-/media/Project/

those that were not yet even due—then MCL 168.558(4) would move up *sub silentio* the due dates on any fees assessed by the election officials. In this case, for example, although plaintiff was told his payment was not required until March 18, the effect would be that it was really due on February 18, when he filed his AOI.

For these reasons, I believe that a late filing fee is not "required of the candidate" until the date it must be paid. In the present case, there is no dispute that plaintiff's late fee was not yet due when he filed his AOI. Therefore, the statement in plaintiff's AOI that at the time of filing all fees due from him had been paid was true. I therefore dissent and would grant plaintiff mandamus relief for placement on the August primary ballot.

BERNSTEIN, J., joins the statement of VIVIANO, J.

CAVANAGH V BOARD OF STATE CANVASSERS, No. 164484; Court of Appeals No. 361583.

VIVIANO, J. (*concurring*). I concur in the denial of leave to appeal. In my view, plaintiff has raised a potentially meritorious argument that the Board of State Canvassers cannot disqualify signatures on his petitions for lack of genuineness without checking them against the qualified voter file. See *Johnson v Bd of State Canvassers*, 509 Mich 1015, 1017 (2022) (VIVIANO, J., concurring). But plaintiff has not provided any supporting evidence to indicate that a proper review of all the signatures he submitted would lead to a determination that he has a sufficient number of valid signatures to satisfy the statutory requirements. Therefore, although he only needs to identify 184 genuine signatures from the 1,125 that were invalidated because of fraud, given that he has not raised at least a colorable claim that he had collected sufficient signatures, any remand to the Board would likely be futile.

BERNSTEIN, J., would order oral argument.

CAVANAGH, J., did not participate due to a familial relationship with a party.

TURNER V SECRETARY OF STATE, No. 164486; Court of Appeals No. 361577.

VIVIANO, J. (*concurring*). I agree with the Court's denial of leave in this case. Under MCL 168.558(4), a candidate must file an affidavit of identity that states "that as of the date of the affidavit, all statements, reports, late filing fees, and fines *required of the candidate* or any candidate committee organized to support the candidate's election under the Michigan campaign finance act, 1976 PA 388, MCL 169.201 to 169.282, have been filed or paid. . . ." (Emphasis added.) In *Rocha v Bd of State Canvassers*, 509 Mich 1025, 1026 (2022) (VIVIANO, J., dissenting), I stated my belief that this language does not apply to late filing fees that have been assessed but are not yet due. In

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Websites/sos/01vanderroest/ED104_Aff_ID_Fil_Rec_Vendor.pdf?rev=b4e1c1b464eb4d4c9ca7b4863f1fb1b7> (accessed June 7, 2022) [https://perma.cc/FLK5-AM68].

that case, because the candidate was not required to have paid any late filing fees as of the date on which he filed his affidavit—the fee was due later—I would have found that his affidavit of identity was not false when it asserted there were no unpaid fees due from the candidate. In the present case, however, plaintiff was assessed a $1,000 fee that was due on September 23, 2021. That fee was unpaid when plaintiff filed his affidavit of identity on February 11, 2022. Consequently, contrary to his affidavit, there was a fee that was "required of" plaintiff at the time he filed his affidavit. His affidavit was therefore false, and the Court of Appeals reached the right outcome. I therefore concur in the denial order.

BERNSTEIN, J., joins the statement of VIVIANO, J.

Application for Leave to Appeal Dismissed June 7, 2022:

DAVIS v HIGHLAND PARK CITY CLERK, No. 164490; Court of Appeals No. 361544. On order of the Court, the motion for immediate consideration is GRANTED. The motion to intervene is DENIED. There being no party to the case pursuing an appeal to this Court, the application for leave to appeal and the remaining motions are DISMISSED.

WELCH, J. (*dissenting*). I disagree with the Court's decision to deny Carlton Clyburn, Jr.'s motion to intervene and to dismiss his appeal, at least at this stage. I would have granted Clyburn's motion to intervene because the Court of Appeals' decision will result in the removal of his name from the nonpartisan August primary ballot and no other defendant has appealed. MCR 2.209. See also *League of Women Voters of Mich v Secretary of State*, 506 Mich 561 (2020). I also question whether mandamus relief was appropriately granted in this case. It is undisputed that Clyburn left a blank space on his affidavit of identity (AOI) for designating party affiliation and that he is seeking election to a nonpartisan mayoral office. As of December 27, 2021, MCL 168.558(2) requires that an AOI "contain . . . the candidate's political party or a statement indicating no party affiliation if the candidate is running without political party affiliation," but MCL 168.550 does not mandate disqualification from the ballot for noncompliance because Clyburn is not seeking to appear on the "official primary election ballot of any political party . . . ." In the absence of a clear statutory mandate, I think it is debatable whether the local clerk had a clear legal duty to disqualify Clyburn from appearing on the ballot and whether such a duty was ministerial in nature. See *Taxpayers for Mich Constitutional Gov't v Dep't of Technology, Mgt, & Budget*, 508 Mich 48, 81-82 (2021); *Teasel v Dep't of Mental Health*, 419 Mich 390, 410 (1984). A majority of this Court has agreed that strict compliance with preelection form and content requirements is required. See *Stand Up For Democracy v Secretary of State*, 492 Mich 588, 594, 600-608, 619 (2012) (opinion by MARY BETH KELLY, J.); *id*. at 620 (YOUNG, C.J., concurring in part and dissenting in part); *id*. at 637, 640-641 (MARKMAN, J., concurring in part and dissenting in part). However, because Clyburn is seeking election to a nonpartisan local office, I question whether the Court of Appeals was correct to hold that silence as to party affiliation cannot satisfy the

requirement of "indicating no party affiliation" under MCL 168.558(2). I do not believe *Stumbo v Roe*, 332 Mich App 479 (2020), directly answers this question, and *Moore v Genesee Co*, 537 Mich App 723 (2021), drew a distinction between immaterial defects in an AOI that do not warrant disqualification and material defects that do warrant disqualification. These issues, I believe, are worthy of further consideration.

BERNSTEIN, J., joins the statement of WELCH, J.

Summary Disposition June 10, 2022:

PEOPLE v FURLONG, No. 163010; Court of Appeals No. 348555. By order of January 26, 2022, while retaining jurisdiction, we remanded this case to the Court of Appeals to consider whether 50 points were correctly assigned to Offense Variable (OV) 13 pursuant to MCL 777.43(1)(a) in light of *People v Nelson*, 491 Mich 869 (2012). On order of the Court, the Court of Appeals having issued its opinion on remand on March 10, 2022, the application for leave to appeal is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE that part of the March 25, 2021 judgment of the Court of Appeals affirming the Jackson Circuit Court's scoring of OV 13 for the reasons given by the Court of Appeals majority in its March 10 opinion on remand. Accordingly, we VACATE the defendant's sentence and REMAND this case to the trial court for resentencing. As noted by the Court of Appeals majority on remand, based on the reasoning of *Nelson*, 50 points may only be assigned to OV 13 if the sentencing offense is first-degree criminal sexual conduct involving the penetration of a victim under the age of 13 and is part of a pattern of other sexual penetrations of a victim under the age of 13. The sentencing offense in the instant case did not involve sexual penetration of a person less than 13 years of age, so 50 points should not have been assigned to OV 13.

WELCH, J. (*dissenting*). I respectfully dissent from this Court's decision to peremptorily reverse the portion of the Court of Appeals' judgment that affirmed the scoring of OV 13 at 50 points, MCL 777.43(1)(a) ("The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age."). I agree with the Court of Appeals' dissenting opinion that *People v Nelson*, 491 Mich 869 (2012), and *People v Aldridge*, unpublished per curiam opinion of the Court of Appeals, issued June 4, 2020 (Docket No. 349082), are distinguishable and do not preclude a 50-point score for OV 13 under the facts of this case. See *People v Furlong (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued March 10, 2022 (Docket No. 348555) (SERVITTO, J., dissenting).

Interlocutory Application for Leave to Appeal Dismissed June 10, 2022:

PEOPLE v LABELLE, No. 163779; Court of Appeals No. 354415. On order of the Court, the stipulation signed by counsel for the parties agreeing

to the dismissal of the interlocutory application for leave to appeal is considered, and the interlocutory application is DISMISSED with prejudice and without costs. The motion for immediate consideration is DENIED as moot.

VIVIANO, J. (*concurring*). I concur with the Court's order denying leave because the present appeal of the trial court's denial of defendant's motion for release on bond is moot. I write separately because I believe this case vividly demonstrates how blind acceptance of confessions of error can undermine public confidence in the fairness of the criminal justice system.

I. FACTS AND PROCEDURAL HISTORY

On May 14, 2018, Michael Ritter was making his last delivery of the day to the Walgreens in Ann Arbor across the street from the University of Michigan campus. Because the store has no rear entrance or parking lot, deliveries must be made from the street near the front entrance to the store. On this occasion, Ritter's delivery truck was double-parked along the curb, blocking defendant's car. According to Ritter, defendant approached him, threatened that he had a firearm, and told Ritter to move his truck. A physical altercation ensued between Ritter and defendant. At some point, defendant pulled a handgun out of his bag and shot Ritter in the torso at close range. Ritter, who lost a large amount of blood, received life-saving treatment from the police officer who arrived at the scene and from the trauma unit at the University of Michigan Hospital, which is located nearby. Much of the incident was captured on surveillance video.

Defendant was charged with assault with intent to murder, a capital felony punishable by up to life in prison.[1] Defendant was also charged with carrying a concealed weapon and carrying a firearm during the commission of a felony. After a preliminary examination, the matter was bound over to circuit court on all charges.[2] While on bond awaiting trial,

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[1] SCAO, *Michigan Trial Court Records Management Standards—Case Type Codes (MCR 8.117)* (May 2021), (A)(3)(b) (defining "capital felony" cases as those "in which life sentence is possible and a larger number of peremptory jury challenges is provided").

[2] Defendant filed a motion to quash the bindover, which the circuit court denied. Defendant filed an interlocutory application for leave to appeal this decision in the Court of Appeals, which was also denied because the panel was not persuaded that the issue required immediate appellate review. In lieu of granting leave to appeal, we remanded the case to the Court of Appeals for reconsideration in light of *People v Yost*, 468 Mich 122 (2003), because, if the trial proceeded, the defendant would lose the opportunity to challenge the bindover. *Id*. at 124 n 2 (noting that the Court of Appeals' denial of leave for " 'failure to persuade the Court of the need for immediate review' " was "flawed"

defendant was involved in another altercation, this one with contractors doing work on his parents' home. Because the workers' truck was blocking the driveway, preventing him from leaving, he became angry, started shouting, and threw the truck's fire extinguisher. As a result of this incident, defendant was charged with four additional misdemeanor offenses.

As trial on the felony charges approached, defendant was represented by two retained attorneys, Douglas Mullkoff and John Shea. Despite their aggressive advocacy on his behalf, defendant claimed he was dissatisfied with his legal representation.[3] Specifically, he did not believe his attorneys were adequately considering what defendant believed to be the racial overtones of the case. Defendant eventually sought and retained an African-American attorney, Gerald Evelyn, to join his trial team and take over as lead counsel. Defense counsel requested an adjournment on October 30, 2019, only days before the trial was scheduled to begin, based in part on the fact that Evelyn was not yet prepared for trial. Because the case had already been pending for 17 months, and the trial had already been adjourned on two prior occasions, the trial court denied the motion.

Defendant's trial began on November 4, 2019 (without Evelyn's participation as counsel), and on November 12, 2019, defendant was convicted on all counts. Defendant failed to appear in court on that day and absconded from the jurisdiction. A bench warrant was issued and, after a national manhunt led by the United States Marshals Service, he was apprehended at Union Station in Chicago carrying a one-way ticket

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because "[i]f defendant went to trial and were found guilty, any subsequent appeal would not consider whether the evidence adduced at the preliminary examination was sufficient to warrant a bindover"). On remand, the Court of appeals denied defendant's application "for lack of merit in the grounds presented." *People v Labelle*, unpublished order of the Court of Appeals, entered October 29, 2019 (Docket No. 347421).

[3] According to the trial judge, during the pendency of defendant's case, defendant's retained attorneys filed approximately 33 motions on his behalf. They also filed three separate interlocutory appeals, each of which they pursued in the Court of Appeals and this Court, and this direct appeal. Finally, while defendant was awaiting sentencing, his attorneys filed a petition for habeas corpus in federal court, which was summarily dismissed. See *Labelle v Clayton*, order of the United States District Court for the Eastern District of Michigan, entered April 27, 2020 (Case No. 20-10971-BC) (dismissing the petition for habeas corpus); *Labelle v Clayton*, order of the United States District Court for the Eastern District of Michigan, entered May 21, 2020 (Case No. 20-10971) (denying motion for reconsideration of the order denying the petition for habeas corpus).

to Denver and $9,000 in cash.[4] After defendant was captured, two additional attorneys, Gerald Evelyn and Kenneth Mogill, filed their appearances as counsel for defendant. The sentencing was delayed for several months because defendant unsuccessfully sought to disqualify the trial judge.[5] In June 2020, defendant was sentenced to concurrent prison terms of 10 to 20 years for the assault with intent to murder conviction and 2 to 5 years for his carrying a concealed weapon conviction, and to a consecutive sentence of 2 years in prison for his felony-firearm conviction.[6]

Defendant thereafter filed a motion for a new trial arguing, among other things, that his trial counsel were ineffective for failing to inform the trial court that defendant wanted Evelyn not just as another counsel but as his lead counsel. Defendant argued that this deprived him of the counsel of his choice. According to defendant, the Washtenaw County Prosecutor's Office informed him it would confess error on this basis. But newly elected prosecuting attorney Eli Savit removed himself from the case due to a conflict of interest or the appearance of bias.[7] Defendant unsuccessfully moved to set aside Savit's disqualification.[8] Subsequently, the Attorney General appointed a special prosecutor, Genesee County Prosecutor David Leyton. The special prosecutor con-

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[4] Defendant was charged with absconding, a felony punishable by up to four years in prison. That charge was later dismissed without prejudice by the special prosecutor after defendant was sentenced to a lengthy prison sentence on the underlying crime.

[5] After the motion was denied, defendant appealed the denial to Chief Judge Carol Kuhnke, but she recused herself because of a relationship with defendant's parents, and a substitute judge was assigned by the State Court Administrator. After that judge denied the motion, defendant sought review in the Court of Appeals and in this Court. Each of those appeals was rejected.

[6] Because of the victim's expressed desire for leniency, the trial court's sentence was below defendant's minimum sentence guidelines range.

[7] According to defendant, the recusal occurred as the result of Savit's public comments on defendant's case and because defendant's mother participated in Savit's transition team.

[8] Defendant sought an interlocutory appeal of the trial court's decision denying his motion to set aside the prosecutor's disqualification. After his interlocutory appeal was denied by the Court of Appeals, defendant appealed the issue in this Court. *People v Labelle*, unpublished order of the Court of Appeals, issued October 29, 2019 (Docket No. 357514). In lieu of granting leave to appeal, we remanded the case as on leave granted to the Court of Appeals. *People v Labelle*, 508 Mich 913 (2021). This appeal was dismissed by stipulation of the parties after the special prosecutor notified defendant that he, too, would be confessing error.

fessed error on the ineffective-assistance claim, but the trial court rejected the confession and denied defendant's motion in a 15-page opinion and order. An appeal in the Court of Appeals followed.

In the meantime, defendant moved in the trial court to be released on bond pending appeal.[9] The trial court denied the motion, and the Court of Appeals upheld the denial. Currently before this Court is defendant's appeal of that denial. But while his appeal on this issue has been pending before the Court, the Court of Appeals accepted the special prosecutor's confession of error. Notably, the special prosecutor's confession went beyond defendant's argument. The confession focused on the fact that defendant's trial counsel waited too long—slightly over three weeks—to ask for an adjournment so that Evelyn could be substituted.[10]

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[9] The special prosecutor did not oppose defendant's motion for bond pending appeal, even though (1) defendant was convicted by a jury of shooting the victim in the torso at close range with the intent to kill him; (2) while on bond awaiting trial, defendant was involved in another altercation resulting in misdemeanor charges; (3) defendant absconded on the last day of his trial; (4) in addition to being an obvious flight risk, defendant had a record of failing to appear for pretrial hearings, violating his bond conditions, and testing positive for drugs; and (5) the trial court found he was a risk of harm to the general public.

[10] The special prosecutor's confession stated:

> Defendant argues that due to the ineffective assistance of trial counsel the trial court was not correctly informed of the nature of Defendant's request. That is undeniably true. But just as egregious was counsel's failure to make that request in a timely manner. There was absolutely no strategic interest in failing to timely inform the trial court of Defendant's dissatisfaction with counsel's performance, his desire to retain new counsel who would consider his position on how to proceed and understand his concerns that racial undertones were a factor in the offense as well as in the defense of the case, that Defendant's chosen trial counsel had a conflict with the then-set trial date, and that assertion of his constitutional right to counsel of his choosing was a critical factor in seeking to adjourn the trial date. Because of this failure, the trial court did not even have the opportunity to weigh the legitimate factors of such a request and to exercise its discretion in determining whether to grant a short adjournment nor even the length of adjournment being sought.

Further, the special prosecutor claimed that Evelyn did not need an adjournment so that he could have time to prepare; rather, Evelyn needed an adjournment because of a scheduling conflict.

In an order signed and approved by only one Court of Appeals judge, Judge DOUGLAS SHAPIRO, pursuant to MCR 7.211(C)(7), the Court of Appeals accepted the confession of error without undertaking any independent analysis of the legal basis for the confession.[11] The case therefore returned to the trial court, ostensibly for a new trial. However, a few days later, even though she had previously recused herself from making a prior ruling in the case, and apparently without a hearing, Chief Judge Carol Kuhnke reassigned the case to the Washtenaw County Peacemaking Court.[12] On the same date, and also apparently without a hearing, the new judge assigned to the case released defen-

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[11] MCR 7.211(C)(7) provides as follows:

> Confession of Error by Prosecutor. In a criminal case, if the prosecutor concurs in the relief requested by the defendant, the prosecutor shall file a confession of error so indicating, which may state reasons why concurrence in the relief requested is appropriate. The confession of error shall be submitted to one judge pursuant to MCR 7.211(E). If the judge approves the confession of error, the judge shall enter an order or opinion granting the relief. If the judge rejects the confession of error, the case shall be submitted for decision through the ordinary processes of the court, and the confession of error shall be submitted to the panel assigned to decide the case.

[12] See note 17 of this statement. Neither defendant's request for reassignment nor the trial court's order granting the request indicates that the disqualification of Chief Judge Kuhnke was waived by the parties. See MCR 2.003(E) (providing that "[a]ny agreement to waive the disqualification [of a judge] must be made by all parties to the litigation and shall be in writing or placed on the record").

dant on a $1,000 personal bond.[13] As of now, no plea agreement has been placed on the record[14] and no new trial date or other pretrial hearings have been scheduled.

II. COURTS SHOULD NOT BLINDLY ACCEPT CONFESSIONS OF ERROR

Because defendant has already been released on bond, his appeal on that issue is now moot. And because neither party will seek to appeal the Court of Appeals' acceptance of the confession of error, no court will ever be able to review the merits of the confession or determine whether a new trial is truly warranted. The result is that a jury verdict finding defendant guilty of very serious crimes has been discarded without any judicial assessment of whether the claimed error was meritorious or even plausible.

I have written about confessions of error in the past, explaining how a court's blind acceptance of them represents an abdication of the judicial role. See *People v Altantawi*, 507 Mich 873 (2021) (VIVIANO, J., dissenting). I would therefore accept them only if the confessions are plausible. *People v Hernandez*, 508 Mich 972, 973 (2021) (VIVIANO, J., concurring). In this case, the alleged error is ineffective assistance of counsel. That means defendant must "show (1) that trial counsel's performance was objectively deficient, and (2) that the deficiencies prejudiced the defendant." *People v Randolph*, 502 Mich 1, 9 (2018). Here, defendant and the special prosecutor say that because the

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[13] Although this order was entered on January 28, 2022, defendant was released from federal custody in a Texas low-security prison facility on January 31, 2022. It is unclear from the record why defendant was not serving his sentence in a Michigan prison.

In response to a motion for reconsideration filed in the Court of Appeals, Judge SHAPIRO signed an order on February 3, 2022, providing that on remand the case would be assigned to a different judge. This order did not mention or discuss the legal criteria for disqualification of a judge, and it appears to have been erroneously entered since it did not involve an administrative matter under MCR 7.211(E)(2) and the prosecutor took no position on the request (and therefore could not have confessed error with regard to the reassignment). The request therefore should have been submitted to a full panel of the Court of Appeals. See MCR 7.211(E)(1). In any event, the issue was moot because, as noted, the chief judge had already reassigned the case to a new judge.

[14] Although defendant stated in his request for reassignment and emergency motion for release on personal bond that the parties have agreed to a plea and sentence agreement involving no additional jail time, it does not appear from the record that any such plea agreement has ever been placed on the record or approved by the trial judge.

deficient performance led to defendant's being deprived of the counsel of his choice, defendant need not demonstrate any prejudice. This is because a defendant's Sixth Amendment right to counsel of his or her choice is a structural error, meaning that no prejudice need be shown. See *United States v Gonzalez-Lopez*, 548 US 140, 146 (2006).

Accordingly, as the special prosecutor recognized, "the question here is whether the [trial counsel's] failure to raise the issue in a timely and appropriate manner caused" defendant to be deprived of his right to the counsel of his choice. To demonstrate this, defendant must be able to show that had his trial counsel sought an adjournment in early October on the grounds that Evelyn had agreed to be lead counsel and had a scheduling conflict, it would have been reasonably probable that the trial court would have granted the adjournment and allowed Evelyn to take over as lead counsel.

As an initial matter, it does not appear that trial counsel performed deficiently. According to the special prosecutor's confession, defendant's trial counsel initially met with Evelyn on September 25 and learned that if defendant was to be represented by Evelyn, they would need to seek an adjournment of the November 4 trial date. They filed a motion to adjourn (on other grounds) on October 1, and it was denied on October 7. But according to trial counsel, it was not until "shortly after" October 7 that they learned that Evelyn had agreed to serve as lead counsel. At that time, there were appeals pending and trial counsel had filed a motion for a stay of trial court proceedings, which would have had the same effect as an adjournment. The trial court had informed counsel that if our Court denied the motion for a stay, the trial would proceed as scheduled. We denied the motion on October 25, and three days later trial counsel moved in the trial court for a stay based again on the pending appeal. On October 30, trial counsel made the oral request for adjournment on the basis that Evelyn intended to get "on the trial team" and "would need some time to get ready." Thus, trial counsel made numerous requests in October to delay the trial. While those efforts did not emphasize Evelyn's participation, trial counsel did raise this as an alternative ground just three weeks after learning that Evelyn was willing to participate.

Even so, there is no reasonable argument that the trial court would—or should—have granted such an adjournment. We do not have to guess what the trial court would have done in these circumstances. In rejecting the motion for a new trial, the court answered the question of whether it would have granted an adjournment for this reason if the request had been made three weeks earlier, stating, "The answer is simply 'No.' " The trial court found that such a request would simply have been another attempt to delay trial. The trial court pointed out that even though defendant argues that counsel was wrong in saying Evelyn needed more time to get ready and was simply going to be "part of the trial team," Evelyn himself was sitting in the courtroom when this statement was made and did not attempt to correct it. Moreover, the court noted, Evelyn never filed a limited appearance under MCR 2.117(B)(2) for the purpose of seeking an adjournment. In support of its conclusion, the trial court noted that almost all of the multitudinous

pretrial motions were filed by defendant. Further, the trial, which was originally scheduled for April 1, 2019, had already been adjourned "multiple times at Defendant's request."

The question is whether this reasoning constitutes an abuse of discretion. See *Ypsilanti Charter Twp v Dahabra*, 338 Mich App 287, 292 (2021) (reviewing a trial court's decision on a motion for an adjournment for an abuse of discretion). A motion for adjournment can be granted "based on good cause." MCR 2.503(B)(1). The standard for determining whether an adjournment should be granted contains various factors, including whether the defendant (1) was asserting a constitutional right to counsel, (2) "had a legitimate reason for asserting this right," and (3) "was not guilty of negligence[.]" *People v Williams*, 386 Mich 565, 578 (1972). In addition, courts consider whether the defendant (4) was simply attempting to delay a trial and (5) was able to establish prejudice as a result of the court's decision. *People v Echavarria*, 233 Mich App 356, 369 (1999).

Here, defendant has asserted his right to counsel, a constitutional right. It is well established that " 'the right to counsel of choice is not absolute' " but must be weighed against " 'the public's interest in the prompt and efficient administration of justice' " in order for a court to find a constitutional violation. *People v Akins*, 259 Mich App 545, 557 (2003) (citation omitted). Indeed, under markedly similar facts, the Court of Appeals has held that a refusal to adjourn a case 2½ weeks before trial so that new retained counsel could be brought on was not an abuse of discretion violating the defendant's right to counsel of his choice. *Id*. at 558-559.[15] Indeed, as the United States Supreme Court has stated, "[t]rial judges necessarily require a great deal of latitude in scheduling trials. . . . Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel.' " *Morris v Slappy*, 461 US 1, 11-12 (1983) (citation omitted). This appears to be the case especially where a defendant is already represented by his or her chosen counsel. Cf. *People v Fett*, 469 Mich 913, 913 (2003) ("In this case, the out-of-state attorney was to serve as second counsel along with defendant's retained local counsel. Defendant cites no authority, nor is

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[15] See also *Maynard v Meachum*, 545 F2d 273, 278 (CA 1, 1976) ("The right to counsel of one's choice is not absolute. A court need not tolerate unwarranted delays, and may at some point require the defendant to go to trial even if he is not entirely satisfied with his attorney."). One federal circuit noted that "[a]lthough delay is generally a valid reason to deny a motion to substitute counsel, it is not necessarily valid where counsel is shown to be providing constitutionally ineffective representation." *United States v Brumer*, 528 F3d 157, 161 (CA 2, 2008). There is no assertion here that defense counsel had been providing ineffective assistance of counsel such that an adjournment would have justified allowing Evelyn to join the defense team.

this Court aware of any authority, holding that, under the facts of this case, the right to the effective assistance of counsel is violated where a defendant is represented by her attorney of choice, but is denied a second attorney of choice. Accordingly, there is no basis to hold that defendant was denied the right to effective assistance of counsel for the purposes of the state and federal constitution.").

Under the present circumstances, it is inconceivable that it would have been an abuse of discretion for the trial court to reject yet another adjournment so that defendant could receive the services of a *third* counsel of his choice. Neither defendant nor the special prosecutor cited any case remotely suggesting that the Constitution requires such red-carpet treatment. Even in more traditional cases, like *Akins*, a last-minute request for an adjournment to obtain an entirely new (lone) counsel was properly rejected. This is especially so when the request appears to be little more than a stalling tactic. Defendant's request here appears to fit that bill. He has provided only a vague rationale for seeking Evelyn's help in the first place. Defendant had two counsel of his own choosing. While he asserted some unexplained dissatisfaction with his counsel's representation, he apparently did not wish to remove them from the case. Defendant's affidavit did not explain the strain in the relationship other than that it related to "racial overtones to this case" that he felt they were not "sensitive" to. Instead, as the special prosecutor has put it, he "desired an African-American attorney to consider his opinions, understand his concerns, and present his case theory at trial." Perhaps concerns of this nature might sometimes bear upon choice of counsel, but the concerns as defendant has expressed them are too vague to establish that this was a legitimate reason in this case. It is not clear that Evelyn would have adopted a strategy or approach to the case that his trial counsel were unwilling to undertake. Cf. *Echavarria*, 233 Mich App at 369 ("Although defendant was asserting his constitutional right to counsel, there was no bona fide reason for asserting the right.").

Further evidence that defendant merely sought a delay is that, even assuming he did have a legitimate reason for the request, he was negligent in waiting until October to make it. By the time Evelyn agreed (sometime after October 7, 2019) to represent defendant, defendant's case had been pending for nearly 17 months. Defendant does not justify this lengthy delay in seeking a new lead counsel. There is no explanation for why he waited until a few weeks before the rescheduled trial date to express his desire for a new attorney.

Here, defendant received aggressive and effective representation by two retained attorneys of his choice. Indeed, this is one of the most aggressively litigated criminal cases that I have ever encountered.[16] As the trial court noted, those efforts had already caused significant delays. In that light, and given the defendant's vague rationale for seeking yet another attorney, the trial court properly determined that defendant's motives were dilatory rather than legitimate. There can be no serious argument that it would have been an abuse of discretion for the trial

[16] See note 3 of this statement.

court to deny a motion for adjournment so defendant could have the assistance of a third lawyer of his choice under these circumstances. I therefore do not believe that the special prosecutor's confession is remotely plausible and believe it should have been rejected by the Court of Appeals on that ground.

III. CONCLUSION

As I mentioned at the outset, this case is a particularly vivid example of how unquestioning acceptance of confessions of error can undermine public confidence in the fairness of the criminal justice system. The parties appear to have used the confession of error to treat this case as a private dispute that they can settle on their own terms.[17] The societal

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[17] I believe there are many serious questions about how this case has been handled by the parties and the courts. Because the special prosecutor has not contested many controversial decisions in this case—and instead has at times actively advocated on defendant's behalf—the substance of those decisions will never be reviewed by an appellate court. The zeal with which the special prosecutor has confessed such an implausible error itself raises troubling questions. The unquestioning acceptance of the confession of error by one Court of Appeals judge—though apparently allowed by our court rules—is also problematic in my view.

But perhaps most concerning is the chief judge's reassignment of this very serious criminal matter to a specialty court when the defendant is still awaiting retrial on a capital felony charge. The reassignment occurred immediately when the case was remanded to the trial court, apparently without a hearing, by a judge who had already recused herself from a prior ruling on the case. It is unclear from the record whether the chief judge consulted the trial judge who presided over this case for over two years before removing the case from his docket.

Unlike other specialty courts, the Peacemaking Court does not appear to have any statutory authority or other rules setting forth its eligibility criteria and procedures. Notably, the case was reassigned to the Peacemaking Court even though defendant was charged with a violent offense, a fact that would have made him ineligible for most other specialty courts. See, e.g., MCL 600.1203(1) (stating that violent offenders are not eligible for admission to a veterans treatment court) and MCL 600.1064(1) (providing the same eligibility restriction for drug treatment courts). And the case was reassigned even though no plea agreement appears to have been entered. This, too, strikes me as very unusual since, ordinarily, a defendant is required to plead guilty as a condition of his or her entry into a specialty court program. See, e.g., MCL 600.1205(1)(b) (requiring an individual to plead guilty to the

interest in punishment goes well beyond satisfying the prosecutor, the defendant, or even the victim. The public, too, has interests that must be considered in any criminal case. See *People v Snow*, 386 Mich 586, 592 (1972) (noting the principles that guide sentencing as: "(a) the reformation of the offender, (b) protection of society, (c) the disciplining of the wrongdoer, and (d) the deterrence of others from committing like offenses"). Defendant was convicted by a jury of his peers and sentenced to a lengthy prison term for an assault that was intended to, and nearly did, result in the victim's death. I would be hard-pressed to explain to the jurors who served on this jury why their verdict was cast aside and why the defendant is not being held to account for his behavior. And I certainly could not explain why the product of their time, attention, and deliberation has been thrown out on appeal when no appellate court has found that any error actually occurred or that any error was even remotely plausible.

The manner in which this case has been handled by the parties and the courts shows a blatant disregard for the jury's service and raises troubling questions about judge-shopping, favoritism, and unequal treatment of this defendant. Although I am confined to the present appeal regarding defendant's bond pending appeal, which I agree should be denied as moot, I once again must express my strong disapproval of the casual use of confessions of error to thwart the ends of justice. For these reasons, I concur.

CAVANAGH, J. (*concurring*). I agree with Justice VIVIANO that, in deciding whether to grant relief on appeal, there are many different perspectives to consider. Generally, we allow the parties to a case to be the architects of their own claims. See *Mich Gun Owners, Inc v Ann Arbor Pub Schs*, 502 Mich 695, 709-710 (2018), quoting *Greenlaw v United States*, 554 US 237, 243 (2008) (" '[I]n both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.' "). Here, the special prosecutor and defendant agreed that ineffective assistance of counsel tainted defendant's jury convictions. So, the special prosecutor confessed error, and the Court of Appeals approved the confession of error as provided by the court rules.[1] MCR 7.211(C)(7); MCR 7.211(E)(2). And following the vacation of

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charges on the record as a condition of admission to a veterans treatment court). It remains unclear how this most unusual reassignment will affect the ultimate resolution of this case.

[1] I disagree with Justice VIVIANO's conclusion that Judge SHAPIRO, acting under MCR 7.211(C)(7), undertook no independent analysis in accepting the confession of error. MCR 7.211(C)(7) grants discretion to the designated Court of Appeals judge to either approve or reject the confession of error, with further process if the judge rejects the confession. *Id*. The rule does not require that the order specify the legal reasoning behind the decision, and the omission of the reasoning from the order does not suggest that no analysis occurred. The Court of

defendant's sentences by the Court of Appeals, the special prosecutor and defendant agreed to refer the case to restorative justice through the Washtenaw County Peacemaking Court. Justice VIVIANO emphasizes that the parties' perspectives might be at odds with what he presumes to be the perspectives of the jurors and the trial judge involved. Perhaps, but the perspective of the victim is also important and, here, the perspective of the victim aligns with that of the defense and the prosecution. Not only did the victim agree to participate in the Peacemaking Court, but he apparently desired a restorative-justice approach[2] from the get-go, as he made clear at defendant's sentencing hearing:

> I have asked the Court and the Sheriff to let me and [defendant] meet to talk about what happened that night, to talk about why it happened, to talk about how both of us feel about both our actions that night and what is fair for both of us going forward to make us whole. I know that [defendant] wanted to meet and do this and I wanted to do this, and no one would let us. The prosecutor wouldn't listen to me, the Judge denied my request . . . . I want what is fair to me. I want to talk to him and work this out. I do not want him to go to prison for this. It doesn't help me. It won't make me feel any better or make me safer and I don't think it will help him or anyone else.

Appeals often denies applications succinctly by referring to the "lack of merit in the grounds presented" or "failure to persuade the Court of the need for immediate appellate review." It is also standard practice for our Court to deny applications because "we are not persuaded that the question(s) presented should be reviewed by this Court." (This standard denial order language presumably satisfies this Court's obligation under Const 1963, art 6, § 6 to provide "a concise statement of the facts and reasons" for each denial of leave to appeal.) I believe that our judicial colleagues seriously consider every application and motion in front of them, and I see no basis on the record in this case to conclude otherwise.

[2] Restorative-justice approaches are not inconsistent with societal interests. Indeed, the foundational principle of tribal court peacemaking is that humans are profoundly connected to one another and their communities—people are not simply individuals in society but instead owe special obligations to others. Butterwick, Connors, & Howard, *Tribal Court Peacemaking: A Model for the Michigan State Court System?*, 94 Mich B J 34, 34, 38 (June 2015). Evidence-based diversion models offer an alternative to the traditional adversarial system and may reduce recidivism in addition to serving the needs of the participants. See generally Krinsky & Komar, *"Victims' Rights" and Diversion: Furthering the Interests of Crime Survivors and the Community*, 74 SMU L Rev 527 (Summer 2021).

Because I would not disturb the resolution sought by defendant, the prosecution, and the victim, I concur in the order denying the application.

MCCORMACK, C.J., did not participate due to her preexisting relationship with a party.

Leave to Appeal Denied June 10, 2022:

In re BS, No. 163597; Court of Appeals No. 354103.

SUTARIYA v SUTARIYA, No. 163991; Court of Appeals No. 345115.

STERK v SPEYER, No. 164282; Court of Appeals No. 359160.

Summary Disposition June 15, 2022:

KOOMAN v BOULDER BLUFF CONDOMINIUMS UNITS 72-123, 125-146, INC, Nos. 162537 and 162538; reported below at 334 Mich App 188. By order of March 11, 2022, while retaining jurisdiction, this Court remanded this case to the Ottawa Circuit Court to permit the defendants-appellees to raise the argument that the state court proceedings in this matter are barred by collateral estoppel. We ordered that court to submit its findings on this issue to the Clerk of the Supreme Court within 56 days, and it did so on April 29, 2022. Despite this Court's order retaining jurisdiction and requesting the submission of findings, the circuit court purported to issue an opinion and order granting partial summary disposition to the defendants pursuant to MCR 2.116(C)(7). The grant of summary disposition was improper because this Court retained jurisdiction. We therefore VACATE the last paragraph of the circuit court's April 29, 2022 opinion and order. The remainder of the opinion and order is treated as the submission of findings.

On order of the Court, the application for leave to appeal the October 15, 2020 judgment of the Court of Appeals is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we VACATE the October 15, 2020 judgment of the Court of Appeals, and we REMAND this case to that court to address the issue of whether the state court proceedings in this matter are barred by collateral estoppel, taking into consideration the Ottawa Circuit Court's submission of findings. The appellants' motion for supplemental briefing is DENIED. We do not retain jurisdiction.

VIVIANO, J. (*concurring*). I agree with the Court's vacatur of the Court of Appeals' judgment and remand for consideration of whether collateral estoppel bars these proceedings. If these proceedings are barred, then the statutory interpretation issue before the Court will have become moot. Generally, when a case has become moot on appeal, the reviewing court must then determine whether to vacate a lower court decision such as the Court of Appeals' judgment here. See *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 589 (2020). Although vacatur is the usual practice, it is not automatic and instead " 'turns on

"the conditions and circumstances of the particular case." ' " *Id*. at 589 (citations omitted). In other words, in some moot cases a lower court decision will not be vacated but instead will be allowed to stand. By vacating the Court of Appeals judgment *now*, before a determination of mootness is made, we have preempted the usual vacatur analysis. Ordinarily, absent the need for further factual development or findings, I would not favor this course in such circumstances.[1] I do not object to this outcome in the present case because it appears that vacatur would be appropriate here in the event that the lower court determines the case is moot. See *Alvarez v Smith*, 558 US 87, 95-97, (2007). It is also worth noting that nothing in the majority's order takes a position on the Court of Appeals' prior decision in this case. Thus, although the majority glosses over this point, if the Court of Appeals on remand holds that the proceedings are not barred by collateral estoppel, it may reinstate its October 15, 2020 decision. I therefore concur.

PEOPLE V BATES, No. 163925; Court of Appeals No. 359200. By order of March 18, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the December 22, 2021 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. We further ORDER that the stay entered by this Court on March 18, 2022 remains in effect until completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

PEOPLE V NEWBY, No. 164054; Court of Appeals No. 356196. On order of the Court, the application for leave to appeal the December 16, 2021 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to that court for reconsideration in light of *People v Brown*, 339 Mich App 411 (2021). The Court of Appeals shall expedite its consideration of this case. We do not retain jurisdiction.

LINSTROM V TRINITY HEALTH-MICHIGAN, No. 164121; Court of Appeals No. 358487. On order of the Court, the application for leave to appeal the January 21, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

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[1] I supported the earlier remand to the trial court in this case because further factual development was necessary and, in any event, we retained jurisdiction. See generally *Manguriu v Lynch*, 794 F3d 119, 122 (CA 1, 2015) ("Where pertinent facts are in dispute or additional factfinding is needed to determine whether the case has actually become moot, remand is required. . . . So, too, changed circumstances that are either disputed or unclear may require remand.").

Leave to Appeal Denied June 15, 2022:

VEDRODE v ABDOLE, No. 163497; Court of Appeals No. 353542.

BERNSTEIN, J., would grant leave to appeal.

MCLANE COMPANY, INC v DEPARTMENT OF TREASURY, No. 163785; Court of Appeals No. 354973.

PEOPLE v HERBERT SANDERS, No. 163896; Court of Appeals No. 352949.

MATTER v MATTER, No. 163983; Court of Appeals No. 355101.

PEOPLE v WESCH, Nos. 164072, 164073, and 164074; Court of Appeals Nos. 355728, 355729, and 355731.

PEOPLE v DAVIS-HEADD, No. 164104; Court of Appeals No. 351635.

PEOPLE v JARRED ROBINSON, No. 164163; Court of Appeals No. 358370.

ALEXANDER v SECRETARY OF STATE, No. 164499; Court of Appeals No. 361660.

VIVIANO, J. (*concurring*). I concur in the Court's denial of leave in this case. MCL 168.558(4) requires candidates for office to file an affidavit of identity that states "that as of the date of the affidavit, all statements, reports, late filing fees, and fines *required of the candidate* or any candidate committee organized to support the candidate's election under the Michigan campaign finance act, 1976 PA 388, MCL 169.201 to 169.282, have been filed or paid . . . ." (Emphasis added.) In *Rocha v Bd of State Canvassers*, 509 Mich 1025, 1028 (2022) (VIVIANO, J., dissenting), I concluded that this language does not apply to late filing fees that have been assessed but are not yet due. In that case, the candidate was not required to have paid any late filing fees as of the date on which he filed his affidavit, as the fee was not yet due. I therefore would have found that his affidavit of identity was not false when it asserted there were no unpaid fees due from the candidate. The present case is different. The $50 late fee that plaintiff owed was due on December 22, 2021. That fee remained unpaid when plaintiff filed her affidavit of identity on February 1, 2022. Consequently, the affidavit falsely asserted that all late fees "required of" plaintiff had been paid at that time. The Court of Appeals therefore reached the right result in rejecting plaintiff's claim. I concur in the denial order.

BERNSTEIN, J., joins the statement of VIVIANO, J.

ANDERS v SECRETARY OF STATE, No. 164502; Court of Appeals No. 361628.

ANDERS v WAYNE COUNTY CLERK, No. 164507; Court of Appeals No. 361694.

Reconsideration Denied June 15, 2022:

PEOPLE v RODNEY MCKEE, No. 157646; Court of Appeals No. 333720.

PRICE v AUSTIN, No. 161655; Court of Appeals No. 346145.

Summary Disposition June 17, 2022:

ALISA A PESKIN-SHEPHERD, PLLC v BLUME, No. 162375; Court of Appeals No. 348023. On April 6, 2022, the Court heard oral argument on the application for leave to appeal the November 5, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE Part II(A) of the Court of Appeals opinion regarding statutory conversion, VACATE Part II(B) of the opinion regarding treble damages, and REMAND this case to the Oakland Circuit Court for further proceedings not inconsistent with this order. In all other respects, the application for leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

Plaintiff, Alisa Peskin-Shepherd, claims that defendant, Nicole Blume, committed conversion by selling the real property on which plaintiff had an attorney's lien without providing plaintiff her share of the proceeds. "Under the common law, conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein."[1] MCL 600.2919a(1)(a) provides for treble damages to compensate a plaintiff for "[a]nother person's . . . converting property to the other person's own use."

Because real property cannot be converted,[2] plaintiff instead claimed that defendant had converted her attorney's lien. However, though it may be possible to convert a lien in some circumstances,[3] we do not believe that the lien was converted in this case. First, defendant's actions were taken in regard to the real property and the proceeds, but

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[1] *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 346 (2015) (quotation marks and citation omitted).

[2] *Eadus v Hunter*, 268 Mich 233, 237 (1934) ("Trover lies only for the conversion of personal property and not for property while it is a part of the realty."); 6 Michigan Civil Jurisprudence (April 2022 update), Conversion, § 8 ("An action for conversion may only be brought for personal property."), citing *Collins v Wickersham*, 862 F Supp 2d 649 (ED Mich, 2012), and *Eadus*, 268 Mich 233.

[3] There is caselaw recognizing the conversion of personal property similar to the lien at issue, such as leases, deeds, and mortgages. See, e.g., *Eadus*, 268 Mich at 233 (involving conversion of a lease); 44 ALR2d 927 (1955), § 9 ("A mortgage is subject to conversion, for which an action will lie."); 6 Michigan Civil Jurisprudence (April 2022 update), Conver-

not the lien or any document memorializing the lien. In this case, the lien was not property that was converted; the lien only acted as the basis for plaintiff's interest in the real property.[4] Second, to hold that plaintiff's conversion claim succeeds inthese circumstances, in which the property is sold and the effect on the lien is incidental to that sale, would create a loophole to the general rule that real property is not subject to conversion—actions taken with regard to the real property would be conversion if they had even an incidental effect on the lien.

Alternatively, plaintiff argues that it was the proceeds of the sale that defendant converted. It is true that proceeds of a real-estate sale are personal property[5] and thus may be subject to conversion. However, there are specific requirements pertaining to when money can be converted: "[W]here there is no duty to pay the plaintiff the specific

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sion, § 8 ("Actions for conversion will also lie for leases, deeds, causes of action, shares or certificates of corporate stock, bonds, checks, drafts, and promissory notes.").

[4] In contrast, in those cases involving conversion of property similar to liens, such as leases and mortgages, see note 3 of this statement, the defendants wrongfully exerted dominion over that property—often the document—itself. See, e.g., *Eadus*, 268 Mich at 235-237 (recounting that the lease was wrongfully taken out of escrow). See also *Norton v Bankers' Fire Ins Co of Lincoln*, 116 Neb 499 (1928) (upholding a finding of conversion when the plaintiff was defrauded into giving his note and mortgage to conspirators); *Rogers v Rogers*, 96 Colo 473, 477-478 (1935) (holding that the plaintiff sufficiently alleged conversion when the defendant wrongly caused the mortgage on the land to be released); *Barber v Hathaway*, 47 App Div 165, 168-169 (1900) (holding that there was conversion when the defendant held the bond and mortgage as collateral with no right to sell but sold them anyway); *Gleason v Owen*, 35 Vt 590, 598 (1863) (holding that there was sufficient evidence to support the plaintiff's trover claim when the defendant had agreed to deliver the mortgage deed to the plaintiff but then refused). The facts in those cases differ from the facts here, in which defendant sold the real property and plaintiff had an interest in the property via the lien. See *Sleeper v Wilson*, 266 Mich 218 (1934) (discussing the conversion of tools and pipes in which the plaintiff had a mortgage interest and holding that the tools and pipes, rather than the mortgage, were converted); *Aroma Wines*, 497 Mich 337 (discussing the conversion of the wine when the plaintiff had a lien on the wine). See also 51 Am Jur 2d (May 2022 update), Liens, § 77 ("A lienholder may sue *for conversion of the property on which the lienholder's lien exists* if it is wrongfully disposed of by the owner . . . .") (emphasis added).

[5] *Stewart v Young*, 247 Mich 451, 455 (1929).

moneys collected, a suit for conversion may not be maintained."[6] Here, plaintiff's claim to the sale proceeds as a result of her lien was just a claim for a certain amount of money up to the amount of the lien, but it did not relate to any specific monies. The lien was never recorded against the Escanaba property for a specific monetary value and thus was never made a formal encumbrance requiring resolution prior to closing. Plaintiff also did not claim that she was entitled to the specific money that the purchaser used to buy the Escanaba property; plaintiff merely claimed that defendant should have given plaintiff her share of the proceeds as per the lien.[7] Therefore, because neither the proceeds nor the lien were converted in this case, and because real property cannot be the subject of conversion, plaintiff's conversion claim fails.[8] Because plaintiff's conversion claim fails, the Court of Appeals did not need to reach the treble-damages issue.

Oral Argument Ordered on the Application for Leave to Appeal June 17, 2022:

PEOPLE V VEACH, Nos. 160469, 160470, and 160471; Court of Appeals Nos. 342394, 342395, and 342396. By order of January 20, 2021, the application for leave to appeal the October 15, 2019 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Davis* (Docket No. 161396). On order of the Court, the case having been decided on March 14, 2022, 509 Mich 52 (2022), the application is again considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address: (1) whether the Macomb Circuit Court relied on its pretrial courtroom closures or the defendant's failure to object to those closures to justify closing the courtroom for the defendant's trial and, if so, whether that reliance was erroneous; (2) whether the closure of the courtroom during the defendant's trial was a partial or total courtroom closure and whether this issue affects the defendant's claim of error; and (3) what remedy, if any, is available to the defendant, if constitutional or statutory error occurred.

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[6] *Warren Tool Co v Stephenson*, 11 Mich App 274, 299 (1968), citing *Anderson v Reeve*, 352 Mich 65, 69, 70 (1958).

[7] See *Garras v Bekiares*, 315 Mich 141, 147 (1946) ("It should be noted that defendant was not required to deliver to plaintiff the specific or identical moneys which he collected . . . , but was only required to pay plaintiff the invoiced price . . . . Therefore, as plaintiff was not entitled to the specific or identical moneys collected by defendant from his customers, he was not entitled to a judgment in tort for conversion.").

[8] Because we believe there was no conversion, we take no position on whether an attorney may ethically request treble damages if a conversion claim based on an outstanding fee were successful.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v TYSON, No. 162968; Court of Appeals No. 350932. On order of the Court, the application for leave to appeal the April 15, 2021 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address: (1) whether *People v Carpenter*, 464 Mich 223 (2001), should be overruled; (2) if so, whether it should nonetheless be retained under principles of stare decisis, *Coldwater v Consumers Energy Co*, 500 Mich 158, 172-174 (2017); and (3) if *Carpenter* is overruled, what relief, if any, the defendant is entitled to, given that she did not seek to admit evidence of diminished capacity at trial.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 17, 2022:

PEOPLE v NASSAR, No. 162615; Court of Appeals No. 345699. On order of the Court, the application for leave to appeal the December 22, 2020 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

We share the concerns of both the Court of Appeals majority and dissent about the conduct of the sentencing judge in this case[1] and seriously question whether the majority committed error by affirming the trial court's denial of defendant's motion for disqualification and motion for resentencing. Although we consider this case to present a close question, we decline to consider defendant's application any further. First, defendant's claims suffer from preservation problems, and to prove that judicial disqualification is warranted requires defendant to shoulder a heavy burden. *Cain v Mich Dep't of Corrections*, 451

[1] See *People v Nassar*, unpublished per curiam opinion of the Court of Appeals, issued December 22, 2020 (Docket No. 345699), p 8 (acknowledging that some statements made by the trial judge were "wholly inappropriate" and "erode[d] public confidence in the judiciary and cast[] doubt on whether a defendant's due process rights were followed"); *id.* (SHAPIRO, J., dissenting) at 1 (concluding that "[t]he process by which this sentence was imposed challenges basic notions of judicial neutrality, due process, the right to counsel, and the use of social media by judges").

Mich 470, 497 (1996). Second, we conclude that the jurisprudential significance of any holding from this Court would be seriously limited, as the question of this judge's impartiality or bias arises in markedly fact-specific circumstances, involving an unusually high-profile and highly scrutinized case, and a unique sentencing procedure. Third, it is worth noting that the concurrent 40- to 175-year sentences imposed in this case were within the range agreed upon in the parties' plea and sentencing agreement. See *People v Wiley*, 472 Mich 153, 154 (2005).[2] For these reasons, we decline to expend additional judicial resources and further subject the victims in this case to additional trauma where the questions at hand present nothing more than an academic exercise.

PEOPLE V COPELAND, No. 164019; Court of Appeals No. 351231.

CAVANAGH, J. (*concurring*). I concur in the Court's order denying leave to appeal. I write separately to express concern about the current model criminal jury instruction for possession of a firearm during the commission of a felony (felony-firearm) and to encourage the Committee on Model Criminal Jury Instructions to consider whether a revision is warranted. In short, I question whether the current model instruction—M Crim JI 11.34—unnecessarily creates an undue risk of juror confusion and inconsistent verdicts.

The defendant in this case was charged with second-degree murder (along with the lesser included offense of manslaughter) and felony-firearm. In instructing the jury on the elements of felony-firearm, the court advised the jury, consistently with M Crim JI 11.34, that:

> To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the defendant committed the crime of murder or second degree murder or voluntary manslaughter. *It is not necessary, however, that the defendant be convicted of that crime.*
>
> Second, that at the time the defendant committed the crime he knowingly carried or possessed a firearm. [Emphasis added.]

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[2] We also note that defendant was sentenced to a concurrent prison term of 40 to 125 years for similar crimes committed in Eaton County. That sentence is final as defendant's direct appeal has been concluded. *People v Nassar*, 503 Mich 1003 (2019). Before he can begin serving the instant Ingham County sentence and the Eaton County sentence in state prison, defendant must complete three consecutive 20-year sentences in federal prison for convictions related to receiving child pornography, possessing child pornography, and obstructing a federal investigation. *United States v Nassar*, unpublished order of the United States Court of Appeals for the Sixth Circuit, entered August 22, 2018 (Docket No. 17-2490). We do not suggest that this is a legal reason for denying leave to appeal in this case, but when viewed along with the other reasons we have provided, it is a prudential concern that weighs against considering defendant's application for leave any further.

After some deliberation, the jury sought clarification as to the felony-firearm charge, asking: (1) "Is the felony-firearm charge tied to the murder or manslaughter charge?" and (2) "If the defendant is not guilty of those charges, does the firearm charge still stand?" In response, the trial court largely repeated the model instruction. The jury acquitted defendant of second-degree murder and manslaughter, but convicted him of felony-firearm.

Because a conviction for felony-firearm requires the prosecutor to prove that the defendant committed the underlying felony beyond a reasonable doubt (in this case, second-degree murder or manslaughter) the jury's decision to convict of felony-firearm but acquit of the underlying felony is seemingly inconsistent. This Court has held that a jury may generally render inconsistent verdicts, *People v Vaughn*, 409 Mich 463, 465-466 (1980), and more specifically that a jury can acquit a defendant of the underlying felony yet convict of felony-firearm, *People v Lewis*, 415 Mich 443, 450-455 (1982). I write here not to question the correctness of these decisions, which are binding under stare decisis and have not been challenged by defendant. Rather, I write to question whether M Crim JI 11.34 appropriately implements those decisions.

As indicated earlier, the model criminal jury instruction currently directs trial courts to instruct juries that "[i]t is not necessary . . . that the defendant be convicted of [the underlying felony]" to find the defendant guilty of felony-firearm. M Crim JI 11.34(3). While this is an accurate statement of the law under *Lewis*, this precise instruction is not required by that decision. In *Lewis*, the Court held that while commission of the underlying offense is a necessary element of felony-firearm, a *conviction* of the underlying offense is not an element. *Lewis*, 415 Mich at 454-455. The Court rejected defense counsel's argument that the trial judge should have advised the jury " 'that if they acquit the defendant of the underlying felony count, they cannot convict of felony-firearm,' " and instead held that "the jury may not be instructed that it must convict of an underlying felony in order to convict of felony-firearm." *Id*. Thus, while *Lewis* held that a jury cannot be instructed that a conviction of the underlying felony is an element of felony-firearm, it did not hold that a jury must be instructed that a conviction of the underlying offense is *not* an element of felony-firearm.

Even though it is legally correct under *Lewis* that a jury need not convict a defendant of the underlying felony to convict of felony-firearm, I question whether we should as a policy matter be advising juries of this fact. As exemplified by this case, it seems like advising a lay jury that it must find that defendant committed the underlying felony beyond a reasonable doubt but need not actually convict of that underlying felony is likely to cause confusion. Moreover, it is one thing for the judiciary to accept that a jury might render inconsistent verdicts and decline to invalidate a conviction on that basis, but it is another to invite—and tacitly approve preemptively—such a result. It seems to me that the sentence "[i]t is not necessary, however, that the defendant be convicted of [the underlying felony]" could be removed from the current

model instruction and the jury would still be properly instructed without increasing the chances of juror confusion and inconsistent verdicts.

Given that trial courts are generally bound by the model instructions[1] and felony-firearm is one of the more common charges brought against criminal defendants, the decision to include this provision in the model instruction seems consequential. In light of the potential ramifications of this decision, I encourage the Committee on Model Criminal Jury Instructions to consider whether a revision is warranted.

Summary Disposition June 24, 2022:

PEOPLE V VINCEL LEWIS, Nos. 164114 and 164115; Court of Appeals Nos. 354997 and 354998. On order of the Court, the application for leave to appeal the January 6, 2022 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and the September 16, 2020 orders of the Wayne Circuit Court granting the defendant's motion to quash.

As noted by dissenting Court of Appeals Judge SERVITTO, the probable-cause standard at the preliminary examination "is not a very demanding threshold." *People v Harlan*, 258 Mich App 137, 145 (2003). "Probable cause requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *People v Yost*, 468 Mich 122, 126 (2003) (quotation marks and citation omitted). "[A] magistrate is required to determine at the conclusion of the preliminary examination whether there is probable cause that the defendant has committed a crime." *People v Anderson*, 501 Mich 175, 183 (2018) (quotation marks omitted). This Court explained in *Anderson*, *id*. at 184, that one of the relevant definitions of "determine" is "to settle or decide by choice of alternatives or possibilities." (Quotation marks and citation omitted.) Furthermore, "where there is a conflict of evidence or where there is a reasonable doubt as to a defendant's guilt, there generally will be probable cause to bind over a defendant, even if the magistrate may have had reasonable doubt that defendant committed the crime." *Id*. at 186 (quotation marks, citations, and brackets omitted).

Sufficient evidence was presented at the preliminary examination to establish probable cause to believe that the defendant's actions were the cause of the deaths for which the defendant has been charged. The evidence presented demonstrated that the defendant was drunk and

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[1] See *People v Lyles*, 501 Mich 107, 122 n 8 (2017) (noting that "[u]nder MCR 2.512(D)(2), '[p]ertinent portions of the instructions approved by the . . . Committee on Model Criminal Jury Instructions . . . must be given in each action in which jury instructions are given' if they are applicable, they accurately state the applicable law, and they are requested by a party") (alterations in original).

angry with his estranged wife on the night in question, that he chased her vehicle at a high rate of speed until it crashed, that the vehicle the defendant was driving suffered front-end damage, and that the crash-data-retrieval report from that same vehicle also showed evidence of a nondeployment event while moving at a high rate of speed that day. Although this evidence may not be sufficient to prove guilt beyond a reasonable doubt, it is sufficient to demonstrate probable cause for purposes of bindover. Therefore, the 36th District Court did not abuse its discretion by binding the defendant over for trial, and the circuit court erred by granting the defendant's motion to quash. Accordingly, we REMAND this case to the Wayne Circuit Court for further proceedings not inconsistent with this order.

ZAHRA, J., did not participate due to a familial relationship with counsel of record.

Leave to Appeal Denied June 24, 2022:

PEOPLE v KUCHAREK, No. 164387; Court of Appeals No. 357575.

Summary Disposition June 28, 2022:

CHIABAI v GF TRANSITION, INC, No. 164063; Court of Appeals No. 358467. On order of the Court, the application for leave to appeal the January 4, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. We do not retain jurisdiction.

Leave to Appeal Denied June 28, 2022:

DEBRUYN v DILORENZO, No. 163480; Court of Appeals No. 351253.

US BANK TRUST v GORGE, No. 163511; Court of Appeals No. 354118.

NICKERSON v ALLSTATE INSURANCE COMPANY, No. 163620; Court of Appeals No. 354682.

PEOPLE v BARBER, No. 163663; Court of Appeals No. 352361.

PEOPLE v LAZARO, No. 163683; Court of Appeals No. 352317.

PEOPLE v BROWN, No. 163792; Court of Appeals No. 348558.

PEOPLE v RONNIE SPEARS, No. 163802; Court of Appeals No. 357848.

MICHIGAN HEAD & SPINE INSTITUTE v FRANKENMUTH MUTUAL INSURANCE COMPANY, No. 163851; Court of Appeals No. 355521.

PEOPLE v AMANDA REED, No. 163874; Court of Appeals No. 353140.

PEOPLE v LANGSTAFF, No. 163889; Court of Appeals No. 358246.

PEOPLE v CONKLIN, No. 163911; Court of Appeals No. 358806.

ATTITUDE WELLNESS, LLC v VILLAGE OF EDWARDSBURG, No. 163913; Court of Appeals No. 355767.

ATTITUDE WELLNESS, LLC v VILLAGE OF EDWARDSBURG, No. 163916; Court of Appeals No. 355767.

MICHAEL S SHERMAN, DO, PC v SHIRLEY T SHERROD, MD, PC, No. 164027; Court of Appeals No. 351634.

RAINBOW CONSTRUCTION COMPANY, INC v TOWNSHIP OF HOWELL, No. 164028; Court of Appeals No. 354213.

PEOPLE v CONNER-WASHINGTON, No. 164065; Court of Appeals No. 354941.

PEOPLE v MCCREARY, No. 164069; Court of Appeals No. 352315.

ZAHRA, J., did not participate due to a familial relationship with counsel of record.

In re SHELLY ANN-MARIE SANGSTER, RN, No. 164102; Court of Appeals No. 352147.

EAGAN v CITIZENS INSURANCE COMPANY OF THE MIDWEST, No. 164117; Court of Appeals No. 357143.

In re DONALD F CLARK TRUST, No. 164122; COURT OF APPEALS No. 355300.

PEOPLE v MATAYA SHAW, No. 164123; Court of Appeals No. 359439.

PEOPLE v MATTILA, No. 164126; Court of Appeals No. 354092.

PEOPLE v PROCTOR, No. 164130; Court of Appeals No. 358609.

CLARK v LIBERTY MUTUAL INSURANCE COMPANY, No. 164131; Court of Appeals No. 358491.

AH v AR, No. 164141; Court of Appeals No. 358349.

PEOPLE v CALBERT, No. 164150; Court of Appeals No. 357061.

PEOPLE v KECK, No. 164155; Court of Appeals No. 346077.

PEOPLE v HATCHETT, No. 164156; Court of Appeals No. 351289.

PEOPLE v SQUALLS, No. 164157; Court of Appeals No. 353187.

In re MERRIWEATHER, No. 164159; Court of Appeals No. 358450.

PEOPLE v DICKEY, No. 164162; Court of Appeals No. 359255.

PEOPLE v COLLINS, No. 164165; Court of Appeals No. 355096.

MOWER-HARRIGER v ERMC II, LP, No. 164170; Court of Appeals No. 354016.

ROBINSON v CS MOTT CHILDREN'S HOSPITAL, No. 164171; Court of Appeals No. 358423.

BERNSTEIN, J., did not participate due to a familial relationship.

PEOPLE v LOJEWSKI, No. 164175; Court of Appeals No. 359214.

PEOPLE v BARRON, No. 164179; Court of Appeals No. 360296.

PEOPLE v CALDWELL, No. 164187; Court of Appeals No. 358589.

PEOPLE v CONEY, No. 164188; Court of Appeals No. 357427.

PEOPLE v CLARK, No. 164193; Court of Appeals No. 353829.

SMITH v HENRY FORD HEALTH SYSTEM, No. 164198; Court of Appeals No. 354223.

PEOPLE v POMPURA, No. 164202; Court of Appeals No. 353620.

NAYYAR v OAKWOOD HEALTHCARE, INC, No. 164207; Court of Appeals No. 360257.

CITY OF SOUTHFIELD v SHEFA, LLC, No. 164210; reported below: 340 Mich App 391.

PEOPLE v CONNOLLY, No. 164219; Court of Appeals No. 359308.

PEOPLE v GREER, No. 164222; Court of Appeals No. 360204.

CHANDLER v VHS SINAI GRACE HOSPITAL, INC, No. 164230; Court of Appeals No. 359114.

PEOPLE v RUBEN SCOTT, No. 164231; Court of Appeals No. 359120.

STATEBRIDGE COMPANY, LLC v FELLS, No. 164234; Court of Appeals No. 355662.

PEOPLE v DORIAN WALKER, No. 164235; Court of Appeals No. 358952.

PEOPLE v WITHAM, No. 164248; Court of Appeals No. 359492.

PEOPLE v MARKBY, No. 164250; Court of Appeals No. 360384.

PEOPLE v GREEN, No. 164271; Court of Appeals No. 360199.

PEOPLE v WILSON, No. 164292; Court of Appeals No. 358964.

PEOPLE v HACKNEY, No. 164297; Court of Appeals No. 359638.

JURICH v EC BROOKS CORRECTIONAL FACILITY WARDEN, No. 164315; Court of Appeals No. 359217.

VIVIANO, J., did not participate due to a familial relationship with the plaintiff's trial counsel.

RASSEY v HOLTROP, No. 164322; Court of Appeals No. 358816.

PEOPLE v HUNRATH, No. 164345; Court of Appeals No. 358888.

Reconsideration Denied June 28, 2022:

PEOPLE v CARINES, No. 161730; Court of Appeals No. 351600.

PEOPLE v PIRKEL, No. 162765; Court of Appeals No. 354947.

SWANZY v KRYSHAK, No. 163058; reported below: 336 Mich App 370.

PEOPLE v WIMBERLY, No. 163097; Court of Appeals No. 342751.

PEOPLE v STRAMPEL, Nos. 163364 and 163365; Court of Appeals Nos. 352557 and 352558.

EMERY v CAREY, No. 163403; Court of Appeals No. 356573.

PEOPLE v SIMMONS, No. 163469; reported below: 338 Mich App 70.

PEOPLE v SHANANAQUET, No. 163627; Court of Appeals No. 350861.

RESIDENTS OF FRESH AIR PARK SUBDIVISION v POINTE ROSA HOMEOWNERS ASSOCIATION, INC, No. 163716; Court of Appeals No. 355011.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

CALLAHAN v MAROTA, No. 163812; Court of Appeals No. 359155.

HARRINGTON v CHIPPEWA CORRECTIONAL FACILITY WARDEN, No. 163820; Court of Appeals No. 355014.

PEOPLE v PERSON, No. 163878; Court of Appeals No. 347907.

Summary Disposition June 29, 2022:

In re BABY BOY DOE, No. 163807; reported below: 338 Mich App 571. On May 4, 2022, the Court heard oral argument on the application for leave to appeal the August 26, 2021 judgment of the Court of Appeals and the application for leave to appeal as cross-appellants. On order of the Court, the applications are again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, *we hold that petitioner's complaint for divorce did not satisfy MCL 712.10(1)* despite containing a demand for custody because it was filed before the child was born. Accordingly, we REVERSE in part and VACATE in part the judgment of the Court of Appeals and REMAND this case to the Court of Appeals for reconsideration of petitioner's arguments regarding the denial of his motion to unseal the adoption file and for further proceedings not inconsistent with this order.

On August 8, 2018, petitioner filed a complaint for divorce against his then pregnant wife in the Ottawa Circuit Court, Family Division. In the copy of the complaint filed with this Court, petitioner admitted his

lack of certainty about his paternity,[1] alleged that his then wife intended to give the child up for adoption or to surrender the child pursuant to the Safe Delivery of Newborns Law (SDNL), MCL 712.1 *et seq*., and requested that the child be placed with petitioner's parents in Nevada if his paternity was established. On August 9, 2018, Baby Boy Doe was born at a hospital in Kent County. On August 10, 2018, the Ottawa Circuit Court, without knowledge of Doe's birth, entered an ex parte order that ordered "DNA testing [of the child] upon birth to establish paternity" and enjoined either party from taking "any action pertaining to the permanent placement or adoption of the" unborn child until further ordered by the court. *The August 10 order was not served on the birth mother until at least August 30*.

In the meantime, on August 12, 2018, Doe was surrendered under the SDNL at the hospital, and the child was placed with respondent adoption agency, which assumed responsibility for the child. Respondent petitioned the Kalamazoo Circuit Court, Family Division, for an order authorizing placement of Doe with a prospective family, which perfected jurisdiction in that court. The SDNL placement order was granted on August 16, 2018. A "Publication of Notice, Safe Delivery of Newborns" was published in the Grand Rapids Press the same day, but Doe was not placed with the prospective adoptive parents until August 25 because he required additional medical treatment. On September 14, 2018, after receiving no response during the 28-day waiting period, MCL 712.7(f), respondent petitioned the Kalamazoo Circuit Court to accept the release of the surrendering parent and terminate the parental rights of both the surrendering and nonsurrendering parents. The Kalamazoo Circuit Court held a hearing on September 28, 2018, after which it terminated the parental rights of Doe's surrendering and nonsurrendering parents and granted custody and care of Doe to respondent. Doe's adoption by the placement family in Kalamazoo County was finalized on February 12, 2019.

Without knowledge of the proceedings in Kalamazoo County, the Ottawa Circuit Court entered an order in the divorce case awarding temporary custody to petitioner on September 21, 2018. Petitioner never filed a separate petition for custody under the SDNL, nor did he file a motion requesting that the Ottawa Circuit Court locate the court presiding over the SDNL action or that the custody portion of the divorce action be transferred. However, on January 16, 2019, after having located the Safe Delivery of Newborns Publication Notice, petitioner sent a subpoena to respondent in the Ottawa County action, apparently requesting copies of Doe's adoption file and related information. Respondent declined to provide the information and filed a motion to quash the subpoena in the Ottawa Circuit Court on February 1, 2019. After several hearings, some of the subpoenaed information was provided to petitioner's counsel on July 12, 2019, which, at a minimum, provided petitioner with enough information to determine the docket

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[1] Whether petitioner is the biological father of Baby Boy Doe is still undetermined.

number for the SDNL action in the Kalamazoo Circuit Court. The Ottawa Circuit Court entered a default divorce judgment in petitioner's favor on July 30, 2019.

Even though petitioner had known since at least mid-July 2019 that the SDNL proceedings had been commenced in the Kalamazoo Circuit Court, he neither attempted to move for untimely reconsideration of the earlier termination decision under MCR 2.119(F) nor did he attempt to appeal the earlier termination decision under MCR 7.204 or MCR 7.205. Instead, petitioner moved the Kalamazoo Circuit Court to unseal the adoption file on October 7, 2019. That motion was denied on January 2, 2020. Petitioner then argued for the *first time* that his parental rights were improperly terminated in his motion for reconsideration of that decision, which the Kalamazoo Circuit Court denied.[2]

On this record, we hold that regardless of whether the Court of Appeals erred by sua sponte addressing an issue that was unpreserved and beyond the scope of the judgment from which petitioner appealed, it committed reversible error in its interpretation of the SDNL. The statutory issue before this Court is whether a husband's complaint for divorce filed before a child is born that seeks custody of the unborn child, contingent upon the results of DNA testing, can constitute a timely "petition" for custody filed by a "nonsurrendering parent" under MCL 712.10(1). The SDNL "encourages parents of unwanted newborns to deliver them to emergency service providers instead of abandoning them." *In re Miller*, 322 Mich App 497, 502 (2018) (quotation marks, citation, and brackets omitted). The SDNL allows a parent to "surrender"[3] a "newborn"[4] within 72 hours of birth. Under MCL 712.10(1), "[n]ot later than 28 days after *notice of surrender of a newborn* has been published, an *individual claiming to be the nonsurrendering parent of that newborn* may file a petition with the court for custody." (Emphasis added.) This is a filing deadline that is premised on the existence of a "newborn" who has been "surrendered" and the petitioner's status as the nonsurrendering parent. When considered along with the statutory definitions, the statute sets forth the Legislature's intent for a child to be born before a petition for custody can be filed under the SDNL. After birth, and depending on the information available, a petition for custody may be filed in the county where the newborn is located, in the county where the emergency service provider to whom the child was surrendered is located, or in the county where the parent is located. MCL

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[2] "Where an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519 (2009).

[3] " 'Surrender' means to leave a newborn with an emergency service provider without expressing an intent to return for the newborn." MCL 712.1(2)(n).

[4] " 'Newborn' means a child who a physician reasonably believes to be not more than 72 hours old." MCL 712.1(2)(k).

712.10(1)(a) to (c). The statutory language outlining where the petition for custody can be filed presupposes that the child has already been born.

Upon the filing of the petition, the statute establishes several time-sensitive obligations for the courts involved that will slow and potentially cancel the process of terminating parental rights and finalizing adoption. First, if the court in which the petition for custody was filed is not the court that issued "the order placing the newborn," then it "shall locate and contact the court that issued the order and shall transfer the proceedings to that court." MCL 712.10(2). Second, "[*b*]*efore holding a custody hearing on a petition filed under this section* and not later than 7 days after a petition for custody under this section has been filed," the placing court "shall conduct a hearing" to determine paternity or maternity. MCL 712.10(3) (emphasis added). Third, as to the issue of paternity, "[i]n a petition for custody filed under [the SDNL], the court *shall order* the child and each party claiming paternity to submit to blood or tissue typing determinations or DNA identification profiling . . . ." MCL 712.11(1) (emphasis added). Testing will also be required for individuals claiming maternity "[u]nless the birth was witnessed by the emergency service provider" and sufficient documentation exists. MCL 712.11(2). *Only if* the "probability of paternity or maternity" as determined by the testing is "99% or higher and the DNA identification profile and summary report are admissible, paternity or maternity is presumed . . . ." MCL 712.11(3). If the testing "establishes that the petitioner could not be the parent of the newborn, the court shall dismiss the petition for custody." MCL 712.11(5). Fourth, if paternity or maternity is established, then the court must still make a determination of "custody of the newborn based on the newborn's best interest . . . with the goal of achieving permanence for the newborn at the earliest possible date." MCL 712.14(1). Section 14(2) of the SDNL lays out the best-interest factors that the court must consider. Based on the court's findings under MCL 712.14, the court may then (a) grant "legal or physical custody, or both, of the newborn to the [petitioner] parent and either retain[] or relinquish[] jurisdiction," (b) determine "that the best interests of the newborn are not served by granting custody to the petitioner parent and order[] the child placing agency to petition the court for jurisdiction under section 2(b) of chapter XIIA" of the probate code, or (c) dismiss the petition. MCL 712.15. None of the time-sensitive procedures and determinations that a properly filed petition for custody triggers can feasibly be accomplished before a child is born. These procedures demonstrate that the Legislature did not intend a prebirth complaint for divorce to serve as a petition for custody under the SDNL.

Petitioner's complaint for divorce filed in the Ottawa Circuit Court was filed before Doe was born and was not served on Doe's mother until after Doe had been surrendered. The complaint was untimely and did not satisfy the requirements of MCL 712.10(1) because it was filed before Doe's birth. Assuming petitioner could have taken some postbirth action to satisfy the statutory requirements or invoke the SDNL's protections for alleged nonsurrendering parents in the Ottawa Circuit Court, he did not do so. Petitioner also did not file a separate petition for

custody under the SDNL.[5] Accordingly, we REVERSE Part II of the Court of Appeals opinion addressing the termination of any parental rights petitioner might have had. The Court of Appeals' analysis of the Kalamazoo Circuit Court's judgment denying the motion to unseal the adoption records in Part III was intertwined with its holding under Part II; therefore, we VACATE Part III of the Court of Appeals opinion and REMAND this case to the Court of Appeals for reconsideration of that issue and further proceedings not inconsistent with this order.[6]

As to petitioner's "Motion to Strike Non-Conforming Briefs," we GRANT the motion as to the pictures described in ¶ 1, the unverified statistics described in ¶ 4, and any allegations of domestic violence that were not substantiated by official court records, MCR 7.310(A); the balance of the motion is DENIED. As to petitioner's "Motion to Strike Portions of Appendices," we GRANT the motion as to the unverified statistics described in ¶ 9 and the spreadsheet and associated author credentials described in ¶¶ 10 to 12, MCR 7.310(A); the balance of the motion is DENIED, as the remaining allegations refer to copies of court

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[5] Counsel for the adoptive parents, who are cross-appellants here, conceded at oral argument that a timely filed divorce complaint coupled with additional postfiling actions could, in certain circumstances, serve as a petition for custody under MCL 712.10(1). However, because the divorce complaint here was untimely under MCL 712.10(1), we need not address this hypothetical circumstance.

[6] On our own initiative, we directed the parties to brief "whether the application of the SDNL violates the due process rights of an undisclosed father." *In re Baby Boy Doe*, 509 Mich 873, 873 (2022). Upon review of the issue, we decline to reach it. We generally do not reach issues that were not raised and briefed in the lower courts. See *Walters v Nadell*, 481 Mich 377, 387 (2008) ("Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a 'failure to timely raise an issue waives review of that issue on appeal.' ") (citations omitted); *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234 n 23 (1993) ("This Court has repeatedly declined to consider arguments not presented at a lower level, including those relating to constitutional claims. We have only deviated from that rule in the face of exceptional circumstances.") (citations omitted). This course of action is particularly suited to this issue because it raises a constitutional question of first impression not only for this state, but also for other states across the country. Justice ZAHRA considers it "debatable" whether this issue was preserved in the trial court. But aside from a single line by petitioner's counsel at a hearing, petitioner never raised or addressed the constitutionality of the statute throughout this litigation, at least not until prompted by this Court. The constitutional issue, therefore, has not been properly preserved or even presented to the Court.

records and transcripts from official court proceedings. See MRE 201; MRE 902; MRE 1005. We direct the Clerk of the Court to redact the stricken materials from the filed briefs and appendices before making them publicly available.

MCCORMACK, C.J. (*concurring in part and dissenting in part*). I concur with the majority's statutory analysis, concluding that the Court of Appeals erred by holding that the petitioner's complaint for divorce and custody request for the as-yet-unborn child constituted a petition for custody under the Safe Delivery of Newborns Law (SDNL). I also join Justice ZAHRA's partial dissent, as I share his concerns about the SDNL's "dubious method of providing notice before terminating" the parental rights of a nonsurrendering parent. I write separately to express my deep reservations about whether the statute's notice-by-publication provision sufficiently protects the due-process rights of nonsurrendering parents.

The SDNL requires a child-placing agency to "make reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent." MCL 712.7(f). When the identity and address of that parent are unknown, "the child placing agency shall provide notice of the surrender of the newborn by publication in a newspaper of general circulation in the county where the newborn was surrendered." *Id*. That's what happened in this case, where Catholic Charities of West Michigan published the following notice in the Grand Rapids Press on August 16, 2018:

> Publication of Notice
> Safe Delivery of Newborns
> (MCL 712.1)
> TO: Birth Father and Birth Mother, of minor child.
> IN THE MATTER OF: newborn baby, born August 9, 2018 at 11:08 am, and surrendered on August 12, 2018 at Spectrum Health Grand Rapids, MI.
> TAKE NOTICE: By surrendering your newborn, you are releasing your newborn to a child placing agency to be placed for adoption. You have until September 9, 2018 (28 days from surrender of the child) to petition the court to regain custody of your child. After 28 days there will be a hearing to terminate your parental rights. You as the parents can call Catholic Charities West MI, adoption unit at (877) 673-6338 for further information.

The SDNL does not require more. And this notice by publication is likely permissible under current procedural-due-process precedent. See *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 317 (1950) ("[I]n the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights."); *Krueger v Williams*, 410 Mich 144, 166 (1981) (noting that in circumstances where "the specific whereabouts of a person is unknown, service of process by publication may be the most

practicable and adequate method of service available"). But I am not convinced that such a notice, published on a single day in a local print newspaper, should satisfy the due-process guarantees of our state and federal constitutions. At the very least, in an era of rapidly declining print newspaper circulation, I am skeptical that such notice continues to make sense as the standard method of providing constructive notice.

To be sure, the challenge of providing notice to an unknown party is a problem without an easy solution. Nor is it a new problem: As far back as 1950, long before the decline of print newspapers, the Supreme Court was under no illusion about the efficacy of notice by publication: "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed." *Mullane*, 399 US at 315; see also *Walker v City of Hutchinson*, 352 US 112, 116 (1956) ("It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property"); *City of New York v New York, NH & H R Co*, 344 US 293, 296 (1953) ("Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best.").

But the due-process deficiencies inherent in notice by publication are magnified in cases like this one, where a profound, fundamental liberty interest is at stake. The petitioner's parental rights were terminated because he failed to pick up a copy of the August 9, 2018 edition of the Grand Rapids Press and read all the way through the classified ads. And because he did not respond within 28 days to an SDNL notice he did not see, published once, in a print newspaper from a county in which he did not reside, describing a birth "on August 9, 2018 at 11:08 am, and surrendered on August 12, 2018 at Spectrum Health Grand Rapids," he has forfeited his parental rights. I think due process demands more.

The legal rule acknowledges that notice by publication may functionally amount to a legal fiction, "[b]ut when the names, interests and addresses of persons are unknown, plain necessity may" leave no other choice. *City of New York*, 344 US at 296. In other words: What other option do we have? It seems to me government can answer that question today better than in 1953 when *City of New York* was decided.

One partial solution may be found in supplementing traditional notice by publication in print newspapers with simultaneous online postings. See Rieders, Note, *Old Principles, New Technology, and the Future of Notice in Newspapers*, 38 Hofstra L Rev 1009 (Spring 2010); Klonoff, Herrmann, & Harrison, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U Pitt L Rev 727 (Summer 2008). This solution is imperfect, but given the far broader reach of the Internet and its relative ease of access, it represents a marked improvement over the status quo.

Fortunately, the Michigan Legislature appears to agree. In May 2022, the Revised Judicature Act, MCL 600.101 *et seq*., was amended to require Michigan newspapers to provide free access to public notices on their websites. See 2022 PA 74, amending MCL

600.1461 and MCL 691.1051(2)(a)(*i*). Notices must "remain on the website during the full required publication period" and must "remain searchable on the website as a permanent record of the publication." MCL 691.1051(2)(a)(*ii*) and (*iii*). The statute also requires newspaper publishers to ensure that notices are added to a central online repository to consolidate legal notices from across the state. MCL 691.1051(2)(b).

Courts can contribute to a solution too. The petitioner was proceeding in Ottawa Circuit Court to assert his parental rights while his wife's child's adoption was proceeding in Kalamazoo County. Neither court was remotely aware of what the other was doing—through no fault of their own, as Michigan courts do not have a statewide case-management system. On September 28, for instance, the Kalamazoo Circuit Court terminated the parental rights of the petitioner, who had—just one week prior—received an order from the Ottawa Circuit Court purporting to award him physical and legal custody of the very same newborn. Building a statewide case-management system takes resources, but among many other benefits it would provide the public and lawmakers, the enhanced transparency could contribute to solving notice problems.

I suspect, though, that this recent statutory tweak and the hope of a future statewide case-management system are cold comfort to the petitioner, who will never have the opportunity to argue for the right to parent the child he believes is his own.

ZAHRA, J. (*concurring in part and dissenting in part*). This is a case of first impression for this Court addressing the Safe Delivery of Newborns Law (SDNL), MCL 712.1 *et seq*. I agree with the dissenting Court of Appeals judge's opinion highlighting that the SDNL contains "references to custody petitions or proceedings being filed specifically under MCL 712.10. See MCL 712.7(c), MCL 712.10(3), MCL 712.11(1), MCL 712.11(2), MCL 712.17(3)."[1] I also agree with the dissenting judge that "[a]lthough not expressly stated in so many words, it is readily apparent that the Legislature intended that a custody petition under the SDNL must be specifically brought under the SDNL."[2] Along these lines, I am persuaded, as a matter of statutory interpretation, that petitioner's complaint for divorce requesting custody cannot be relied upon to collaterally attack proceedings of a case brought under the SDNL.[3]

Still, I believe that the SDNL is a highly flawed law because of significant constitutional concerns that this Court should not sweep

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[1] *In re Baby Boy Doe*, 338 Mich App 571, 598 (2021) (RONAYNE KRAUSE, P.J., dissenting).

[2] *Id*. (emphasis omitted).

[3] I agree with the majority that a complaint for divorce does not qualify as a petition to gain custody of a newborn under the SDNL. Still, I am not convinced the majority should definitively "hold that petitioner's complaint for divorce did not satisfy MCL 712.10(1) despite containing a demand for custody because it was filed before the child was born." (Emphasis omitted.)

under the rug.[4] The fundamental problem with the SDNL is that the termination of a nonsurrendering parent's rights is presumed without any showing of parental unfitness, regardless whether the nonsurren-

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[4] The Kalamazoo court acknowledged that the SDNL is flawed and ruled from the bench:

> They have got the legislature, the Court of Appeals, everybody has said this is secure haven. I understand you are arguing that mom went rouge [sic] and she had a duty—or somebody had a duty to let dad know what's going on, I mean that is really the heat [sic] of your argument, I get it. It is unfortunate for him.
>
> She is going to the hospital, telling the hospital there—there has been—what did she say—there has been abuse—domestic violence—I don't remember her exact terms and that the best interest [f]or my baby is for me to give my baby up. The hospital can't ask any questions, takes the baby, contacts the people on the list. Catholic Charities gets the baby placed. No questions by law can be asked.
>
> I don't have any clear and convincing evidence of any legal argument from you why the confidential records for an adoption should be opened up in this case. There is nothing unique.
>
> Other than the statute never addresses what happens if there is really no actual notice. There is legal notice. How many times—I don't know what kind of law you guys do, but I don't know how many times this Court has had published notice in the Climax Crescent, some tiny little newspaper within the county, but it is general circulation, meets the criteria of the statute. Do we think dad had actual notice? Probably not, but did he get legal notice? Absolutely.
>
> I find that dad got legal notice. Did mom bamboozle everybody? Maybe. But that in and of itself is not a reason to change the confidential records and open up Pandora's Box and let we [sic] just assure you everything that Catholic Charities gave to this Court Ottawa County has already given to you, just redacted with the third—innocent third parties names on it and the information about them.
>
> So I really don't think our files would have anymore [sic] to give you. You've got the orders, you have submitted them to us and we've got the information that Catholic Charities already gave you. That's all that is there.

dering parent is a legal parent[5] or a putative parent. Because the SDNL does not distinguish between the greater rights possessed by a legal parent from the lesser rights afforded a mere putative parent, I conclude the SDNL is unconstitutional as applied to legal parents. This conclusion is consistent with this Court's precedent as well as that of the Supreme Court of the United States.

In *In re Clausen*,[6] this Court acknowledged the constitutional distinction between legal parents and a mere putative parent. In *Clausen*, an Iowa woman gave up her daughter for adoption but later decided she wanted her back. Before the natural mother had a change of heart, the child was adopted by a Michigan couple. The adoptive parents refused the natural mother's request to set aside the adoption. Litigation dragged on for years, which ended when this Court ordered the child returned to her natural parents.

The Court first acknowledged that " '[n]o one would seriously dispute that a deeply loving and interdependent relationship with an adult and a child in his or her care may exist even in the absence of blood

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* * *

> . . . I really don" [sic] want to unseal our adoptive records. I don't think you've shown anything that shows that anything was violated, that there is any good cause.

* * *

> I find this very interesting. The only concern that I have is I really think the legislature needs to tweak the law about notice. It is unfortunate that, you know, there is no requirement that the publication shall be where the mother resides or where the father resides or that shall be some notice a legal father [sic], but again the domestic violence people would be all up in arms to have that for this very reason. Mom is saying there is domestic violence. She is protecting herself allegedly and her baby. She doesn't want that baby to go to dad. I don't know. I don't know what the facts are, but we certainly have lots of cases like that.
>
> So I have to follow the law until the legislature changes it. In fact, *In re Miller* [322 Mich App 497 (2018)] confirms the legislature's intent.

[5] A "parent," also termed "legal parent," is "[t]he lawful father or mother of someone." *Black's Law Dictionary* (11th ed). "In ordinary usage, the term denotes more than responsibility for conception and birth." *Id*.

[6] *In re Clausen*, 442 Mich 648 (1993).

relationship.' "[7] Yet, quoting at length an opinion from the Supreme Court of the United States in the context of foster care, we recognized that there "are limits to such claims":[8]

> "[T]here are also important distinctions between the foster family and the natural family. First, unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements. . . . [T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.' Here, however, whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset.
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> * * *
>
> "A second consideration related to this is that ordinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another. . . . It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset."[9]

While the aims of the SDNL are laudable, the law fails to adequately secure a legal parent's liberty interest in family, an intrinsic human right understood in accord with "this Nation's history and tradition."[10]

Admittedly, whether this constitutional issue was properly preserved is debatable. At a hearing before the Kalamazoo circuit court, petitioner's counsel attempted to raise the constitutional claim, stating: "I think it is [an] unconstitutional statute because here my guy . . . ." But the trial court put an end to the argument, interjecting, "[w]ell, . . . you are

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[7] *Id*. at 654, quoting *Smith v Org of Foster Families*, 431 US 816, 843-844 (1977).

[8] *In re Clausen*, 442 Mich at 654.

[9] *Id*. at 664-665, quoting *Smith*, 431 US at 845-846 (alterations in original).

[10] *In re Clausen*, 442 Mich at 664, quoting *Smith*, 431 US at 845.

barking up the wrong tree for an unconstitutional statute." There was no further discussion of the SDNL's constitutionality. Ordinarily the constitutionality of a statute will not be first considered on appeal,[11] though there may be compelling reasons to consider the issue on the Court's own initiative.[12] In this case, we asked the parties to brief the constitutional question because there are compelling reasons to question whether the SDNL provides for an adequate process of law before terminating a legal parent rights[13] without any finding of parental unfitness. We highlighted a more recent case decided by this Court, *In re Sanders*,[14] which underscored that "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights."[15] The *Sanders* Court also made clear that "[t]he Constitution does not permit the state to presume rather than prove a parent's unfitness 'solely because it is more convenient to presume than to prove.' "[16]

Under the SDNL, the adoption process begins when a newborn is surrendered. The emergency service provider that takes temporary custody of the child owes several duties to the surrendering parent under the SDNL:

> When the emergency service provider takes temporary custody of the child, the emergency service provider must reasonably try to inform the parent that surrendering the child begins the adoption process and that the parent has 28 days to petition for custody of the child. MCL 712.3(1)(b) and (c). The emergency service provider must furnish the parent with written notice about the process of surrender and the termination of parental rights. MCL

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[11] See 7A Michigan Pleading & Practice (2d ed), § 57:48, pp 551-552 and multiple cases cited therein.

[12] *Id*. at 551, citing *Ridenour v Bay Co*, 366 Mich 225 (1962), for the proposition that even if the question whether a statute is constitutional is not raised in the trial court, it will be considered on appeal "where public rights and the financing of public improvements are involved and an emergency exists with respect to getting proper statutes enacted"; see also *id*. at 551 n 2, citing *Kunde v Teesdale Lumber Co*, 52 Mich App 360 (1974), for the proposition that an appellate court "may exercise its discretion to consider a constitutional question of first impression in Michigan raised by the appellant on appeal of worker's compensation proceedings, even though the appellant did not raise the issue on application for leave to appeal."

[13] Presumably the mother's parental rights could be terminated as well if a newborn is surrendered by someone other than the mother.

[14] *In re Sanders*, 495 Mich 394 (2014).

[15] *Id*. at 415.

[16] *Id*., quoting *Stanley v Illinois*, 405 US 645, 658 (1972).

> 712.3(1)(d). The emergency service provider should also try to inform the parent that, before the child can be adopted, "the state is required to make a reasonable attempt to identify the other parent, and then ask the parent to identify the other parent." MCL 712.3(2)(e). Finally, the emergency service provider must take the newborn to a hospital, if the emergency service provider is not a hospital, and the hospital must take temporary protective custody of the child. MCL 712.5(1).[17]

The hospital then must notify a child-placing agency about the surrender. The child-placing agency has various obligations under the SDNL. These include making "reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent," which may require "publication in a newspaper of general circulation in the county where the newborn was surrendered."[18]

The SDNL provides a procedure for either parent to contest the termination of parental rights: "[T]he surrendering parent, within 28 days of surrender, or the nonsurrendering parent, within 28 days of published notice of surrender, may file a petition to gain custody of the child. MCL 712.10(1)."[19] The procedure for filing a petition for custody is set forth in MCL 712.10(1), which provides in pertinent part:

> Not later than 28 days after notice of surrender of a newborn has been published, an individual claiming to be the nonsurrendering parent of that newborn may file a petition with the court for custody. The surrendering parent or nonsurrendering parent shall file the petition for custody in 1 of the following counties:
>
> (a) If the parent has located the newborn, the county where the newborn is located.
>
> (b) If subdivision (a) does not apply and the parent knows the location of the emergency service provider to whom the newborn was surrendered, the county where the emergency service provider is located.
>
> (c) If neither subdivision (a) nor (b) applies, the county where the parent is located.

If neither parent files a petition for custody, "the child-placing agency must immediately file a petition with the court to terminate the rights of the surrendering parent and the nonsurrendering parent."[20] The agency must offer evidence to show that the surrendering parent released the baby and demonstrate the agency's efforts "to identify, locate, and provide notice to the nonsurrendering parent."[21] If the

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[17] *In re Miller*, 322 Mich App 497, 502 (2018).

[18] MCL 712.7(f); see also *In re Miller*, 322 Mich App at 502.

[19] *In re Miller*, 322 Mich App at 503.

[20] *In re Miller*, 322 Mich App at 503, citing MCL 712.17(2) and (3).

[21] MCL 712.17(4).

agency meets its burden of proof by a preponderance of the evidence and a custody action has not been filed by the nonsurrendering parent, the trial court "shall enter an order terminating parental rights of the surrendering parent and the nonsurrendering parent under this chapter."[22]

The SDNL presumes that an unknown parent is presumptively unfit on the basis of a failure to respond within 28 days of a cryptic public notice. In *Mathews v Eldridge*,[23] the Supreme Court articulated a three-part balancing test to determine "what process is due" when the state seeks to curtail or infringe an individual right:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The process entailed in the SDNL falls woefully short of the process required under *Mathews*. First, as fully explained in *In re Sanders*, the private interest of a legal parent is "significant."[24] Second, there is clearly a " 'risk of an erroneous deprivation of such interest through the procedures used . . . .' "[25] The SDNL merely requires publication in a newspaper of general circulation in the county in which the child was surrendered. As the trial court noted, such notice by publication probably did not give the legal parent actual notice. In short, this is a dubious method of providing notice before terminating a legal parent's parental rights. Finally, the last aspect of *Mathews* must be understood in terms of the adoption aspect permeating the SDNL. Surely, the state has a legitimate and important interest in protecting the health and safety of minors and, in some circumstances, that interest will require temporarily placing a child with a nonparent. But that state interest is largely satisfied simply by the placement of the child with a nonparent. And the SDNL's ancillary goal of expediting adoption requires the termination of parental rights. If the child was simply placed in foster care instead of being rapidly ushered into adoption, the constitutional concerns would dissipate. In other words, foster care provides an

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[22] MCL 712.17(5).

[23] *Mathews v Eldridge*, 424 US 319, 335 (1976).

[24] *In re Sanders*, 495 Mich at 409-410.

[25] *Id*. at 410, quoting *Mathews*, 424 US at 335.

adequate substitute procedural safeguard that does not impose a significant burden on the state's interest in protecting the health and safety of minors.[26]

MCCORMACK, C.J., joins the statement of ZAHRA, J.

WELCH, J. (*concurring*). I concur in full with the Court's disposition of this case. I write separately because we directed the parties to brief the unraised and unpreserved issue of "whether the application of the [Safe Delivery of Newborns Law (SDNL), MCL 712.1 *et seq*.,] violates the due process rights of an undisclosed father," *In re Baby Boy Doe*, 509 Mich 873, 873 (2022), and I believe petitioner is deserving of some explanation in this regard. Under the unique facts of this case, petitioner's due process rights were not violated by application of the SDNL. MCL 712.7(f).

In *Lehr v Robertson*, 463 US 248 (1983), the United States Supreme Court considered whether the failure to provide notice of the pending adoption of a two-year-old child to the putative father violated his due process or equal protection rights. Not only did the putative father in *Lehr* not receive actual notice prior to the adoption, but the Court's decision suggests that notice by publication was not provided either. The Court held that where a putative father had not established a substantial relationship with the child, the failure to give the putative father notice of pending adoption proceedings, despite the state's actual knowledge of his existence and whereabouts, did not deny the putative father due process or equal protection because he could have guaranteed that he would receive notice of any adoption proceedings by mailing a postcard to the putative-father registry. *Id*. at 261-268. Stated differently, the putative father in *Lehr* had the opportunity and legal right to protect any constitutional rights he may have held in connection with the child and failed to do so, and his failure foreclosed his ability to collaterally attack a finalized adoption.

While Baby Boy Doe was not a child born out of wedlock, there are many similarities between this case and the facts of *Lehr*. It appears that petitioner and his wife were separated from around the time of conception through birth. Whether petitioner is the biological father of Doe is unknown. Petitioner's attack on the finalized adoption of Doe is collateral and was raised for the first time in a motion for reconsideration of an order denying a previous motion to unseal the adoption file. The respondent adoption agency and the Kalamazoo Circuit Court both complied with the procedural, notice, and hearing requirements of the SDNL. The record shows that petitioner knew of his wife's plan to surrender Doe prior to filing his complaint for divorce in the Ottawa Circuit Court; thus, petitioner had presurrender and prebirth knowledge that his wife planned to invoke the SDNL. Petitioner did not file a petition for custody under the SDNL or otherwise move the Ottawa

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[26] I am not alone in holding this view. Indeed, the Family Law Section of the State Bar of Michigan submitted an amicus brief in this Court concluding that "[t]he application of the SDNL violates the due process rights of an undisclosed [parent]."

Circuit Court to locate the court where the SDNL action was pending, and he failed to seek reconsideration of or appeal the Kalamazoo Circuit Court's order terminating parental rights after obtaining actual knowledge of the SDNL case information in July 2019 (at the latest). Additionally, had petitioner filed a notice of intent to claim paternity before Doe's birth, respondent would have located him because it checked Michigan's putative-father registry as part of its "reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent." MCL 712.7(f). Under these unique facts and in light of *Lehr*, I would hold that *application* of the SDNL's notice-by-publication provision and the subsequent termination of any parental rights that petitioner might have held did not violate petitioner's right to due process of law.[1]

Despite my conclusion that petitioner's due process rights were not violated in this case, I believe that Chief Justice MCCORMACK and Justice ZAHRA raise valid concerns about the SDNL and the future of notice by publication in printed newspapers. The recent amendments that 2022 PA 76 made to the Revised Judicature Act's newspaper notice-by-publication requirements are an improvement that will make such notices more accessible in real time. I also agree with the Chief Justice that the creation of a statewide case-management system would facilitate better communication between trial courts in situations where time is of the essence. While the SDNL is invoked with relative rarity in Michigan, I would encourage the Legislature to consider amending the SDNL to better ensure that the competing rights of all parties involved are safeguarded to the highest degree possible.

PEOPLE V TRUAX, No. 164431; Court of Appeals No. 360386. On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the May 9, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. We further ORDER that trial court proceedings in the Livingston Circuit Court are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. We do not retain jurisdiction.

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[1] I acknowledge that there could be circumstances under which application of the SDNL to terminate the parental rights of a biological parent who has taken the necessary steps to assert and preserve those rights, such as by filing a petition for custody under MCL 712.10 and establishing paternity or maternity under MCL 712.11, might be unconstitutional.

Oral Argument Ordered on the Application for Leave to Appeal June 29, 2022:

PEOPLE v MONROE, No. 163937; Court of Appeals No. 358825. The parties shall address whether: (1) this Court's decisions in *People v Calloway*, 469 Mich 448 (2003), and *People v Ream*, 481 Mich 223 (2008), were correctly decided; and (2) if not, whether they should nonetheless be retained under principles of *stare decisis*, *Robinson v City of Detroit*, 462 Mich 439, 463-468 (2000).

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

JANINI v LONDON TOWNHOUSES CONDOMINIUM ASSOCIATION, No. 164158; Court of Appeals No. 355191. The parties shall address whether the Court of Appeals correctly held in *Francescutti v Fox Chase Condo Ass'n*, 312 Mich App 640 (2015), that a co-owner of a condominium unit, who slipped and fell on an icy, snow-covered sidewalk located in a common area of the development, was neither a licensee nor an invitee, and thus, there was no duty owed to the co-owner by the condominium association under the principles of premises liability.

The Michigan Association of Justice, the Michigan Defense Trial Counsel, the Negligence Section of the State Bar of Michigan, and the Real Property Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 29, 2022:

PEOPLE v COREY HOWELL, No. 163295; Court of Appeals No. 352535.

WEST ST JOSEPH PROPERTY, LLC v DELTA TOWNSHIP, No. 163621; reported below: 338 Mich App 522.

DETROIT MEDIA GROUP, LLC v DETROIT BOARD OF ZONING APPEALS, No. 163714; reported below: 339 Mich App 38.

MATHIS v AUTO OWNERS INSURANCE, No. 163873; reported below: 339 Mich App 471.

CORBIN v MEEMIC INSURANCE COMPANY, No. 164093; reported below: 340 Mich App 140.

PEOPLE v CARLOS THOMAS, No. 164125; Court of Appeals No. 353184.

PEOPLE v DANIEL, No. 164194; Court of Appeals No. 360010.

In re KNOBLAUCH/BALDWIN, No. 164309; Court of Appeals No. 357959. BERNSTEIN, J., would grant leave to appeal.

Leave to Appeal Denied July 1, 2022:

In re NM BRETTSCHNEIDER, No. 164361; Court of Appeals No. 357318.

In re MJM, No. 164413; Court of Appeals No. 358753.

Summary Disposition July 8, 2022:

PEOPLE v FONTENOT, No. 162211; reported below: 333 Mich App 528. On March 3, 2022, the Court heard oral argument on the application for leave to appeal the September 10, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we VACATE Part II(C) of the Court of Appeals opinion and REMAND this case to the 45th District Court for further proceedings not inconsistent with this order.

MRE 803(6) states that otherwise admissible business records may be excluded if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." "[T]he presumed trustworthiness of both the source of information reported and the accuracy with which the information is recorded lies at the heart of the business records hearsay exception . . . ." *Solomon v Shuell*, 435 Mich 104, 116-117 (1990). The Court of Appeals' suggestion that a trial court may not consider whether there are reasons to doubt the trustworthiness of a particular purported business record is without support. Indeed, MRE 803(6) gives the trial court discretion to consider whether any particular circumstances undercut the indicia of trustworthiness that is generally presumed to apply to business records. Though Michigan caselaw construing MRE 803(6)'s trustworthiness component tends to highlight circumstances where the documents' trustworthiness is undermined because the documents are prepared in anticipation of litigation, see *Shuell*, 435 Mich at 126-128; *People v Jambor (On Remand)*, 273 Mich App 477, 482 (2007), we agree with the dissenting judge that "nowhere in MRE 803(6) is there any limitation on the meaning of 'trustworthiness' or specification of how or why a record might lack trustworthiness," *People v Fontenot*, 333 Mich App 528, 540 (2020) (RONAYNE KRAUSE, J., dissenting).

We also disagree with the panel majority's assertion that the trustworthiness of the log is merely "a question of the weight that the fact-finder should give this evidence" and not a question of "whether they are admissible as business records." *Fontenot*, 333 Mich App at 538 (opinion of the Court). Indeed, we already considered and rejected that argument in *Shuell*: "We disagree, however, that, under MRE 803(6), trustworthiness is not also a question of admissibility. As the rule and its theoretical underpinnings indicate, trustworthiness is, under MRE 803(6) . . . an express condition of admissibility." *Shuell*, 435 Mich at 128.

The trial court nevertheless erred by determining that the MRE 803(6) exception did not apply because the DataMaster technician was employed by a contractor rather than directly by the state of Michigan. The lack of a direct employer–employee relationship, without more, does

not indicate a lack of trustworthiness. "[I]f the employee preparing the report is under a duty to do so or is aware of his employer's general reliance on the accuracy of the records, a powerful motivation to be accurate is supplied." *Shuell*, 435 Mich at 120. That "powerful motivation" applies to direct and contract employees alike—unless there is evidence that it is lacking in a particular case. We take no position on whether the contractor or contract employee at issue in this case are sufficiently trustworthy to support the admission of the records under MRE 803(6). On remand, the trial court may consider further arguments on the issue of trustworthiness. In all other respects, the application for leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

MCCORMACK, C.J. (*concurring*). In this drunk-driving case, the prosecution seeks to introduce administrative logs documenting routine testing and inspection of the DataMaster breath-testing machine used to clock the defendant's blood alcohol levels on the afternoon of his arrest. The question is whether the logs are admissible as evidence or whether the prosecution must also offer the technician as a witness at trial.

I concur in the order vacating the Court of Appeals' analysis of the application of MRE 803(6). While the trial court's basis for finding that the business-records exception did not apply was erroneous, I agree that the defendant should be provided another opportunity to argue that this hearsay exception is nonetheless inapplicable in light of unique concerns about the trustworthiness of this particular declarant. Our Court's order denies leave on the separate question of whether a technician's inspection logs of a DataMaster breath-testing machine are testimonial statements that trigger constitutional protections under the Confrontation Clauses, US Const, Am VI; Const 1963, art 1, § 20. By sidestepping that issue, the published Court of Appeals opinion holding that such administrative logs are nontestimonial remains binding on lower courts. The Court of Appeals majority embraced the near-unanimous view of other state and federal courts that have taken up this question. See, e.g., *State v Hawley*, 149 So 3d 1211 (La 10/15/14); *Commonwealth v Dyarman*, 621 Pa 88, 102 (2013); *People v Pealer*, 20 NY3d 447, 455 (2013); *State v Benson*, 295 Kan 1061, 1067-1068 (2012); *Commonwealth v Zeininger*, 459 Mass 775, 786-787 (2011); *United States v Foster*, 829 F Supp 2d 354, 361-363 (WD Va, 2011); *United States v Forstell*, 656 F Supp 2d 578, 580-581 (ED Va, 2009). And while I concur in our denial on that issue in the absence of further guidance from the United States Supreme Court, I write separately to express some reservations about the consensus that has seemingly emerged that these statements are nontestimonial.

I. THE PRIMARY-PURPOSE TEST

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" Likewise, "[s]ince its birth

as a state, Michigan has also afforded a criminal defendant the right to 'be confronted with the witnesses against him,' adopting this language of the federal Confrontation Clause verbatim in every one of our state constitutions." *People v Fackelman*, 489 Mich 515, 525 (2011) (citation omitted).

The modern era of Confrontation Clause jurisprudence begins with *Crawford v Washington*, 541 US 36 (2004). There, the Supreme Court created a dividing line between so-called "testimonial" and "nontestimonial" statements. The Court did not provide a definition for testimonial statements, but it offered some illustrative examples:

> Various formulations of this core class of "testimonial" statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. [*Crawford*, 541 US at 51-52 (cleaned up).]

Testimonial statements are protected by the confrontation right and therefore require in-court testimony from the declarant (unless she is unavailable and the defendant had a prior opportunity to question her). Not so for nontestimonial statements. *Crawford* opted to "leave for another day any effort to spell out a comprehensive definition of 'testimonial,' " *id*. at 68, but the nearly two decades of Supreme Court precedent since *Crawford* help flesh out the contours of what makes a statement "testimonial."

Davis v Washington, 547 US 813 (2006), a consolidated case involving statements made by domestic-violence survivors in two separate prosecutions, was the first Supreme Court case to apply *Crawford*'s new framework. In *Davis*, the statements were made in a frantic 911 call in the immediate aftermath of an episode of domestic violence. In the companion case, *Hammon v Indiana*, the statement was elicited during an in-person police interrogation in the declarant's living room, where she discussed the abuse she suffered at the hands of her husband and then completed an affidavit about it. *Id*. at 819. The Supreme Court found the statements in *Davis* to be nontestimonial, while the statements in *Hammon* were.

To differentiate the two, the Court introduced the primary-purpose test: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that

the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id*. at 822. Because the 911 caller in *Davis* was alone, without police protection, and "apparently in immediate danger," the Court concluded that she "was seeking aid, not telling a story about the past." *Id*. at 831. The emergency was ongoing. In contrast, the living-room interrogation in *Hammon* was "delivered at some remove in time from the danger she described." *Id*. at 832. The statements were "neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation . . . ." *Id*. In other words, while the *Davis* declarant's primary purpose was to secure police assistance in response to an ongoing emergency, for the *Hammon* declarant, "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime[.]" *Id*. at 830.

The primary-purpose test therefore emerged from two fact patterns involving interrogations of the declarant by law enforcement—one involving police officers and one involving 911 operators acting as agents of law enforcement. See also *Michigan v Bryant*, 562 US 344 (2011) (finding that a gunshot victim's identification of his shooter in response to police questioning was nontestimonial because it was made to help police respond to an ongoing emergency). In a footnote, the *Davis* Court explained that it was unnecessary, at that time, to consider "whether and when statements made to someone other than law enforcement personnel are 'testimonial.' " *Davis*, 547 US at 823 n 2.

Ohio v Clark, 576 US 237 (2015), presented the question that *Davis* saved for another day. There, the interrogation came not from law enforcement but from preschool teachers asking a 3-year-old child about the source of injuries on his body. *Id*. at 241. The child responded that his mother's boyfriend had caused his injuries. *Id*. A child-abuse prosecution followed, and the question for the Court was whether the child's statements to his teachers were testimonial. The Court said no: the child's statements "clearly were not made with the primary purpose of creating evidence for [the defendant's] prosecution." *Id*. at 246. Rather, the teacher's questions and the child's answers were "primarily aimed at identifying and ending the threat" of an ongoing child-abuse emergency. *Id*. at 247. The objective, in other words, was simply to protect the child. The Court expressly declined to adopt a rule that "statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment" but emphasized that the questioner's identity is still highly relevant to the analysis, because "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Id*. at 249.

The Court used the primary-purpose test to evaluate the nature of statements made in response to questioning—regardless of whether the interrogator was a police officer, a 911 operator, or a concerned preschool teacher. That makes sense because in these circumstances, mixed motives abound. The lines can blur easily between statements that "enable police assistance to meet an ongoing emergency" (*Davis*, *Bryant*,

Clark) and statements that take on a prosecutorial purpose (*Hammon*). The primary-purpose test, which objectively "evaluate[s] the circumstances in which the encounter occurs and the statements and actions of the parties," provides a framework to parse the meaning and purpose of the declarant's statements. *Bryant*, 562 US at 359.

Indeed, our Court has remarked upon the context-dependent use of the primary-purpose test. In *Fackelman*, the majority opinion emphasized how the test makes sense when applied to emergency situations where "there is often ambiguity concerning the objectives or purposes of the declarant's utterances." *Fackelman*, 489 Mich at 559. But we also described the test as "largely irrelevant" in more mundane circumstances, where it is difficult to imagine a statement taking on alternative purposes. *Id*.

The *Fackelman* Court's observation is salient because, of course, not every Confrontation Clause fact pattern comes from the heated context of time-sensitive emergencies like police questioning or dying declarations of gunshot victims. Sometimes, the statement comes from the cold remove of a scientific forensic report or, as in this case, the banal entries of a technician's log.

II. THE PRIMARY-PURPOSE TEST AND FORENSIC REPORTS

The *Fackelman* Court's reluctance to apply the primary-purpose test outside the context of emergency situations was consistent with United States Supreme Court precedent at the time. In *Melendez-Diaz v Massachusetts*, 557 US 305 (2009), the challenged statements were notarized certificates, signed by forensic analysts, that the material seized by police was cocaine. There was no emergency, and the Court never applied the primary-purpose test. The *Melendez-Diaz* Court instead looked to *Crawford*'s articulation of the " 'core class of testimonial statements' " and its two references to "affidavits." *Id*. at 310, quoting *Crawford*, 541 US at 51. The Court saw a parallel: though described as "certificates," the documents were functionally equivalent to affidavits: " 'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.' " *Melendez-Diaz*, 557 US at 310, quoting *Black's Law Dictionary* (8th ed). The certificates stated that the substance was cocaine. Had the analyst testified at trial, they would have told the jury the exact same thing. The certificates were functionally identical to live, in-court testimony. And it's not as if the analysts would be surprised to learn that their reports were being used for an evidentiary purpose; indeed, "that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves." *Melendez-Diaz*, 557 US at 311.

In *Bullcoming v New Mexico*, 564 US 647 (2011), the Court considered a forensic laboratory report certifying that the defendant's blood alcohol levels were well above the legal threshold. The Court again found the report to be testimonial; *Melendez-Diaz* left no room for a contrary finding. *Id*. at 663-665. It was a document created solely for an "evidentiary purpose" and produced to aid a police investigation. *Id*. at 664. The primary-purpose test was only referenced in a footnote and a

partial concurring opinion from Justice Sotomayor emphasizing that the state never suggested that the laboratory report certification had an alternative purpose; it was instead clearly meant to create an out-of-court substitute for trial testimony. *Id*. at 659 n 6; *id*. at 668 (Sotomayor, J., concurring in part).

III. *WILLIAMS*, *NUNLEY*, AND THE "TARGETED INDIVIDUAL TEST"

And then to *Williams v Illinois*, 567 US 50 (2012). Like *Melendez-Diaz* and *Bullcoming*, the contested statement was a forensic report. In this rape prosecution, a private DNA-testing company analyzed a vaginal swab to create a DNA profile, which prosecutors were then able to match to the defendant using a state database. None of the analysts from the private lab testified at trial, nor was the report entered into evidence. The prosecution instead offered a DNA expert, who testified that the DNA analysis confirmed a match between the defendant and the sample. On cross-examination, the analyst acknowledged that she had not conducted or observed any of the testing in this case but that she trusted the private lab's reliability.

What resulted was a fractured opinion that lower courts have struggled to interpret for a decade. See *Stuart v Alabama*, 586 US ____, ____; 139 S Ct 36, 36 (2018) (Gorsuch, J., dissenting from the denial of certiorari) ("This Court's most recent foray in this field, *Williams v. Illinois*, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012), yielded no majority and its various opinions have sown confusion in courts across the country."). Writing for a four-justice plurality, Justice Alito explained that the primary purpose of the DNA analysis "was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time." *Williams*, 567 US at 84. The opinion applied a new formulation of the primary-purpose test to ask whether the report was "prepared for the primary purpose of *accusing a targeted individual*." *Id*. at 84 (emphasis added). The plurality's reformulation of the test was not lost on the four-justice dissent, which puzzled over the new requirements that the statement must be accusatory and directed at a previously identified person to be testimonial. Noting that such a test had no basis in precedent, the dissenting justices explained that while the Court's cases had "previously asked whether a statement was made for the primary purpose of establishing 'past events potentially relevant to later criminal prosecution'—in other words, for the purpose of providing evidence," there had never before been a suggestion of a "targeted individual" requirement. *Id*. at 135 (Kagan, J., dissenting) (citation omitted). In the context of highly technical laboratory work, the fear is not that a researcher might carry a personal vendetta against a particular defendant, but rather that "careless or incompetent work" may go unchallenged. *Id*. Given that, "it makes not a whit of difference whether, at the time of the laboratory test, the police already have a suspect." *Id*. at 136.

In an opinion concurring only in the judgment, Justice Thomas shared the dissenters' distaste for the plurality's new test, finding that it "lacks any grounding in constitutional text, in history, or in logic." *Id*.

at 114 (Thomas, J., concurring in the judgment). All in all, five Supreme Court justices rejected the formulation of the primary-purpose test proposed by four justices.

In the aftermath of *Williams*, the proper formulation of the primary-purpose test is unclear.[1] Is it necessary for a suspect to have already been "targeted" for a declarant's statement to be sufficiently prosecutorial to trigger Confrontation Clause concerns? If so, the defendant in this case is out of luck; the technician's logs were completed months before the alleged drunk-driving incident and necessarily months before the defendant was ever a "targeted individual." But given that a majority of Supreme Court justices rejected Justice Alito's formulation in *Williams*, I don't think it should be applied here.

The Court of Appeals' panel saw things differently. It said that in *People v Nunley*, 491 Mich 686 (2012), this Court had already adopted the *Williams* plurality's primary-purpose test. See *People v Fontenot*, 333 Mich App 528, 534-535 (2020). I disagree. In *Nunley*, which was issued about three weeks after *Williams*, this Court considered whether a certificate of mailing asserting that the Michigan Department of State had mailed a notice to the defendant that his driver's license had been suspended was testimonial. *Nunley*, 491 Mich at 689. We held that it was not testimonial "because the circumstances under which it is generated would not lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*. While the opinion summarized the plurality, concurring, and dissenting opinions from *Williams*, it did not adopt any of them. *Id*. at 702-704. Instead, in a footnote, we explained that "our analysis is consistent with the reasoning of both the lead opinion and the dissenting opinion from the United States Supreme Court's recent plurality decision in *Williams*." *Id*. at 710 n 77.

The Court of Appeals' conclusion, then, that the DataMaster logs were nontestimonial, in part, because "they were not created for the purpose of prosecuting defendant specifically," *Fontenot*, 333 Mich App at 535, relies on reasoning rejected by a majority of the United States Supreme Court and never formally adopted by this Court.

IV. DATAMASTER LOGS AS TESTIMONIAL EVIDENCE

While I am not persuaded by Justice Alito's formulation of the "primary purpose" test in *Williams* and the Court of Appeals' embrace of it below, the defendant faces strong headwinds. First, while the *Nunley* Court may not have formally adopted the *Williams* plurality's primary-purpose-test formulation, it did rely heavily on the fact that the certificate of mailing was generated *before* the charged crime could be committed. *Nunley*, 491 Mich at 707. "At the time the certificate was

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[1] And given the limited or nonexistent application of any variation of the primary-purpose test in *Melendez-Diaz* and *Bullcoming*, a threshold ambiguity arguably remains about whether the primary-purpose test (in any form) should be applied to statements in forensic reports.

created, there was no expectation that defendant would violate the law by driving with a revoked driver's license and therefore no indication that a later trial would even occur." *Id*. at 709. Unlike *Crawford* and its progeny, the evidence at issue was not prepared as a result of a criminal investigation or created after the commission of the crime. That distinction, we wrote, "makes 'all the difference in the world' . . . ." *Id*. at 709-710, quoting *Melendez-Diaz*, 557 US at 322. The prosecution urges us to apply that reasoning here, where the inspection logs were necessarily completed before the defendant was accused of driving while intoxicated.

Second, *Melendez-Diaz* includes a footnote clarifying that "we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the . . . accuracy of the testing device, must appear in person as part of the prosecution's case. . . . Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." *Melendez-Diaz*, 557 US at 311 n 1. That footnote responded to the dissenting opinion, which expressed the concern that the majority's reasoning would be applied broadly to precisely the type of testing-device-accuracy logs at issue in this case.

Third, Mich Admin Code, R 325.2654(2) requires routine inspections of the DataMaster machines and imposes a duty to maintain administrative records of those calibration checks like the one at issue here. As the Court of Appeals explained, "Although the DataMaster logs are occasionally presented at trials, they are not prepared for the purpose of litigation, but rather, because the administrative regulations require the keeping of such logs." *Fontenot*, 333 Mich App at 537.

In my view, none of these arguments is dispositive. *Nunley* is distinguishable as a certificate of mailing—mechanically generated to establish that a letter had been sent—is fundamentally different than a technician's calibration-log entry indicating that a complex piece of machinery produces reliable data. I agree with the *Nunley* Court that the certificate of mailing was not generated under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. But the same can't be said for a technician's entry into an inspection log that is designed, at least in part, for ensuring the reliability of the tests for the purpose of future prosecutions. A certificate of mailing might not find its way into a prosecution, but breath-test-machine-inspection logs routinely do. Like the certificates in *Melendez-Diaz*, the logs here were "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Melendez-Diaz*, 557 US at 310 (quotation marks and citation omitted). I suspect that the *Nunley* Court did not anticipate this particular factual pattern, in which a statement could be made before the commission of a crime but still be made with a prosecutorial purpose in mind.

And the *Melendez-Diaz* footnote doesn't add much. It supports the prosecution's view in a general way, but it provides only persuasive authority. As for Mich Admin Code, R 325.2654(2), I agree with the dissenting judge in the Court of Appeals, who noted that the underlying

purpose of the administrative rule should matter: it "is for the purpose of using the tests in prosecutions. It cannot be overemphasized that the 120-day test logs do not simply show that a test was administered, but rather that a test was properly administered, which in turn is of direct relevance to the reliability and thus admissibility of the test." *Fontenot*, 333 Mich App at 541 (RONAYNE KRAUSE, J., dissenting) (emphasis omitted).

Rather than applying the *Williams* plurality's formulation of the primary-purpose test, I would instead—like the *Melendez-Diaz* Court—look to *Crawford*'s articulation of the core class of testimonial statements and consider how the technician's logs in this case line up with "material such as affidavits . . . or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . ." *Crawford*, 541 US at 51 (quotation marks and citation omitted). In other words, were the technician's log entries "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"? *Id*. at 52 (quotation marks and citation omitted). It certainly seems like it. The logs were kept for the purpose of litigation—to directly establish key facts relevant and necessary to prosecute defendants for driving while intoxicated.

And like the report in *Melendez-Diaz*, which had the relevant state-law provision reprinted on the certificate itself, the logs here expressly stated how failure to comply with the relevant Michigan Administrative Rule "may result in breath alcohol analysis results being inadmissible in court or other proceedings." It's difficult for me to imagine how an objective witness could view entries into the log without believing that those entries would be available for use at a later trial.

Despite my reservations about the Court of Appeals' constitutional analysis, I concur with this Court's denial of leave on that question. Future Confrontation Clause challenges to testimonial logs or reports serving similar functions may well bring additional clarity to this set of questions. But this area of Confrontation Clause jurisprudence remains unsettled, and absent further guidance from the United States Supreme Court, I cannot conclude that the panel majority's analysis was clearly erroneous. Though I would caution lower courts against automatic application of the *Williams* plurality's "targeted individual" test, I nonetheless concur.

BERNSTEIN, J., joins the statement of MCCORMACK, C.J.

Leave to Appeal Denied July 8, 2022:

PEOPLE V KUHNS, No. 163686; Court of Appeals No. 352179.

MCCORMACK, C.J. (*concurring*). I concur in the Court's denial but write separately because I believe that had the defendant raised a challenge to his competency at *sentencing*, he may have been entitled to resentencing.

The defendant, James Kuhns, admitted to the police that he murdered Leonard Hempel and was charged with open murder. He was

originally represented by attorney Louis Willford. The parties agreed that Kuhns's competency should be evaluated, and he was found to be competent. Shortly after, Willford moved to withdraw as counsel and the defendant was represented by attorney Dwight Carpenter moving forward.

Eleven months after the competency evaluation, Kuhns pled guilty to the open-murder charge. The record from the plea hearing suggests that Kuhns understood what was happening. He stated his name clearly and indicated that he understood the charge and the possible penalties associated with it. And after the judge described each of the rights Kuhns was giving up, Kuhns again said he understood. Kuhns's responses suggested he pled guilty to open murder knowingly and voluntarily. The only possible indication that Kuhns didn't appreciate the rights he was waiving was the plea deal itself, which wasn't much of a deal at all. Kuhns pled guilty to the charge of open murder, with no benefit in exchange for the rights he was waiving. At a later evidentiary hearing to determine the degree of murder, the court found Kuhns guilty of first-degree murder.

Almost a year after the plea hearing, Kuhns was sentenced to life in prison without the possibility of parole. At the sentencing hearing, it appears Kuhns's mental state had deteriorated significantly. He was confused about who his lawyer was and asked what his own name was. Speaking to the judge, he said: "I have a good deal of research. I'm trying my best to control my Wi-Fi and people keep packing my system. I do not feel completely safe, because I have not been seeing things step-by-step, in a way that is completely sealing my defense, in a way that is one hundred percent trustworthy." But the judge was unconcerned, and accused Kuhns of putting on an act: he told Kuhns he was "not going to go through theatrics here where you pretend not to understand what is going on."

With the aid of appellate counsel, Kuhns filed a motion to withdraw his plea, hold a second competency evaluation, and conduct a *Ginther* hearing. His appellate counsel attached an "offer of proof" to the motion, which was unsworn. In the offer of proof, appellate counsel describes a meeting with Kuhns from about five months after the sentencing hearing where his speech was nonsensical. She also spoke to both of his trial attorneys, Willford and Carpenter, and learned that they had been concerned about Kuhns's mental state but failed to take action. Carpenter, who represented the defendant from before the plea hearing through sentencing, recalled asking the prosecutor for a second competency evaluation at some unspecified point. But Kuhns's appellate counsel also spoke with the prosecutor and she had no memory of this. In fact, she said she would have supported a second evaluation if asked. The "offer of proof" also mentioned letters Kuhns sent to the sheriff and to Willford—one sent before the plea hearing, another sent after the sentencing hearing—both containing erratic statements indicative of declining mental health.

The trial court denied the motion, including the requests for a new competency evaluation and *Ginther* hearing. The defendant appealed;

the Court of Appeals affirmed. *People v Kuhns*, unpublished per curiam opinion of the Court of Appeals, issued September 16, 2021 (Docket No. 352179).

On appeal, Kuhns raised two arguments about his competency. First, his plea wasn't knowing and voluntary because he wasn't competent at the plea hearing. Second, his two trial attorneys provided ineffective assistance of counsel by failing to request a new competency evaluation before his plea hearing.

Because his appellate counsel framed both arguments around Kuhns's plea, I agree with the Court of Appeals that his arguments lack merit. The record of the plea hearing indicates that Kuhns understood the charge against him, the possible penalties, and the rights he was waiving. I agree with the Court of Appeals that his plea was "understanding and voluntary" and therefore "no error in the plea-taking process" can be shown. *Kuhns*, unpub op at 5. The transcript of this hearing doesn't indicate a lack of understanding. And therefore, even if his trial attorneys were objectively unreasonable for failing to request a reevaluation before his plea hearing, I also agree with the Court of Appeals that the defendant hasn't demonstrated prejudice from such an error.

In contrast, at the sentencing hearing, the record suggests that Kuhns's mental state had declined significantly. A claim that Kuhns was not competent at sentencing would warrant factual development at an evidentiary hearing.

If Kuhns was incompetent at sentencing, I believe this would have entitled him to resentencing. The United States Court of Appeals for the Second Circuit has held that if the trial court "has reasonable grounds to believe that the defendant may not have a level of awareness sufficient to understand the nature of the proceeding or to exercise his right of allocution, the judge should not proceed . . . ." *Saddler v United States*, 531 F2d 83, 86 (CA 2, 1976). Our court rules provide an analogous allocution right: a court must "give the defendant . . . an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence[.]" MCR 6.425(D)(1)(c). This opportunity is meaningless if a defendant is incompetent.

If a trial court fails to provide an opportunity for allocution, resentencing is required. *People v Wells*, 238 Mich App 383, 392 (1999), citing *People v Berry*, 409 Mich 774, 781 (1980), overruled on other grounds by *People v Petit*, 466 Mich 624, 633 (2002). And that opportunity must be "meaningful." *People v Bailey*, 330 Mich App 41, 67 (2019) (trial court's interruption of the defendant at sentencing deprived the defendant of a meaningful opportunity for allocution). If a defendant is incompetent at sentencing, they do not have a meaningful opportunity for allocution.

Because Kuhns has not argued that he is entitled to resentencing, I can't say that the Court of Appeals erred.

CAVANAGH, J. (*dissenting*). I dissent from the Court's denial order because I believe the trial court erred by denying defendant's motion for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

If defendant's representations are accurate, a lot seems to have gone wrong in this case. After defendant was charged with open murder, defense counsel and the prosecution stipulated to the need for a forensic examination. On August 8, 2017, the trial court entered an order, finding defendant competent to stand trial. Defendant, however, did not plead guilty until almost a year later in June 2018.[1] I agree with Chief Justice MCCORMACK in her concurring statement that, on its face, the transcript of the plea hearing does not reveal that defendant was incompetent.[2] However, defendant's appellate attorney now claims that defendant's trial attorneys have expressed to her that defendant was showing signs of serious mental illness between the competency finding and the plea proceeding. The record does not suggest that the trial court was made privy to this information, and therefore the trial court did not abuse its discretion by not further inquiring into defendant's competence. *People v Kammeraad*, 307 Mich App 98, 138 (2014). Further, I agree with the Court of Appeals that the trial court did not abuse its discretion by denying defendant's request for a second competency examination. That request was not made until August 2019 as part of defendant's attempt to withdraw his plea. Any information about defendant's competency at that point in time would have little bearing on the state of defendant's competency 14 months earlier because competency is not a static state of being. See *Drope v Missouri*, 420 US 162, 181 (1975); *People v Blocker*, 393 Mich 501, 510 (1975).

That said, while there may be no apparent trial court error as it relates to defendant's purported incompetency, whether defendant's trial attorneys were ineffective for not requesting a second competency exam is a closer question and, importantly, one which an evidentiary hearing may be able to help answer. The inquiry is whether counsel's performance was deficient and, if so, whether that deficient performance prejudiced defendant. To show prejudice, a defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 694 (1984). If the representations made by appellate counsel are accurate, I find compelling defendant's

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[1] As Chief Justice MCCORMACK remarks, defendant's plea to open murder does not appear to be "much of a deal at all" given that defendant received no discernible benefit in exchange for the rights he was waiving. While I recognize that this procedure is authorized by statute, see MCL 750.318 and *People v Watkins*, 468 Mich 233 (2003), I question whether advising a client to take such a plea might by itself constitute ineffective assistance of counsel in some cases. Defendant, however, does not make this argument.

[2] But see *People v Matheson*, 70 Mich App 172 (1976) (noting that analyzing competency at a plea hearing may be different than competency during a trial because a plea-taking "is, effectively, a trial compressed into a few moments," and is "in an environment which may lend itself to a rote procedure").

argument that the performance of his trial attorneys was objectively unreasonable. According to appellate counsel's affidavit, defendant's first attorney, Louis Willford, noticed that defendant demonstrated an "inability to clearly communicate" and "that [defendant's] mental health steadily declined while incarcerated . . . ." Further, appellate counsel states that attorney Willford said, "It became impossible to represent [defendant] because of [defendant's] inability to clearly communicate," which led to attorney Willford withdrawing from the case. Defendant's second attorney, Dwight Carpenter, found it "extremely difficult to communicate with [defendant because] he lacked focus and would often talk about issues completely unrelated to the case," including "speaking about experiments being done on him while at the jail."[3] Attorney Carpenter indicated to appellate counsel that he thought a second referral for a competency examination was appropriate, but he never filed a request because he believed the prosecutor would object. In my view, this information would tend to suggest that the failure to at least request a second referral was objectively unreasonable.

Even if the performance of one or both of defendant's trial attorneys was objectively unreasonable, proving prejudice is tricky. To establish prejudice, defendant must demonstrate a reasonable probability that the outcome of the proceeding would have been different. Here, I believe that would be a demonstration that he was incompetent and unable to voluntarily, knowingly, and intelligently accept the plea to open murder. A defendant is presumed competent but must be deemed incompetent if they are incapable because of their mental condition of understanding the nature and object of the proceedings or of assisting in their defense in a rational manner. MCL 330.2020(1). Because no second competency examination took place and a competency examination performed now would not help answer whether defendant was competent in June 2018, that tool is unavailable to the trial court. But based on appellate counsel's offer of proof, testimony from trial counsel could be sufficient to make this determination.

The trial court clearly erred by denying the motion for a *Ginther* hearing. The trial court noted some of the statements in the offer of proof from appellate counsel but concluded that

> there's nothing in the offer of proof to the effect that either attorney was concerned that the defendant might not be competent to stand trial or competent to enter a plea, and nor is there anything of any detail in the offer of proof to support any such finding.

But there was. Again, appellate counsel's affidavit asserted that attorney Willford told her that "[i]t became impossible to represent [defendant] because of [defendant's] inability to clearly communicate with

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[3] I do not suggest that any person exhibiting signs of mental illness is legally incompetent, but I find these assertions concerning enough that it appears a second competency examination should have at least been requested.

Attorney Willford, which led to Attorney Willford's Motion to Withdraw." Further, appellate counsel's affidavit asserts attorney Carpenter believed a second competency examination was necessary but that Carpenter failed to seek it only because he thought the prosecutor would object. The offer ofproof asserts that both attorneys thought defendant was not competent to enter a plea.[4]

Without a *Ginther* hearing, it is impossible to say if defendant can establish prejudice entitling him to plea withdrawal. However, I believe defendant has made a sufficient offer of proof to obtain a *Ginther* hearing, so I would remand for such a hearing, and I respectfully dissent from the order denying leave to appeal.

SMITH V TOWN AND COUNTRY PROPERTIES II, INC, No. 163593; Court of Appeals No. 353839.

Summary Disposition July 15, 2022:

STEGALL V RESOURCE TECHNOLOGY CORPORATION, No. 160495; Court of Appeals No. 341197. On May 4, 2022, the Court heard oral argument on the application for leave to appeal the September 24, 2019 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals and REMAND this case to that court for further consideration of plaintiff's public-policy claim.

In Part II(A) of its opinion, the Court of Appeals erred by holding that plaintiff's public-policy claim fails because the public-policy exception does not extend to discharges in retaliation for internal reporting of alleged violations of the law. In this case, plaintiff did not argue for an addition to the public-policy exceptions that are recognized in *Suchodolski v Mich Consolidated Gas Co*, 412 Mich 692 (1982). Instead, plaintiff grounds his claim on two of the well-recognized *Suchodolski* exceptions—that he was discharged both because he exercised a right conferred by well-established legislative enactment and because he failed or refused to violate the law. *Suchodolski*, 412 Mich at 695-696. It bears noting that these are two separate exceptions under *Suchodolski*. It is irrelevant to the former exception whether plaintiff reported an actual or alleged violation of the law; that plaintiff relies on the exercise of a right conferred by a well-established legislative enactment such as the Occupational Safety and Health Act (OSHA), 29 USC 651 *et seq*., is

[4] Although not raised, I also note that the trial court accepted defendant's plea while his interlocutory appeal was pending. It is, therefore, at least questionable whether the trial court had subject-matter jurisdiction over the case at that time. See *People v Washington*, 508 Mich 107 (2021); *People v Scott*, 509 Mich 978 (2022) (remanding for the Court of Appeals to apply *Washington* in the context of an interlocutory proceeding).

sufficient. The Court of Appeals majority erred by considering the requirements of the two *Suchodolski* exceptions together.

To the extent that the Court of Appeals majority held that a public-policy claim fails when only internal reports are made, the Court of Appeals has previously held that a plaintiff could support a public-policy claim on the basis of internal reporting. *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 531-532 (2014). We see no reason why limiting public-policy claims to external reports would serve the welfare of the people of Michigan, especially where the Whistleblowers' Protection Act, MCL 15.361 *et seq*., might otherwise preempt claims that involve reports to public bodies. See MCL 15.362; *Anzaldua v Neogen Corp*, 292 Mich App 626, 631 (2011). In this case, plaintiff had a good-faith belief that there was a violation of asbestos regulations at his workplace and followed proper internal reporting procedures. His internal report was thus sufficient to state a public-policy claim.[1]

We remand this case to the Court of Appeals for further consideration of whether plaintiff has established a prima facie claim that he was discharged in violation of public policy, whether plaintiff's public-policy claim is nonetheless preempted by either state or federal law, and whether arguments that the claim has been preempted are preserved.

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[1] We do not take a position on whether there remains a genuine issue of material fact regarding plaintiff's public-policy claim, although we do note that some of the facts the dissent relies upon remain disputed. Because the Court of Appeals erred by concluding that internal reports could not support a public-policy claim and by conflating plaintiff's claims made under separate *Suchodolski* exceptions, we remand to the Court of Appeals for that court to consider the remaining issues in the first instance. However, the dissent forges ahead to prematurely reject plaintiff's claims. Specifically, the dissent relies on *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68 (1993), overruled in part on other grounds by *Brown v Detroit Mayor*, 478 Mich 589, 594 n 2 (2007), to conclude that plaintiff's claims are preempted by the OSHA and the Michigan Occupational Safety and Health Act (MiOSHA), MCL 408.1001 *et seq*. This ignores the fact that these specific preemption arguments were raised for the very first time in this Court and were thus never addressed by the Court of Appeals. We also note that, in *Suchodolski* itself, this Court cited MiOSHA as a potential source of a right conferred by well-established legislative enactment. *Suchodolski*, 412 Mich at 695 & n 2. It is unclear what impact *Dudewicz* has on MiOSHA preemption given this language in *Suchodolski* that specifically refers to MiOSHA in explaining the contours of this exception, and the dissent fails to note or address this tension. We continue to believe that these questions are more appropriately addressed by the Court of Appeals in the first instance.

In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur in the Court's order remanding to the Court of Appeals for further consideration of plaintiff's public-policy claim. I dissent from the order to the extent it denies leave to appeal with regard to plaintiff's claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. To establish a prima facie case under the WPA, a plaintiff must prove that:

> (1) The employee was engaged in one of the protected activities listed in the provision.
>
> (2) [T]he employee was discharged, threatened, or otherwise discriminated against regarding his or her compensation, terms, conditions, location, or privileges of employment.
>
> (3) A causal connection exists between the employee's protected activity and the employer's act of discharging, threatening, or otherwise discriminating against the employee. [*Wurtz v Beecher Metro Dist*, 495 Mich 242, 251-252 (2014).]

The Court of Appeals majority and defendant Brightwing both acknowledged that plaintiff had engaged in a protected activity by filing a wrongful-termination complaint with the Michigan Occupational Safety and Health Administration (MiOSHA). *Stegall v Resource Technology Corp*, unpublished per curiam opinion of the Court of Appeals, issued September 24, 2019 (Docket No. 341197), p 5. Also, the Court of Appeals majority acknowledged that termination of an employment relationship amounts to an adverse action. *Id*. But the Court of Appeals majority held that plaintiff could not satisfy the third element because plaintiff had "shown nothing more than temporal proximity between his protected activity and his alleged discharge," relying on *West v Gen Motors Corp*, 469 Mich 177, 186 (2003). *Id*. I agree with the Court of Appeals dissent that *West* does not establish that temporal proximity alone cannot, as a matter of law, establish causal connection and that the record reveals more than temporal proximity in this case at any rate. *Stegall* (GLEICHER, J., dissenting), unpub op at 8-9. *West* specifically noted that, contrary to the Court of Appeals' conclusion, the plaintiff did not have an " 'impeccable' or 'unblemished' " record. *West*, 469 Mich at 187. As the United States Court of Appeals for the Sixth Circuit has noted, retaliation can be evidence of causal connection because in some cases "little other than the protected activity could motivate the retaliation." *Mickey v Zeidler Tool & Die Co*, 516 F3d 516, 525 (CA 6, 2008). Unlike in *West*, the Court of Appeals dissent notes that in this case plaintiff's employment record was "entirely favorable," including a letter of recommendation from his supervisor "highly praising [his] work and abilities[.]" *Stegall* (GLEICHER, J., dissenting), unpub op at 8. Before plaintiff filed his MiOSHA complaint, he had been assured that he would be offered a new position. *Id*. However, he was terminated shortly after filing his complaint. Because I believe this is sufficient to create a jury question with regard to causation, I respectfully dissent.

ZAHRA, J. (*dissenting*). I do not join the majority's holding that an internal report can form the basis for a public-policy claim because it is unnecessary to reach that issue to resolve this case.[1] Plaintiff's public-policy claim fails both because (1) it is preempted by the Michigan Occupational Safety and Health Act (MiOSHA), MCL 408.1001 *et seq*., and/or the federal Occupational Safety and Health Act (OSHA), 29 USC 651 *et seq*., and because (2) the public-policy exceptions to at-will employment that plaintiff invokes under *Suchodolski v Mich Consol Gas Co*[2] are not applicable. Therefore, I would deny leave to appeal.

Beginning with preemption, under *Dudewicz v Norris-Schmid, Inc*,[3] a public-policy claim is sustainable "only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue."[4] Both MiOSHA and OSHA prohibit retaliatory discharge. MiOSHA requires an employer to "[f]urnish to each employee, employment and a place of employment that is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to the employee,"[5] and it prevents the discharge of an employee "because the employee filed a complaint . . . or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act."[6] OSHA similarly provides a right to a hazard-free workplace,[7] as well as protection against retaliatory dis-

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[1] The majority provides little discussion or analysis on this point.

[2] *Suchodolski v Mich Consol Gas Co*, 412 Mich 692 (1982).

[3] *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68 (1993), overruled in part on other grounds by *Brown v Detroit Mayor*, 478 Mich 589, 594 n 2 (2007).

[4] *Dudewicz*, 443 Mich at 80. Accord *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 572 (2008). See also *Ohlsen v DST Indus, Inc*, 111 Mich App 580, 582 (1982) (denying the plaintiff's public-policy claim when he also sued under MiOSHA provisions that prohibited discharge in retaliation for the employee's exercise of statutory rights).

[5] MCL 408.1011(a).

[6] MCL 408.1065(1).

[7] See 29 USC 654(a) (providing that "[e]ach employer—(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this chapter").

charge.[8] Thus, because both statutes prohibit retaliatory discharge, plaintiff's public-policy claim is preempted under *Dudewicz*.[9]

Even assuming that plaintiff's public-policy claims are not preempted by MiOSHA or OSHA, plaintiff does not satisfy the *Suchodolski* exceptions that he invokes.[10] The majority holds that under *Suchodol-*

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[8] See 29 USC 660(c)(1) (providing that "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [OSHA] or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by [OSHA]").

[9] Plaintiff argues that, in light of the broad discretion afforded to the Secretary of Labor in determining whether to bring an action under OSHA, there is a real possibility that the retaliatory termination will go unredressed. See *Taylor v Brighton Corp*, 616 F2d 256, 264 (CA 6, 1980) (holding that OSHA's antiretaliation provision, 29 USC 660(c), does not "create" a private cause of action for an employee who is discharged for reporting a safety violation). Therefore, according to plaintiff, OSHA does not preempt his public-policy claim. But our caselaw indicates that whether OSHA provides an adequate remedy is irrelevant. To be sure, this Court once claimed that a "statutory remedy is not deemed exclusive if such remedy is plainly inadequate." *Pompey v Gen Motors Corp*, 385 Mich 537, 553 n 14 (1971) (holding that the Michigan Civil Rights Commission did not have exclusive jurisdiction over workplace-discrimination claims). However, as this Court clarified in *Lash v Traverse City*, 479 Mich 180, 192 n 19 (2007), that statement is dictum, and the adequacy principle it set forth, "which has never since been cited in any majority opinion of this Court, appears inconsistent with subsequent caselaw." Furthermore, MiOSHA's antiretaliation provision, MCL 408.1065, mirrors that of OSHA, 29 USC 660(c), which provides that the Secretary of Labor has discretion as to bringing a cause of action. Therefore, similar reasoning would apply to MiOSHA: Preemption does not occur only when a statute provides an "adequate" remedy. See, e.g., *Ohlsen*, 111 Mich App at 584-586, citing *Schwartz v Mich Sugar Co*, 106 Mich App 471 (1981) (holding that when an employer discharges an employee because of his exercise of a right afforded by the MiOSHA's anti-retaliation provision, the remedy provided is exclusive, precluding civil suit). See also *White v Chrysler Corp*, 421 Mich 192, 206 (1984) (refusing to permit a tort remedy for violations of MiOSHA despite acknowledging that the statutory remedy was inadequate because it resulted "in the undercompensation of many seriously injured workers").

[10] See *Suchodolski*, 412 Mich at 695-696 (listing the three exceptions).

ski's exception to at-will employment for exercising a right conferred by a well-established legislative enactment, "[i]t is irrelevant . . . whether plaintiff reported an actual or alleged violation of the law; that plaintiff relies on the exercise of a right conferred by a well-established legislative enactment such as [OSHA] is sufficient." But even if a public-policy claim could be grounded on OSHA, that is not the end of the analysis.

For adjudicating claims of unlawful retaliation, Michigan follows the burden-shifting framework set forth by the Supreme Court of the United States in *McDonnell Douglas Corp v Green*.[11] Under that framework, once the plaintiff-employee establishes a prima facie case of unlawful, retaliatory discharge, the burden shifts to the defendant-employer to show a legitimate, nonretaliatory reason for the discharge.[12] If the defendant-employer succeeds in rebutting the plaintiff-employee's prima face case, then the burden shifts back to the plaintiff-employee to show that the defendant-employer's proffered reason for the discharge was a mere pretext for unlawful conduct.[13]

Under that test, plaintiff's claim must fail. Even if plaintiff can establish a prima facie case of unlawful retaliation for exercising his right to an asbestos-free workplace by making internal complaints when in fact there was no asbestos,[14] defendant FCA still has an opportunity to show that it had a legitimate, nonretaliatory reason to terminate plaintiff's employment.[15] In my view, defendant FCA easily makes that showing, as the record shows that defendant FCA closed the entire plant when it eliminated the second shift, and plaintiff turned down an opportunity to work the third shift at another location. To side with plaintiff would require us to believe that defendant FCA decided to

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[11] *McDonnell Douglas Corp v Green*, 411 US 792, 802-804 (1973).

[12] See *Debano-Griffin v Lake Co*, 493 Mich 167, 176 (2013) (adopting and applying the *McDonnell Douglas* burden-shifting framework).

[13] *Id*. (" '[A] plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful retaliation].' ") (citation omitted; alterations in original).

[14] Three separate inspections—by defendant FCA's plant health and safety manager, an outside asbestos specialist, and the Michigan Occupational Safety and Health Administration—all established that there was no asbestos in plaintiff's workplace.

[15] The alleged retaliatory discharge would not extend to defendant Brightwing, which had no part in the termination and attempted to help plaintiff find another job after defendant FCA terminated him. Thus, I would hold that plaintiff's public-policy claim also fails against Brightwing.

retaliate against plaintiff by closing an entire plant when it knew that plaintiff's complaints amounted to nothing more than "unfounded suspicions."[16]

Finally, under *Suchodolski*'s exception for failure or refusal to violate the law, it is incorrect to say that plaintiff—by complaining to his manager of possible asbestos in the workplace—was terminated for failing or refusing to violate workplace-safety laws, which in the relevant sense are directed at employers, not employees; that is, those laws impose duties on employers, not employees. As I see it, the law does not place any duty on plaintiff to do, or refrain from doing, anything to establish a hazard-free workplace.[17] What the law does do for plaintiff, however, is give him the right to such a workplace. Therefore, when plaintiff made his various demands, *he* was not failing or refusing to violate the law. The relevant inquiry under this *Suchodolski* exception is whether an *employee* was discharged because he or she failed or refused to violate the law. That is not this case.[18]

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[16] *Stegall v Resource Technology Corp*, unpublished per curiam opinion of the Court of Appeals, issued September 24, 2019 (Docket No. 341197), p 3.

[17] While MiOSHA requires an employee to "[c]omply with rules and standards promulgated, and with orders issued pursuant to this act," MCL 408.1012(a), and OSHA requires an employee to "comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct," 29 USC 654(b), neither of those provisions can be said to place a duty on plaintiff to establish a safe workplace, which is what is relevant here. This duty rests with an employer, not an employee.

[18] Imagine, however, a hypothetical case in which a manager refused to send his subordinates (e.g., persons like plaintiff) into spaces where there might have been a health hazard (e.g., asbestos), and then that manager was fired. In my view, such a manager would have a strong argument that he has a viable claim under *Suchodolski*'s failure-or-refusal-to-violate-the-law exception. But, again, the relevant laws do not impose such a duty on plaintiff, though they do give him the right to a safe workplace; rather, the duty is on an *employer* to provide a hazard-free workplace to its employees. Refusing, as an employee, to go along with your employer's violations of workplace-safety laws is not the same as failing or refusing to violate those laws yourself by, say, requiring your subordinates to enter into possibly hazardous work spaces. And this is to say nothing of the fact that defendant FCA did not even violate the law, as there was no asbestos found at plaintiff's workplace. Thus, it boggles the mind to think that an employee could have failed or refused to violate the law—or acquiesced in its violation, in plaintiff's telling—when there was no actual violation of the law.

Here, plaintiff, by raising questions about workplace safety and being reluctant to work in certain areas of the plant without air-quality tests, an inspection, and personal protective equipment, cannot fairly be said to have *himself* failed or refused to violate the law, which directs certain duties at his *employer—not* him, an employee. Indeed, the very cases that the *Suchodolski* Court cited when it laid out this exception show that even plaintiff's characterization of his own actions—i.e., that he refused to "acquiesce" in the violation of the law—are not covered under it.[19]

In sum, this Court should deny leave because plaintiff's public-policy claim is preempted under *Dudewicz*, and even if it is not, it fails under the two *Suchodolski* exceptions that he invokes.[20] Because a majority of this Court holds otherwise, however, I dissent.

VIVIANO, J., joins the statement of ZAHRA, J.

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[19] See *Suchodolski*, 412 Mich at 695 & n 3, citing *Trombetta v Detroit, T & I R Co*, 81 Mich App 489 (1978) (discharge for refusing to falsify pollution-control reports that were required to be filed with the state); *McNulty v Borden, Inc*, 474 F Supp 1111 (ED Pa, 1979) (discharge for refusal to participate in an illegal price-fixing scheme); *Petermann v Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 396*, 174 Cal App 2d 184 (1959) (discharge because employee refused to give false testimony before a legislative committee); see also *id*. at 189 ("To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and serve to contaminate the honest administration of public affairs. This is patently contrary to the public welfare."). Each of these cases involved a plaintiff who failed or refused to violate the law, which had imposed a duty *on him*. Again, that is not this case.

[20] The majority asserts that it is inappropriate to deny leave to appeal because the preemption issue was raised for the first time in this Court. But in our order directing supplemental briefing, the parties were instructed to address "whether the Court of Appeals erred in holding that the appellees were entitled to summary disposition of the appellant's claim that he was discharged in violation of public policy." *Stegall v Resource Technology Corp*, 508 Mich 986, 986 (2021). That language certainly encompasses the preemption issue; indeed, the briefing addressed preemption extensively, thereby putting us in a position to rule on it. Moreover, even if it is true, as the majority claims, that it is "unclear" what impact *Dudewicz* has on MiOSHA or OSHA preemption, for the reasons I have given, this case is a poor vehicle to address that relationship. Simply put, plaintiff's public-policy claim is meritless because there was no asbestos found at his workplace; plaintiff could not have been terminated in violation of public policy when his employer did

Oral Argument Ordered on the Application for Leave to Appeal July 15, 2022:

PEOPLE v JOSEPH JONES, No. 164110; Court of Appeals No. 353209. The parties shall address: (1) whether the defendant is entitled to withdraw his plea where the trial court provided an estimated guidelines range with its preliminary evaluation of an appropriate sentence but did not advise the defendant that his final range could be different, see *People v Cobbs*, 443 Mich 276, 283 (1993); (2) whether the trial court indicated it would consider a sentence within a particular range rather than at the very bottom of the sentencing guidelines; (3) if the trial court did indicate it was looking at a range, whether the range it was considering was sufficiently clear to enable appellate review of whether the trial court imposed a sentence consistent with its preliminary evaluation; and (4) whether the trial court imposed a sentence consistent with its preliminary evaluation.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied July 15, 2022:

In re RANKIN/NYBERG/VALENZUELA, No. 164485; Court of Appeals No. 358240.

In re FLINT WATER LITIGATION, No. 164488; Court of Appeals No. 360718.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for former Governor Rick Snyder.

Leave to Appeal Granted July 22, 2022:

PEOPLE v TRAVIS JOHNSON, No. 163073; reported below: 336 Mich App 688. By order of May 13, 2022, the Court directed supplemental briefing from the parties. On order of the Court, the briefs having been received, the application for leave to appeal the April 8, 2021 judgment of the Court of Appeals is again considered, and it is GRANTED. The parties shall address: (1) whether MCL 769.1k(1)(b)(*iii*) violates separation of powers by assigning the judicial branch " 'tasks that are more properly accomplished by [the Legislature],' " *Mistretta v United States*, 488 US 361, 383 (1989), quoting *Morrison v Olson*, 487 US 654, 680-681 (1988);

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not violate any workplace-safety laws. To ignore that critical fact is to prefer a hypothetical case to this actual case.

see also *Houseman v Kent Circuit Judge*, 58 Mich 364, 367 (1885); (2) whether MCL 769.1k(1)(b)(*iii*) violates due process by creating a " 'potential for bias' " or an "objective risk of actual bias," *Caperton v A T Massey Coal Co, Inc*, 556 US 868, 881, 886 (2009), quoting *Mayberry v Pennsylvania*, 400 US 455, 465-466 (1971); see also, e.g., *Williams v Pennsylvania*, 579 US 1, 8-9 (2016); and (3) should we find MCL 769.1k(1)(b)(*iii*) facially unconstitutional under either theory, what remedy follows. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Edwards* (Docket No. 163942).

The Michigan Senate and the Michigan House of Representatives, the Michigan District Judges Association, the Criminal Defense Attorneys of Michigan, the Prosecuting Attorneys Association of Michigan, the Detroit Justice Center, and the Institute for Justice are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE V KELWIN EDWARDS, No. 163942; Court of Appeals No. 354647. By order of May 3, 2022, the application for leave to appeal the November 18, 2021 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Johnson* (Docket No. 163073). On order of the Court, leave to appeal having been granted in *Johnson* on July 22, 2022, 509 Mich 1094 (2022), the application is again considered, and it is GRANTED. The parties shall address: (1) whether MCL 769.1k(1)(b)(*iii*) violates separation of powers by assigning the judicial branch " 'tasks that are more properly accomplished by [the Legislature],' " *Mistretta v United States*, 488 US 361, 383 (1989), quoting *Morrison v Olson*, 487 US 654, 680-681 (1988); see also *Houseman v Kent Circuit Judge*, 58 Mich 364, 367 (1885); (2) whether MCL 769.1k(1)(b)(*iii*) violates due process by creating a " 'potential for bias' " or an "objective risk of actual bias," *Caperton v A T Massey Coal Co, Inc*, 556 US 868, 881, 886 (2009), quoting *Mayberry v Pennsylvania*, 400 US 455, 465-466 (1971); see also, e.g., *Williams v Pennsylvania*, 579 US 1, 8-9 (2016); and (3) should we find MCL 769.1k(1)(b)(*iii*) facially unconstitutional under either theory, what remedy follows. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Johnson* (Docket No. 163073).

The Michigan Senate and the Michigan House of Representatives, the Michigan District Judges Association, the Criminal Defense Attorneys of Michigan, the Prosecuting Attorneys Association of Michigan, the Detroit Justice Center, and the Institute for Justice are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied July 22, 2022:

DORSEY v SURGICAL INSTITUTE OF MICHIGAN, LLC, No. 163692; reported below: 338 Mich App 199. On order of the Court, the application for leave to appeal the July 29, 2021 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J. (*concurring*). I agree with Justice WELCH that there are jurisprudentially significant questions related to negligent-credentialing claims that are worthy of this Court's consideration in an appropriate case. In particular, there is currently no binding appellate caselaw addressing whether Michigan recognizes a cause of action for negligent credentialing of a medical provider.[1] Moreover, I share Justice WELCH's concern that, assuming such an action is recognized in Michigan, the Court of Appeals' caselaw interpreting the statutory peer-review privilege[2] seems to make it difficult—if not impossible—for a plaintiff to succeed on such a claim. See *Dye v St John Hosp & Med Ctr*, 230 Mich App 661 (1998), lv den 459 Mich 1005 (1999) (Justices MICHAEL F. CAVANAGH and MARILYN J. KELLY would grant leave to appeal); see also *Johnson v Detroit Med Ctr*, 291 Mich App 165, 167-169 (2010), lv den 489 Mich 984 (2011) (Justice DIANE HATHAWAY would grant leave to appeal).[3]

However, I do not believe that this is the appropriate case to consider these issues. While plaintiff argues in this Court that the peer-review privilege should not apply in the context of a negligent-credentialing claim and that this Court should "reexamine" *Dye*, she does not scrutinize the language of the pertinent statutory authority or explain

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[1] Our Court of Appeals has on at least two occasions recognized the existence of such a cause of action, but these decisions do not constitute binding precedent. See *Ferguson v Gonyaw*, 64 Mich App 685, 697 (1975); *Engelhardt v St John Health Sys—Detroit-Macomb Campus*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2012 (Docket No. 292143), pp 5-6.

[2] See MCL 333.20175, MCL 333.21515; see also MCL 331.531 through MCL 331.533.

[3] Notably, while the *Dye* majority held that the peer-review privilege prevented discovery of a credentialing file for the purposes of a negligent-credentialing claim, it left open a narrow window for plaintiffs by clarifying that the privilege only precludes discovery of the file itself and that a "[p]laintiff is free to pursue discovery of information contained in the credentials file if it is available from other sources." *Dye*, 230 Mich App at 674 n 11. However, it is unclear to what extent a plaintiff is able, as a practical matter, to obtain the files necessary to sustain a negligent-credentialing claim without disclosure of the actual file.

why *Dye* was incorrectly decided.[4] Moreover, while the Court of Appeals' decision here is published, it focuses much of its attention on case-specific issues and does not address the jurisprudentially significant issues mentioned earlier. Indeed, the Court of Appeals explicitly declined to address defendants' argument that Michigan does not recognize a cause of action for negligent credentialing. *Dorsey v Surgical Institute of Mich LLC*, 338 Mich App 199, 230 (2021). With regard to the scope of the peer-review privilege, the Court of Appeals only addressed the narrow issue of whether the statutory peer-review privilege applies to the type of medical facility at issue: a freestanding surgical outpatient facility. *Id*. at 224-229. I see no clear error in the Court of Appeals' resolution of the issues that it specifically addressed.

In light of these considerations, I concur with this Court's order denying leave to appeal. However, I echo Justice WELCH's belief that the appropriate interaction between a negligent-credentialing cause of action and the statutory peer-review privilege is worthy of consideration by this Court, and I am open to doing so in an appropriate case.

WELCH, J. (*dissenting*). I respectfully dissent from this Court's order denying leave in this case. In a published decision, the Court of Appeals concluded that the credentialing file regarding a physician who was subsequently convicted of fraud was inadmissible under the statutory peer-review privilege set forth in MCL 333.20175 and MCL 333.21515.[1] The end result of that decision appears to call into question the ability to prove a negligent-credentialing claim under Michigan law. This is a significant conclusion and one that I believe merits this Court's attention. I also believe that this case presented an opportunity for this Court to revisit *Dye v St John Hosp & Med Ctr*, 230 Mich App 661 (1998), lv den 459 Mich 1005 (1999). Accordingly, I would have granted plaintiff's application for leave to appeal in this case to consider whether the Court of Appeals' published decision reached the correct conclusion for the correct reasons.

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[4] Plaintiff relies mainly on caselaw addressing the privilege in other jurisdictions and on policy arguments that are untethered to the pertinent statutory language. And plaintiff's argument specifically addressing *Dye* consists primarily of a brief quotation from the *Dye* dissenting opinion without any reference to the statutory provisions analyzed in that opinion and without any explanation as to why the *Dye* dissent's statutory analysis is stronger than that provided by the *Dye* majority.

[1] MCL 333.20175(8) provides that "[t]he records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility . . . are confidential . . . and are not subject to court subpoena." MCL 333.21515 sets forth the identical confidentiality provision under the Public Health Code, MCL 333.1101 *et seq*.

MACOMB COUNTY PROSECUTOR v MACOMB COUNTY EXECUTIVE, No. 164388; Court of Appeals No. 359887.

VIVIANO, J. (*concurring*). I concur in this Court's denial order because I believe the Court of Appeals reached the correct result. I write separately because this result is not intuitive in some respects and the statutory language at issue might benefit from being revisited by the Legislature. Under the Uniform Budgeting and Accounting Act, MCL 141.421 *et seq*., certain individuals are granted standing to challenge municipal budgeting decisions. MCL 141.438(6), in pertinent part, allows for actions to enforce an appropriation already made:

> An elected official who heads a branch of county government or the chief judge of a court funded by a county has standing to bring suit against the chief administrative officer of that county concerning an action relating to the enforcement of a general appropriations act for that branch of county government or that court.[1]

The critical question in the present case is whether plaintiff, in his capacity as the Macomb County prosecutor, has standing to bring this action as an "elected official who heads a branch of county government" under MCL 141.438(6). There is no dispute that he is an elected official and that he heads Macomb County's prosecutor's office. So the issue boils down to whether that office is a branch of county government. At least to those who have attended government class, the notion that a local prosecutor's office is an entire branch of government sounds odd. A "branch" of government generally calls to mind the legislative, executive, and judicial branches. That is how our Constitution talks about them, for example, in the context of state government. See Const 1963, art 3, § 2 ("The powers of government are divided into three branches: legislative, executive and judicial."). But we have recognized that "[m]unicipal government in Michigan typically has not been divided among three branches of government." *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 267 (1997). In some municipalities, the executive "serves at the will of the" legislative body, while in others the legislative and executive functions are blended. *Id*., citing MCL 117.3. In yet others, the legislative body exercises executive powers. *Id*. at 267-268.

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[1] To force an appropriation of money from the municipality's legislative body, MCL 141.436(9), which contains the same phrase at issue here, provides in relevant part:

> An elected official who heads a branch of county government or the chief judge of a court funded by a county has standing to bring a suit against the legislative body of that county concerning a general appropriations act, including any challenge as to serviceable levels of funding for that branch of county government or that court.

These general observations about municipal government, however, are not entirely germane here. Macomb County operates as a charter county. See generally MCL 45.501 *et seq*. The statute allowing charter counties arguably establishes a more formal and traditional division of powers, at least with regard to the executive and legislative branches. See Ward, *The Charter Form of County Government: Wayne County, 25 Years Later*, 54 Wayne L Rev 1791, 1804 (2008) (citing the statutes and noting they "establish[] the executive form of county government and expressly separates the powers of the executive and the legislative branches"). The statute calls for a chief administrative officer or an executive who will wield veto power. MCL 45.514; MCL 45.511a. There also must be an elected legislative body. MCL 45.514(1)(b).[2] The wrinkle in the present case, however, is that the statute also provides for the election of various officials who would otherwise seem to fall within the executive branch. See MCL 45.514(1)(c) (requiring "[t]he partisan election of a sheriff, a prosecuting attorney, a county clerk, a county treasurer, and a register of deeds, and for the authority of the county board of commissioners to combine the county clerk and register of deeds into 1 office as authorized by law"). Thus the executive power, at least, is dispersed. Cf. *Charter Form of County Government*, 54 Wayne L Rev at 1800 (noting that the Legislature retained a " 'multiple elected executives' requirement" from a previous version of the statute) (citation omitted).

The question here thus becomes whether one of these elected officials, the prosecutor, heads a "branch" of county government under MCL 141.438(6). The Court of Appeals adequately explained why he does. A "branch" is relevantly defined as "[a]n offshoot, lateral extension, or division of an institution[.]" *Black's Law Dictionary* (11th ed). The Macomb County Prosecutor's Office is a division of county government and therefore constitutes a "branch." Defendants contend, however, that the statute expressly differentiates between branches and departments, which defendants claim exist within branches. MCL 141.438(12) offers some support for this, as it provides that "[t]he pendency of a claim in a suit under this section shall not constitute a basis for expenditure of funds by any *department or branch* of, or court funded by, the county" exceeding the amount appropriated. (Emphasis added). The problem with defendants' argument is that it, at best, restricts application of the phrase "branch of county government" to a single specific branch, which the Legislature could have easily named had it intended for the phrase

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[2] With regard to the judiciary, the Court of Appeals in the present case concluded that the Macomb Circuit Court did not represent a county judicial branch because under Const 1963, art 6, § 1, "the judicial power of the state is vested exclusively in one court of justice . . . ." Consequently, the Court of Appeals concluded that the circuit court is part of the state judiciary. But counties are required to fund the circuit courts and some district courts and, for that reason alone, it is arguable that those courts should be considered a branch of county government for purposes of a statute regulating their budget. This question, however, need not be resolved in the present case.

to be so limited. Defendants posit that the statute could encompass only the three traditional branches of government—the executive, the legislative, and the judicial. Under this interpretation, only the "head" of the legislative body—here, the Macomb County Board of Commissioners—would fit the bill as "[a]n elected official who heads a branch of county government . . . ." MCL 141.438(6). And, as the Court of Appeals observed, it is arguable whether the board has a "head" as contemplated by the statute. Under defendants' reading, the phrase would not include the executive himself because the statute is establishing who can sue the executive. And the phrase would not need to extend to the judiciary, as the statute specifically provides that the "chief judge of a court funded by a county has standing . . . ." MCL 141.438(6).

Consequently, the phrase "elected official who heads a branch of county government" would mean, at most, the chair of the board. For the same reasons, the same phrase in the serviceability provision of the statute, MCL 141.436(9)—which allows suits against the legislative body for appropriations—would refer only to the county executive or administrator. If the Legislature had intended the same phrase in each statute to refer only to one specific branch or individual, it would be reasonable to conclude that the branch or individual would have been specifically named.[3] The fact that the Legislature used a more general phrase, which by its terms encompasses a category of individuals, is an indication that the Legislature intended the broader meaning.

For these reasons, I believe the Court of Appeals properly resolved this issue, the most important in the case. But the result is, perhaps, not intuitive, and the Legislature might wish to further clarify its intent.

PEOPLE v DELENIA HOWELL, No. 164570; Court of Appeals No. 360676.

Reconsideration Denied July 22, 2022:

In re S ROSSIER, No. 164030; Court of Appeals No. 357270.

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[3] Although not necessary to my conclusion, it is interesting to note that when MCL 141.436(9) and MCL 141.438(6) were introduced in the House of Representatives, neither contained the phrase at issue: "an elected official who heads a branch of county government." Instead, each restricted standing to a particular office or entity. In particular, the provision that became MCL 141.438(6) stated that "*the legislative body of a county* has exclusive standing to bring suit against the chief administrative officer of that county" to enforce "a general appropriations act for any department or branch of that county, including a department or branch headed by another elected or appointed official." 2013 HB 4704, § 18(6) (emphasis added). And the provision that eventually became MCL 141.436(9) limited standing to "the chief administrative officer of a county." 2013 HB 4704, § 16(9).

Amended Complaint Dismissed February 3, 2022:

DETROIT CAUCUS v INDEPENDENT CITIZENS REDISTRICTING COMMISSION, No. 163926. On order of the Court, the first amended verified complaint is considered, and the relief requested is DENIED.

Plaintiffs challenge the plans adopted by the Independent Citizens Redistricting Commission (the Commission) on December 28, 2021 for Michigan's congressional and legislative districts. This Court has authority to "review a challenge to any plan adopted by the commission . . . ." Const 1963, art 4, § 6(19). Plaintiffs allege that the adopted plans do not "comply with the voting rights act and other federal laws" as required by Const 1963, art 4, § 6(13)(a). More specifically, plaintiffs contend that the absence of an equivalent number of majority-minority districts in the adopted plans as compared to Michigan's existing congressional and state legislative districts will result in unlawful vote dilution in violation of the Voting Rights Act of 1965 (VRA), 52 USC 10301 *et seq*. In considering whether the adopted plans violate federal laws, we are bound by the decisions of the United States Supreme Court that construe those laws. *Abela v Gen Motors Corp*, 469 Mich 603, 606 (2004); *Chesapeake & O R Co v Martin*, 283 US 209, 220-221 (1931). Those United States Supreme Court decisions must govern our decision.

Earlier this year, in anticipation of redistricting challenges invoking our original jurisdiction, this Court unanimously adopted amendments to our court rules governing original proceedings. MCR 7.306(J) provides that "[t]he Court may set the case for argument as on leave granted, grant or deny the relief requested, or provide other relief that it deems appropriate, including an order to show cause why the relief sought in the complaint should not be granted." After receiving briefing on the merits of plaintiffs' challenge, we ordered expedited oral argument seeking the parties' respective views on "the proper disposition of the plaintiffs' complaint, including whether the plaintiffs have sustained their claims on the merits or whether there are disputed questions of fact." *Detroit Caucus v Independent Citizens Redistricting Comm*, ____ Mich ____ (2022). During oral argument, plaintiffs' counsel repeatedly answered our question by stating that plaintiffs had no intention of further supplementing the record and that it was plaintiffs' position that the reduction in majority-minority districts was "clear evidence in and of itself," that "the numbers speak for themselves," and that "[t]he results speak for themselves." Counsel also asserted that plaintiffs were satisfied that they "have enough that's been substantiated and submitted" and that "the evidence is clear as day to us and with what we submitted thus far." Plaintiffs' counsel expressly conceded that the case was "ready" for adjudication and that there was no need for a

court-appointed expert.[1] The Commission's counsel agreed that this Court should proceed to address the merits of plaintiffs' challenge as presented

"Redistricting is never easy," and there are "competing hazards of liability" for a body tasked with producing a lawful redistricting plan. *Abbott v Perez*, 585 US ____, ____; 138 S Ct 2305, 2314-2315 (2018) (quotation marks and citation omitted). The Commission must abide by a host of different—and sometimes competing—redistricting criteria. See *id*. at ____, 138 S Ct at 2314; see also Const 1963, art 4, § 6(13)(a) through (g) (ranking priority of state redistricting criteria). As particularly relevant to plaintiffs' challenge, "federal law impose[s] complex and delicately balanced requirements regarding the consideration of race." *Abbott*, 585 US at ____; 138 S Ct at 2314. It is settled beyond dispute that the Equal Protection Clause of the United States Constitution "forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification." *Id*. Yet, "[a]t the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the [VRA] pulls in the opposite direction" and "often insists that districts be created precisely because of race." *Id*.

Plaintiffs, supported by a conclusory expert affidavit with no accompanying bloc-voting analysis, argue that the mere absence of an equivalent number of race-based, majority-minority districts in the adopted plans as compared to Michigan's existing congressional and state legislative districts violates the VRA. But that is not the measure of vote dilution under the VRA. Vote dilution exists when "members of a minority group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Johnson v De Grandy*, 512 US 997, 1000 (1994) (quotation marks and citation omitted). For more than 35 years, vote-dilution claims have been governed by the standard first announced in *Thornburg v Gingles*, 478 US 30 (1986). As explained by the

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[1] Nor are we persuaded that a court-appointed expert is necessary or advisable. Although MRE 706 "permits a court to appoint and compensate an expert to assist the court," *In re Yarbrough Minors*, 314 Mich App 111, 121 (2016), our Court of Appeals has prudently recognized that "litigant assistance" is not the purpose of the rule, *id*. at 121 n 7 (quotation marks and citation omitted). A court-appointed expert is "for the court's benefit," *Grand Blanc Landfill, Inc v Swanson Environmental, Inc*, 186 Mich App 307, 311 (1990), and is most appropriate "when the parties' retained experts are in such wild disagreement that the trial court might find it helpful and in furtherance of the search for truth to appoint an independent expert," *In re Yarbrough Minors*, 314 Mich App at 121 n 7 (quotation marks and citation omitted). Those circumstances are not present in this case. We agree with plaintiffs' counsel that plaintiffs' position, regardless of its legal merit, is "clear" and does not warrant a court-appointed expert.

United States Supreme Court in *Cooper v Harris*, 581 US ____, ____; 137 S Ct 1455, 1470 (2017) (some alterations added):

> [T]his Court identified, in [*Gingles*], three threshold conditions for proving vote dilution under § 2 of the VRA. See [*Gingles*, 478 US at 50-51]. First, a "minority group" must be "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district. *Id*., at 50. Second, the minority group must be "politically cohesive." *Id*., at 51. And third, a district's white majority must "vote[] sufficiently as a bloc" to usually "defeat the minority's preferred candidate." *Ibid*. Those three showings, we have explained, are needed to establish that "the minority [group] has the potential to elect a representative of its own choice" in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is "submerg[ed] in a larger white voting population." *Growe v Emison*, 507 US 25, 40 (1993).

The *Cooper* Court then went on to clarify the exact circumstances that might provide sufficient justification to intentionally assign citizens to a district on the basis of race: "If a State has good reason to think that all the ' *Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. *But if not, then not.*" *Cooper*, 581 US at ____; 137 S Ct at 1470 (emphasis added; citation omitted); see also *Bush v Vera*, 517 US 952, 977-978 (1996) (opinion of O'Connor, J.) (assuming, without deciding, that VRA compliance is a compelling state interest capable of satisfying strict scrutiny to avoid an equal-protection violation but requiring that the redistricting body have "a strong basis in evidence for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2") (quotation marks and citation omitted).

In other words, the Commission needed good reason to think that the *Gingles* preconditions were satisfied to believe that § 2 of the VRA required majority-minority districts. Under *Cooper*, 581 US at ____; 137 S Ct at 1464, the Commission could only "invoke[] the VRA to justify race-based districting" with " 'a strong basis in evidence' " establishing that race-based, majority-minority districts were necessary as a narrowly tailored means of ensuring an equal opportunity to elect candidates preferred by Black voters. (Citation omitted.) The Commission asserts that the evidentiary basis supporting a need for majority-minority districts was entirely lacking in the public record. In fact, the Commission's voting-analysis expert extensively analyzed voting patterns in general-election and primary-election contests over the prior redistricting cycle both statewide and specifically within Wayne, Oakland, Genesee, and Saginaw Counties. The resulting racial bloc-voting analysis (a breakdown in voting patterns based on race) suggested significant white crossover voting for Black-preferred candidates that had the effect of affording Black voters an equal opportunity to elect representatives of their choice even in the absence of 50%+ majority-minority districts. This evidence of white crossover voting—unrebutted

by plaintiffs' expert—reinforces our conclusion that plaintiffs have not made the threshold showing of white bloc voting required by *Gingles*.

Plaintiffs have not identified grounds or legal authority that would allow us to question the Commission's decision not to draw race-based, majority-minority districts. That decision was the correct one precisely because there was no "strong basis in evidence" providing "good reason" for the Commission to believe that the three threshold *Gingles* preconditions were satisfied so as to potentially require race-based district lines in order to avoid liability for vote dilution under § 2 of the VRA. See *Cooper*, 581 US at ____, ____; 137 S Ct at 1464, 1470 (quotation marks and citation omitted). " '[I]n the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters.' " *Voinovich v Quilter*, 507 US 146, 158 (1993), quoting *Gingles*, 478 US at 49 n 15; see also *Cooper*, 581 US at ____; 137 S Ct at 1470 (recognizing that "[i]t is difficult to see how the majority-bloc-voting requirement could be met—and hence how § 2 liability could be established"—if the electoral history tends to demonstrate that "a meaningful number of white voters join[] a politically cohesive black community to elect that group's favored candidate") (quotation marks and citation omitted; alteration in original). And if the Commission had intentionally created majority-minority districts without "sufficient justification," it would have easily invited a potentially meritorious challenge as an unconstitutional racial gerrymander. See *Cooper*, 581 US at ____; 137 S Ct at 1463.

We are bound to follow the precedent of the United States Supreme Court when considering whether the Commission's adopted plans violate federal law. That precedent requires that any redistricting plan comply with both the VRA and the Equal Protection Clause of the United States Constitution. The relief plaintiffs request would put the work of the Commission squarely in the crosshairs of an Equal Protection Clause violation. We recognize that some challenges to redistricting might require additional factual development, and that this is particularly true when redistricting happens behind closed doors because the evidence on which decisions are made is generally not publicly available.[2] However, the Commission's work has been an open and public process as required by Const 1963, art 4, § 6. In light of plaintiffs' concession that further factual development is unnecessary for resolu-

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[2] In early September, the Commission's voting-analysis expert *publicly* presented the initial findings of the Commission's racial bloc-voting analysis. Moreover, that statistical analysis is premised on election results and demographic data that are, and always have been, publicly available. This *evidence* is entirely distinguishable from the materials relating to legal advice that this Court held was not privileged and subject to disclosure in *Detroit News, Inc v Independent Citizens Redistricting Comm*, ___ Mich ___ (2021) (Docket No. 163823).

tion of the case, we have the responsibility to resolve the case at this juncture consistent with our charge under the Michigan Constitution.[3]

Plaintiffs have not demonstrated that the Commission's adopted plans are noncompliant with Const 1963, art 4, § 6(13)(a). Therefore, the relief requested is denied and the first amended verified complaint is dismissed.

ZAHRA, VIVIANO, and BERNSTEIN, JJ. (*dissenting*). We dissent not because we disagree with the legal framework set out by the majority's denial order; neither party contests that this case is governed by the test set forth in *Thornburg v Gingles*.[1] And we certainly agree with the majority's unremarkable proposition that "[i]n considering whether the adopted plans violate federal laws, we are bound by decisions of the United States Supreme Court that construe those laws." Rather, our contention is that the majority's dismissal is premature. Instead of dismissing the case without any analysis of whether plaintiffs have stated a claim or any opportunity for further factual development if they have stated a claim, we would appoint an independent expert to assist the Court in assessing the evidence and factual assertions presented thus far and any additional evidence the parties would develop and submit for review.[2]

On January 6, 2022, plaintiffs filed the present suit alleging that the redistricting maps adopted by defendant—an independent, quasi-legislative body known as the Independent Citizens Redistricting Commission (the Commission)[3]—impermissibly dilute the votes of Black

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[3] It is not at all unusual for this Court to dismiss an original action brought under MCR 7.306 without further proceedings. We routinely summarily dismiss original actions seeking superintending control over lower courts and tribunals without holding oral argument. See, e.g., *Oakes v 30th Judicial Circuit Court*, 507 Mich 903 (2021); *Truss v Attorney Grievance Comm*, 507 Mich 884 (2021). And as previously noted, this case has received the extra attention of expedited oral argument.

[1] *Thornburg v Gingles*, 478 US 30 (1986).

[2] We would do so under MRE 706. Given the expedited nature of these proceedings, we conclude that the emergency oral argument on January 26, 2022, in which we questioned the parties about "whether the plaintiffs have sustained their claims on the merits or whether there are disputed questions of fact," would serve as the show-cause hearing.

[3] In 2018, through the exercise of direct democracy, see Const 1963, art 12, § 2 (recognizing the power of the people of Michigan to initiate proposed constitutional amendments that, if various requirements are met, are placed on the ballot and voted on at election time), the voters amended our state's Constitution to vest responsibility for redistricting in the Commission. That amendment is Const 1963, art 4, § 6, which "marked a departure from the prevailing mode of redistricting, which

Michiganders in violation of § 2 of the Voting Rights Act of 1965 (VRA), 52 USC 10301 *et seq*., and Const 1963, art 4, § 6(13)(a) and (c). This case involves significant questions concerning the recently adopted constitutional amendments to our redistricting process, Const 1963, art 4, § 6. It also involves a complex subject matter—voter dilution—that this Court does not regularly address. And the case comes to us as an original action, meaning no other court below has, or can, address it. All of this counsels in favor of caution and the need for due deliberation in resolving this matter. And yet the majority summarily dismisses the case because plaintiffs failed to present sufficient evidence at this threshold stage of the case—something neither common practice nor our court rules required them to do.

This case arises under our original jurisdiction to "review a challenge to any plan adopted by the commission . . . ."[4] Accordingly, no lower court has addressed the merits of plaintiffs' claims. This means that, in essence, we operate as the trial court. In a typical case at this early stage—that is, after the initial pleading has been filed and the defendant has responded—evidentiary materials have not been marshaled or put forward by the parties. That process occurs later, during discovery. Instead, at this point in a trial proceeding, a defendant might move for summary disposition on the pleadings, arguing that the plaintiff's complaint has "failed to state a claim on which relief can be granted."[5] Such an argument attacks the "*legal sufficiency* of a claim based on the factual allegations in the complaint."[6] Accordingly, the court "must accept all factual allegations as true" and "decid[e] the motion on the pleadings alone."[7] We are a notice-pleading state, and, as a result, the function of the complaint is simply to give notice of the claims being lodged against the defendants.[8] Accordingly, "[a] motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery."[9]

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had been done for decades by the Legislature." *Detroit News, Inc v Independent Citizens Redistricting Comm*, ___ Mich ___, ___ (2021) (Docket No. 163823); slip op at 1-2. See also *In re Apportionment of State Legislature–1982*, 413 Mich 96, 116 (1982) (returning responsibility for state legislative redistricting to the Legislature by holding that "the function of the [Commission on Legislative Apportionment] . . . , and indeed the commission itself, are not severable from the [previously] invalidated [apportionment] rules").

[4] Const 1963, art 4, § 6(19).

[5] MCR 2.116(C)(8).

[6] *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159 (2019).

[7] *Id.* at 160.

[8] See *Baker v Gushwa*, 354 Mich 241, 246 (1958).

[9] *El-Khalil*, 504 Mich at 160.

We are at the pleading stage. Plaintiffs have filed their complaint and accompanying brief, and defendant has responded, pursuant to MCR 7.306. If this were a typical case, the trial court would examine the legal sufficiency of the pleadings and could not dismiss the complaint at this stage of the proceedings solely because of plaintiffs' failure to produce all the relevant supporting evidence. That is the situation here.

The majority does not suggest that plaintiffs have failed to state a claim. Nor could it. Plaintiffs' complaint raises a constitutional issue of first impression: the legality of the Commission's maps. The Commission is charged with creating maps based on a series of criteria that are ranked by importance in the redistricting process.[10] The very first criterion—meaning it is the most important one in the creation of the maps—is the one at issue here: the "[d]istricts shall be of equal population as mandated by the United States constitution, and shall comply with the voting rights act and other federal laws."[11] The VRA states that "[n]o voting . . . standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."[12] A violation occurs "if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members" of a protected class "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[13] To prevail on such a claim, the plaintiffs must show that (1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "the minority group . . . is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate."[14] If these showings are made, then the court must consider the totality of the circumstances.[15]

As federal courts have recognized, § 2 claims under the VRA are usually viewed as involving "mixed questions of law and fact," and "[t]his makes it particularly inappropriate to foreclose at the pleading

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[10] Const 1963, art 4, § 6(13).

[11] Const 1963, art 4, § 6(13)(a).

[12] 52 USC 10301(a).

[13] 52 USC 10301(b).

[14] *Gingles*, 478 US at 50-51 (citation omitted).

[15] *Id*. at 79.

stage Plaintiffs' opportunity to prove their claims."[16] The United States Court of Appeals for the First Circuit said it well:

> It is no accident that most cases under section 2 [of the VRA] have been decided on summary judgment or after a verdict, and not on a motion to dismiss. This caution is especially apt where, as here, we are dealing with a major variant not addressed in *Gingles* itself—the single member district—and one with a relatively unusual history. As courts get more experience dealing with these cases and the rules firm up, it may be more feasible to dismiss weaker cases on the pleadings, but in the case before us we think that the plaintiffs are entitled to an opportunity to develop evidence before the merits are resolved.[17]

Another federal appellate court, rejecting a motion to dismiss based on the pleadings, stated that the plaintiffs needed "only to allege that the [challenged practice or rule] dilutes minority voting strength such that minority voters in the relevant wards have 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' "[18] Thus, under a notice-pleading standard like ours, plaintiffs are "not required on the face of their complaint to allege every legal element or fact that must be proven in a vote dilution claim."[19] Nowhere has the United States Supreme Court stated that the *Gingles* factors must be alleged in the complaint in order to survive dismissal at this initial stage—"[t]his implies that a plaintiff should have an opportunity to prove the *Gingles* prerequisites by setting out facts in support of the claim."[20] And because VRA claims "require courts to engage in a fact-intensive, 'intensely local appraisal of the design and impact of electoral administration in the light of past and present reality,' " they "are not easily susceptible to resolution at the pleadings stage."[21]

Here, plaintiffs have alleged that defendant's newly adopted maps dilute Black votes in various districts. They have even alleged facts supportive of each of the three *Gingles* threshold factors as well as the "totality of the circumstances" considerations. Those facts, if proven,

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[16] *Rose v Raffensperger*, 511 F Supp 3d 1340, 1355, 1360 (ND Ga, 2021).

[17] *Metts v Murphy*, 363 F3d 8, 11 (CA 1, 2004).

[18] *Kingman Park Civic Ass'n v Williams*, 358 US App DC 295, 302 (2003) (citation omitted).

[19] *Id*.

[20] *Bradley v Indiana State Election Bd*, 797 F Supp 694, 699 & n 7 (SD Ind, 1992) (noting the "apparent dearth of dismissals in other [VRA] § 2 cases for failure to allege the *Gingles* elements specifically").

[21] *Middleton v Andino*, 474 F Supp 3d 768, 776 (D SC, 2020) (citation omitted).

might not be enough to ultimately prevail in this case. But they would be enough for the case to move forward in any trial court assessing the complaint under a notice-pleading standard, and they should be sufficient for the case to proceed in our Court as well.[22]

The fact that the present case comes to us as an original action matters; we ought not summarily discount an original action as we often do in the exercise of our discretionary jurisdiction. Appellate courts in this state and elsewhere rarely entertain original actions. But when they do, these courts have been attentive to the need for factual development, particularly in cases like the present one that involve significant issues that will affect our state for a decade or more. The United States Supreme Court has stated, "The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts."[23]

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[22] It is noteworthy, too, that neither the defendants, the majority, nor our own research has uncovered any VRA case that has been summarily dismissed on the merits at such an early stage.

[23] *United States v Texas*, 339 US 707, 715 (1950), superseded by statute on other grounds as recognized by *Parker Drilling Mgt Servs, Ltd v Newton*, 139 S Ct 1881, 1887 (2019); see also Note, *Special Juries in the Supreme Court*, 123 Yale L J 208, 233 (2013) ("The practice of delegating fact-finding in original jurisdiction cases to special masters has become institutionalized . . . ."); Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 Tex L Rev 269, 342 (1999) ("The Court customarily refers these cases to a special master for fact-finding . . . .").

The majority suggests that the gravamen of plaintiffs' complaint is that minority-majority districts need to be adopted. This focus allows the majority to emphasize the caselaw indicating that the VRA does not, without more, require the adoption of such districts. But this twists the nature of the argument. The VRA, as interpreted by the United States Supreme Court, prohibits the dilution of the voting power of minority groups. Plaintiffs are claiming that their voting power has been impermissibly diluted. The relief they seek would involve establishing minority-majority districts, but they do not need to show entitlement to that particular relief in order to prevail on their claim. If plaintiffs were able to establish that their voting power has been impermissibly diluted, the appropriate remedy under the VRA might be something greater than the present proportion of Black voting-age population in the present maps but less than the creation of a minority-majority district(s). Perhaps districts with a Black voting-age population of less than 50% would adequately remedy any improper vote dilution given the

Our practice is similar. For example, in judicial disciplinary actions, over which we have original jurisdiction,[24] we have erected an elaborate process by which facts can be developed before this Court disposes of the case.[25] The same goes for attorney discipline proceedings.[26] We have similarly acknowledged the need for factual development in certain constitutional tax challenges—known as Headlee Amendment actions —which can be filed as original actions in the Court of Appeals. In doing so, we erected special pleading requirements that would indicate to the court whether further factual development is needed. Our rules require the pleadings in those actions to "set forth with particularity the factual basis for the alleged violation or a defense and indicate whether there are any factual questions that are anticipated to require resolution by the court."[27] As former Justice YOUNG wrote at the time we adopted that rule, "Trial courts are designed efficiently to preside over discovery matters, pretrial hearings, and ultimately a trial on the merits. Those are the means that our system of justice uses to fully and efficiently develop the facts underlying the parties' claims."[28] But the Court of Appeals was not "equipped for factual development of new claims," and thus for Headlee cases, we implemented a process by which the parties would sharpen the factual dispute at the threshold stage.[29]

Our court rule governing this case, by contrast, has neither a defined process through which facts are to be developed nor heightened pleading requirements. The court rule does not require the parties to specify their factual allegations with particularity, much less present evidence, at this stage. MCR 7.306(C) and (D) simply require the plaintiff to file a complaint and brief, which will be followed by the defendant's answer and brief, capped finally by a reply brief. Nor do we require the parties to specify or present any particular facts or evidence. The rule does not state that the initial pleadings must cover the ultimate merits of the case. And no one reading the rule would believe that a plaintiff is on notice that the case will be dismissed if the plaintiff fails to present all of their evidence along with the complaint and brief. Yet that is exactly what the majority has done, faulting plaintiffs for their failure to present evidence that we never requested or required them to present (and that would never be presented at this stage in any trial court).

What makes the majority's dismissal even more unjust is the tight time frame plaintiffs have had to file this redistricting challenge. The

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crossover votes of the white population. Determining this, however, would require a deeper analysis of the facts than the majority is willing to offer.

[24] See Const 1963, art 6, § 30.

[25] See MCR 9.200 *et seq*.

[26] See Const 1963, art 6, § 4; MCR 9.100 *et seq*.

[27] MCR 2.112(M).

[28] MCR 7.206, 480 Mich clviii, clxi (YOUNG, J., concurring).

[29] *Id*.

Constitution required defendant to adopt its redistricting maps on November 1.[30] But, because delays in the transmission of data from the United States Census Bureau to the states made this deadline difficult to comply with, defendant did not adopt the maps until December 28—almost two months later.[31] Plaintiffs filed suit roughly a week later.

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[30] Const 1963, art 4, § 6(7). But before the Commission could "adopt" any plans, it had to make them available for public comment for 45 days, which means that the proposed redistricting plans had to be completed even earlier—by September 17.

[31] In June 2021, the Commission sought a ruling from this Court that the timing requirements of Const 1963, art 4, § 6 are merely directory, that is, that the constitutional deadlines were "advisable, but not absolutely essential—in contrast to a mandatory requirement." *Black's Law Dictionary* (11th ed) (defining "directory requirement"). It claimed, therefore, that the failure to comply with the deadlines due to the delay in receiving the census data would not affect the viability of the late-adopted maps. We denied the petition for anticipatory relief, and there is no need to resolve the matter in the present case. We do, however, note that nothing in our Constitution expressly requires defendant to use the federal decennial census data for redistricting. While the Constitution refers to "the federal decennial census" data in various sections—see Const 1963, art 4, §§ 6(2)(a)(i), (2)(c) through (f), (5), and (7)—when the Constitution provides for the materials defendant can use to create the maps, it refers more generally to "data" without suggesting that such data is limited to the federal decennial census data. Other courts have recognized that federal census data is not required for redistricting. See *In re Interrogatories on Senate Bill 21-247 Submitted by Colorado General Assembly*, 488 P3d 1008, 1013-1014, 1019 (2021) (holding that similar constitutional language—"necessary census data"—did not require Colorado's independent redistricting commission to "refer wholly or exclusively to" the federal decennial census to draw new maps); see also *Holloway v Virginia Beach*, 531 F Supp 3d 1015, 1061 (ED Va, 2021) (noting that "sister jurisdictions have consistently relied upon [non-census data] for examining demographic information of minority populations for Section 2 cases"); *id*. (collecting cases); *Ohio v Raimondo*, 528 F Supp 3d 783, 794 (SD Ohio, 2021), rev'd on other grounds 848 F Appx 187 (CA 6, 2021) ("While the use of census data is the general practice, no stricture of the federal government requires States to use decennial census data in redistricting, so long as the redistricting complies with the Constitution and the Voting Right[s] Act."); see generally *Burns v Richardson*, 384 US 73, 91 (1966) (holding that states may draw districts based on voter-registration data and stating that "the Equal Protection Clause does not require the States to use total population figures derived from the

They needed to act quickly because the first candidate filings under the new maps are due in April.[32] On this compressed schedule, it would have been difficult if not impossible for plaintiffs to assemble and submit with its complaint all the evidence necessary to support their claim.[33] "Since direct evidence of minority voting patterns is unavailable (in that ballots do not indicate a voter's race), statistical proof is commonly presented in vote-dilution cases . . . ."[34] This data generally must be "presented and analyzed by expert witnesses" who can select the proper voting data and undertake regression analysis, scatterpoint analysis, and any other methods for making valid inferences from the data.[35] These are complicated matters that necessarily take time to evaluate. And they are not subjects frequently litigated in our courts.[36]

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federal census as the standard by which this substantial population equivalency is to be measured"). Whether the delay was necessary or not, the fact remains that plaintiffs had to bring this suit soon after the maps were adopted in order to ensure that any relief the Court provided would not interfere with the upcoming elections. This necessarily made any presuit factual development more difficult, at the very least, and thus makes it all the more puzzling why the majority would fault plaintiffs for not presenting extensive evidence at the pleading stage (while at the same time failing to examine the evidence plaintiffs did present).

[32] See MCL 168.133; MCL 168.163.

[33] While plaintiffs did not specify at oral argument the precise pieces of evidence they would submit, their counsel nonetheless observed that their filing of the complaint and brief did not waive their opportunity for factual development in this case. Plaintiffs' counsel at argument actually invited the Court to appoint an expert. And while he said he did not think further factual development was necessary for plaintiffs to prevail, he said that plaintiffs would welcome the opportunity for further factual development. The majority makes much of counsel's assertion that plaintiffs had presented enough information to prevail. But is this so damning? Was the only way for plaintiffs to obtain factual development for their counsel to concede that their claim, on the record presently presented, lacked factual support? Requiring such an admission is patently unfair, given the fact that our court rule placed plaintiffs in a precarious position: it was unclear to them—as it was unclear to us before the present majority order—whether this Court would reject a claim at the pleading stage for failure to adduce sufficient proof.

[34] 25 Am Jur 2d, Elections, § 46, p 919.

[35] *Id.* at 919-920.

[36] The majority suggests that "the Commission's work has been an open and public process" and that therefore factual development is unnecessary. Maybe that is so with regard to most of the Commission's

Ignoring the complexities of this case (and VRA cases in general), the majority has completely abdicated its responsibility to evaluate the sufficiency of the evidence presented in this case and explain why it is inadequate. As noted, VRA claims "require courts to engage in a fact-intensive, 'intensely local appraisal of the design and impact of electoral administration in the light of past and present reality . . . .' "[37] The majority somehow finds that plaintiffs have not met their evidentiary burden without examining the evidence and examples plaintiffs have presented. We believe the Court should be more thorough and circumspect in assessing the factual sufficiency of an incomplete record involving such a complex, unfamiliar, and vitally important subject matter.

Given the shortened time frame in which to assess a challenge, we would exercise our authority to appoint an expert under MRE 706(1)[38] to evaluate the evidence presented thus far and any additional evidence

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work, but it is certainly not the case with the materials most relevant to the present matter. Less than two months ago it took an opinion of this Court to force the Commission to disclose documents and a recording of a closed meeting relating to the Commission's compliance with the VRA. *Detroit News, Inc*, ___ Mich ___. These materials were released roughly two weeks prior to the filing of plaintiffs' suit. It is simply not the case that any "open and public process" by the Commission gave plaintiffs ample time for factual development of their VRA claim prior to the filing of this action.

[37] *Middleton*, 474 F Supp 3d at 776 (citation omitted).

[38] Because we are effectively sitting as a trial court, we have discretion to appoint an expert to assist us with fact finding and to decide how that expert will be compensated. See MRE 706; *Grand Blanc Landfill, Inc v Swanson Environmental, Inc*, 186 Mich App 307, 311 (1990) ("MRE 706, which vests a trial court with authority to appoint [a neutral] expert, must be construed as allowing for the creation of a relationship between the expert and the appointing court, for the court's benefit. It is the court that appoints the expert, establishes its duties, and determines its compensation."). An expert witness may be appropriate if the evidence to be presented at trial is complex. See MRE 702 ("If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise . . . ."). The limitation on the appointment of an independent expert is that the court cannot delegate judicial functions to such an expert. See generally *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116 (1996). We conclude that the emergency oral argument on January 26, 2022, in which we questioned the parties about "whether the plaintiffs have sustained their claims on the merits or whether there

the parties may submit in this case. This would allow both sides an opportunity to develop the evidence they intend to rely on and would also help the Court begin to assess the sufficiency of that evidence.[39] Depending on the expert's report, we would then consider whether a special master is needed to make specific factual findings for our review.

Procedure matters. People care about how their cases are handled and whether they had a fair opportunity to be heard.[40] As a matter of procedure, the majority's decision today is completely unprecedented. It does not resemble what would normally occur in a case filed in our trial courts or in the federal courts. It does not reflect anything required by our court rules. And it does not accord with any notion of fair play. The majority's decision today will do much to undermine the public's confidence that this Court will take seriously original complaints filed in our Court under Const 1963, art 4, § 6. Indeed, plaintiffs have challenged the very highest priority criterion for redistricting in this state—compliance with constitutional requirements, Const 1963, art 4, § 6(13)(a), and the VRA—and yet the majority brushes their challenge aside by erecting, without advance notice, a requirement that plaintiffs needed to present evidence sufficient to withstand dismissal at the time they filed their complaint.[41] Despite its decision todismiss this case on

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are disputed questions of fact," would serve as the show-cause hearing required under MRE 706. See note 2 of this statement.

[39] Contrary to the majority's insinuation, the expert would not be appointed on behalf of any party but rather would help the Court assess the evidence. But the evidence the expert would help interpret for the Court would include that which is now in the case along with any other evidence that may be developed and presented by the parties on an expedited basis.

[40] See Lind & Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988), p 92 ("Indeed, the picture that seems to be emerging [from research studies] is of people much more concerned with the process of their interaction with the law and much less concerned with the outcome of that interaction than one might have supposed.").

[41] The majority makes a curious claim: that nobody should be troubled by its hasty dismissal of this case because this Court has in the past summarily dismissed requests to exercise superintending control over lower courts pursuant to Const 1963, art 6, § 4. But this is a deeply flawed comparison. Superintending control is "[t]he general supervisory control that a higher court in a jurisdiction has over the administrative affairs of a lower court within that jurisdiction." *Black's Law Dictionary* (11th ed), p 416. To decline to take up such invitations is a far cry from dismissing an original action in a redistricting case involving a VRA claim (the highest-priority constitutional criterion, Const 1963, art 4, § 6(13)(a)), an action that has been solemnly entrusted to this Court alone and will shape the people's exercise of the franchise in this state

the basis that the evidence was insufficient, the majority fails to adequately grapple with the evidence and factual assertions that plaintiffs have put forward. We believe, by contrast, that it is too soon to rule on the merits of this case and that plaintiffs deserve an opportunity to prove their case. They deserve their day in court. For these reasons, we respectfully dissent.

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for the next decade. So different are the two that we can scarcely fathom why the majority thinks that stating it is a point in its favor. In truth, it is a distraction. Regardless of the propriety of that view, the majority has not shown that we have ever taken this course in a redistricting case, let alone one that arises under a new constitutional provision testing the propriety of maps, drawn by a new entity, that mark a significant departure from the maps that have governed since the last redistricting. In other words, we believe it is a poor use of the Court's discretion to essentially close the courtroom doors in a case raising significant legal issues of first impression.

Special Orders

SPECIAL ORDERS

In this section are orders of the Supreme Court (other than orders entered in cases before the Court) of general interest to the bench and bar of the state.

Order Entered March 9, 2022:

PROPOSED AMENDMENT OF MCR 9.116.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.116 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 9.116. JUDGES; FORMER JUDGES.

(A) [Unchanged.]

(B) Former Judges. Except as otherwise provided in this subrule, the administrator or commission may not take action against a former judge for conduct where the Michigan Supreme Court imposed a sanction less than removal or the Judicial Tenure Commission has taken any action under MCR 9.223(A)(1)-(5). The administrator or commission may take action against a former judge:

(1) for conduct resulting in removal as a judge;~~, and~~

(2) if the former judge does not hold judicial office at the time the Court issues its decision under MCR 9.252(A), and the Court finds that the conduct would have resulted in removal as a judge had the former judge still held judicial office at that time; or

(3) for any conduct that~~which~~ was not the subject of a disposition by the Judicial Tenure Commission or by the Court.

~~The administrator or commission may not take action against a former judge for conduct where the court imposed a sanction less than removal or the Judicial Tenure Commission has taken any action under MCR 9.223(A)(1)-(5).~~

(C) [Unchanged.]

Staff Comment: The proposed amendment of MCR 9.116 would allow the Attorney Grievance Commission to initiate disciplinary proceedings against a former judge who, but for his or her departure from the bench, would have been removed from office based on misconduct that was the subject of judicial disciplinary proceedings.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by July 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-11. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered March 16, 2022:

PROPOSED AMENDMENT OF MCR 6.502.

On order of the Court, the proposed amendment of Rule 6.502 of the Michigan Court Rules having been published for comment at 508 Mich 1201 (2021), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

Order Entered April 13, 2022:

PROPOSED AMENDMENT OF MCR 3.903.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.903 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(18) [Unchanged.]

(19) "Party" includes ~~the~~

(a) ~~petitioner and juvenile~~ in a delinquency proceeding~~,~~;

(i) the petitioner and juvenile.

(b) ~~petitioner, child, respondent, and parent, guardian, or legal custodian~~ in a protective proceeding~~,~~.

(i) the petitioner, child, and respondent

(ii) the parent, guardian, or legal custodian.

(20)-(27) [Unchanged.]

(B)-(F) [Unchanged.]

Staff Comment: The proposed amendment of MCR 3.903 would clarify the definition of a party in child protective proceedings.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by August 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-33. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered April 13, 2022:

PROPOSED AMENDMENT OF MCR 8.119.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.119 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(B) [Unchanged.]

(C) Filing of Documents and Other Materials. The clerk of the court shall process and maintain documents filed with the court as prescribed by Michigan Court Rules and the Michigan Trial Court Records Management Standards and all filed documents must be file stamped in accordance with these standards. The clerk of the court may only reject documents submitted for filing that do not comply with MCR 1.109(D)(1) and (2), are not signed in accordance with MCR 1.109(E), or are not accompanied by a required filing fee or a request for fee waiver under MCR 2.002(B), unless already waived or suspended by court order. Documents prepared or issued by the court for placement in the case file are not subject to rejection by the clerk of the court and shall not be stamped filed but shall be recorded in the case history as required in subrule (D)(1)(a) and placed in the case file.

(D)-(L) [Unchanged.]

Staff Comment: The proposed amendment of MCR 8.119 would clarify that a request for a fee waiver must be filed in accordance with MCR 2.002(B), which requires the request to be made on a form approved by the State Court Administrative Office.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by August 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-13. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered April 13, 2022:

PROPOSED AMENDMENT OF MCR 7.305.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.305 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before

adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.305. APPLICATION FOR LEAVE TO APPEAL.

(A)-(B) [Unchanged.]

(C) When to File.

(1) [Unchanged.]

(2) Application After Court of Appeals Decision. Except as provided in subrule (C)(4), the application must be filed within 28 days in ~~termination of parental rights~~ cases where the respondent's parental rights have been terminated, within 42 days in other civil cases, or within 56 days in criminal cases, after:

(a)-(d) [Unchanged.]

(3)-(7) [Unchanged.]

(D)-(I) [Unchanged.]

Staff Comment: The proposed amendment of MCR 7.305 would clarify that the 28-day timeframe for filing an application for leave to appeal applies to cases where the respondent's parental rights have been terminated.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by August 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-16. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered April 13, 2022:

PROPOSED RESCISSION OF ADMINISTRATIVE ORDER NO. 1998-1 AND PROPOSED AMENDMENT OF MCR 2.227.

On order of the Court, this is to advise that the Court is considering a rescission of Administrative Order No. 1998-1 and amendment of Rule 2.227 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

~~Administrative Order No. 1998-1 Reassignment of Circuit Court Actions to District Judges~~

~~In 1996 PA 374 the Legislature repealed former MCL 600.641; MSA 27A.641, which authorized the removal of actions from circuit court to district court on the ground that the amount of damages sustained may be less than the jurisdictional limitation as to the amount in controversy applicable to the district court. In accordance with that legislation, we repealed former MCR 4.003, the court rule implementing that procedure. It appearing that some courts have been improperly using transfers of actions under MCR 2.227 as a substitute for the former removal procedure, and that some procedure for utilizing district judges to try actions filed in circuit court would promote the efficient administration of justice, we adopt this administrative order, effective immediately, to apply to actions filed after January 1, 1997.~~

~~A circuit court may not transfer an action to district court under MCR 2.227 based on the amount in controversy unless: (1) The parties stipulate to the transfer and to an appropriate amendment of the complaint, see MCR 2.111(B)(2); or (2) From the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit of the district court.~~

~~Circuit courts and the district courts within their geographic jurisdictions are strongly urged to enter into agreements, to be implemented by joint local administrative orders, to provide that certain actions pending in circuit court will be reassigned to district judges for further proceedings. An action designated for such reassignment shall remain pending as a circuit court action, and the circuit court shall request the State Court Administrator assign the district judge to the circuit court for the purpose of conducting proceedings. Such administrative orders may specify the categories of cases that are appropriate or inappropriate~~

~~for such reassignment, and shall include a procedure for resolution of disputes between circuit and district courts as to whether a case was properly reassigned to a district judge.~~

~~Because this order was entered without having been considered at a public hearing under Administrative Order No. 1997-11, the question whether to retain or amend the order will be placed on the agenda for the next administrative public hearing, currently scheduled for September 24, 1998.~~

RULE 2.227. TRANSFER OF ACTIONS ON FINDING OF LACK OF JURISDICTION.

(A) Transfer to Court Which Has Jurisdiction. Except as otherwise provided in this rule, w~~W~~hen the court in which a civil action is pending determines that it lacks jurisdiction of the subject matter of the action, but that some other Michigan court would have jurisdiction of the action, the court may order the action transferred to the other court in a place where venue would be proper. If the question of jurisdiction is raised by the court on its own initiative, the action may not be transferred until the parties are given notice and an opportunity to be heard on the jurisdictional issue.

(B) Transfers From Circuit Court to District Court.

(1) A circuit court may not transfer an action to district court under this rule based on the amount in controversy unless:

(a) the parties stipulate in good faith to the transfer and to an amount in controversy not greater than the applicable jurisdictional limit of the district court; or

(b) from the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit of the district court.

(B)-(C) [Relettered (C)-(D) but otherwise unchanged.]

(E~~D~~) Procedure After Transfer.

(1) The action proceeds in the receiving court as if it had been originally filed there. If further pleadings are required or allowed, the time for filing them runs from the date the filing fee is paid under subrule (D~~C~~)(1). The receiving court may order the filing of new or amended pleadings. If part of the action remains pending in the transferring court, certified copies of the papers filed may be forwarded, with the cost to be paid by the plaintiff.

(2) [Unchanged.]

(3) A waiver of jury trial in the court in which the action was originally filed is ineffective after transfer. A party who had waived trial by jury may demand a jury trial after transfer by filing a demand and paying the applicable jury fee within 28 days after the filing fee is paid under subrule (D~~C~~)(1). A demand for a jury trial in the court in which the action was originally filed is preserved after transfer.

(E) [Relettered (F) but otherwise unchanged.]

Staff Comment: The proposed rescission of Administrative Order No. 1998-1 and proposed amendment of MCR 2.227 would move the relevant

portion of the administrative order into court rule format and make the rule consistent with the holding in *Krolczyk v Hyundai Motor America*, 507 Mich 966 (2021).

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by August 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-17. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered April 13 2022:

PROPOSED AMENDMENT OF MCR 3.943.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.943 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.943. DISPOSITIONAL HEARING.

(A)-(D) [Unchanged.]

(E) Dispositions.

(1)-(6) [Unchanged.]

(7) Mandatory Detention for Use of a Firearm.

(a)-(b) [Unchanged.]

(c) "Firearm" includes any weapon which will, is designed to, or may readily be converted to expel a projectile by action of an explosive~~means any weapon from which a dangerous projectile may be propelled by using explosives, gas, or air as a means of propulsion, except any~~

~~smoothbore rifle or hand gun designed and manufactured exclusively for propelling BB's not exceeding.177 caliber by means of spring, gas, or air~~.

Staff Comment: The proposed amendment of MCR 3.943 would update the definition of "firearm" in juvenile proceedings to be consistent with MCL 8.3t, which contains the definition referenced in the court rule's companion statute, MCL 712A.18g.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by August 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-18. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered April 13 2022:

PROPOSED AMENDMENT OF MCR 3.613.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.613 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.613. CHANGE OF NAME.

(A) A petition to change a name must be made on a form approved by the State Court Administrative Office.

(A) [Relettered (B) but otherwise unchanged.]

(C) No Publication of Notice; Confidential Record. Upon receiving a request establishing good cause, the court may order that no publication

of notice of the proceeding take place and that the record of the proceeding be confidential. Good cause may include but is not limited to evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger.

(1) Evidence of the possibility of physical danger must include the petitioner's or the endangered individual's sworn statement stating the reason for the fear of physical danger if the record is published or otherwise available.

(2) The court must issue an ex parte order granting or denying a request under this subrule.

(3) If a request under this subrule is granted, the court must:

(a) issue a written order;

(b) notify the petitioner of its decision and the time, date, and place of the hearing on the requested name change; and

(c) if a minor is the subject of the petition, notify the noncustodial parent as provided in subrule (E), except that if the noncustodial parent's address or whereabouts is not known and cannot be ascertained after diligent inquiry, the published notice of hearing must not include the current or proposed name of the minor.

(4) If a request under this subrule is denied, the court must issue a written order that states the reasons for denying relief and advises the petitioner of the right to request a hearing regarding the denial, file a notice of dismissal, or proceed with the petition and publication of notice.

(5) If the petitioner does not request a hearing under subrule (4) within 14 days of entry of the order, the order is final.

(6) If the petitioner does not request a hearing under subrule (4) or file a notice of dismissal within 14 days of entry of the order denying the request, the court may set a time, date, and place of a hearing on the petition and proceed with ordering publication of notice as provided in subrule (B), and if applicable, subrule (E).

(7) A hearing under subrule (4) must be held on the record.

(8) The petitioner must attend the hearing under subrule (4). If the petitioner fails to attend the hearing, the court may adjourn and reschedule or dismiss the petition for a name change.

(9) At the conclusion of the hearing under subrule (4), the court must state the reasons for granting or denying a request under this subrule and enter an appropriate order.

(B) [Relettered (D) but otherwise unchanged.]

(E~~C~~) Notice to Noncustodial Parent. Service on a noncustodial parent of a minor who is the subject of a petition for change of name shall be made in the following manner.

(1) [Unchanged.]

(2) Address Unknown. If the noncustodial parent's address or whereabouts is not known and cannot be ascertained after diligent inquiry, that parent shall be served with a notice of hearing by publishing in a newspaper and filing a proof of service as provided by MCR 2.106(F) and (G). Unless otherwise provided in this rule, t~~T~~he notice must be published one time at least 14 days before the date of the

hearing, must include the name of the noncustodial parent and a statement that the result of the hearing may be to bar or affect the noncustodial parent's interest in the matter, and that publication must be in the county where the court is located unless a different county is specified by statute, court rule, or order of the court. A notice published under this subrule need not set out the contents of the petition if it contains the information required under subrule (~~A~~B). A single publication may be used to notify the general public and the noncustodial parent whose address cannot be ascertained if the notice contains the noncustodial parent's name.

(D)-(E) [Relettered (F)-(G) but otherwise unchanged.]

Staff Comment: The proposed amendment of MCR 3.613 would clarify the process courts must use after receiving a request not to publish notice of a name change proceeding and to make the record confidential.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by August 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-21. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered May 11 2022:

PROPOSED AMENDMENT OF RULE 5.5 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 5.5 and its official comment of the Michigan Rules of Professional Conduct. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 5.5. UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW.

(a)-(d) [Unchanged.]

(e) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended may remotely practice the law of the jurisdiction(s) in which the lawyer is properly licensed while physically present in the State of Michigan, if the lawyer does not hold themselves out as being licensed to practice in the State of Michigan, does not advertise or otherwise hold out as having an office in the State of Michigan, and does not provide or offer to provide legal services in the State of Michigan.

Comment

[Paragraphs 1-21 unchanged.]

Paragraph (e) is not meant to infringe upon any authorized practice in the federal courts. See, e.g., *In re Desilets*, 291 F3d 925 (CA 6, 2002). In addition, paragraph (e) does not authorize lawyers who are admitted to practice in other jurisdictions to maintain local contact information (i.e., contact information within the State of Michigan) on websites, letterhead, business cards, advertising, or the like.

Staff Comment: The proposed amendment of Rule 5.5 of the Michigan Rules of Professional Conduct and its accompanying comment would clarify that lawyers may practice remotely in another jurisdiction while physically present in Michigan.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by September 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-24. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered May 11, 2022:

PROPOSED AMENDMENT OF MCR 3.101.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.101 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A)-(E) [Unchanged.]

(F) Service of Writ.

(1) The plaintiff shall serve the writ of garnishment, a copy of the writ for the defendant, the disclosure form, and any applicable fees, on the garnishee within 182 days after the date the writ was issued in the manner provided for the service of a summons and complaint in MCR 2.105, except that service upon the state treasurer may be made in the manner provided under subsection (3).

(2) [Unchanged.]

(3) Unless service is subject to electronic filing under MCR 1.109(G), service upon the state treasurer or any designated employee may be completed electronically in a manner provided under guidelines established by the state treasurer. Guidelines established under this subsection shall be published on the department of treasury's website and shall identify, at a minimum, each acceptable method of electronic service, the requirements necessary to complete service, and the address or location for each acceptable method of service. For purposes of this subsection:

(i) Electronic service authorized under the guidelines shall include magnetic media, e-mail, and any other method permitted at the discretion of the state treasurer.

(ii) Service in the manner provided under this subsection shall be treated as completed as of the date and time submitted by the plaintiff, except that any submission made on a Saturday, Sunday, or legal holiday shall be deemed to be served on the next business day.

(G)-(T) [Unchanged.]

Staff Comment: The proposed amendment of MCR 3.101 would allow writs of garnishment to be served electronically on the Department of

Treasury, subject to current e-filing requirements and guidelines established by the Department of Treasury.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by September 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2022-06. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered June 1, 2022:

PROPOSED AMENDMENT OF MCR 6.001 AND PROPOSED ADDITION OF 6.009.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.001 and an addition of Rule 6.009 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for each public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

> [Rule 6.009 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.001. SCOPE; APPLICABILITY OF CIVIL RULES; SUPERSEDED RULES AND STATUTES.

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.009, 6.101, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.425(D)(3), 6.427, 6.430, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapter 6.600 govern matters in criminal cases cognizable in the district courts.

(C) Juvenile Cases. MCR 6.009 and t~~T~~he rules in subchapter 6.900 govern matters of procedure in the district courts and in circuit courts and courts of equivalent criminal jurisdiction in cases involving juve-

niles against whom the prosecutor has authorized the filing of a criminal complaint as provided in MCL 764.1f.

(D)-(E) [Unchanged.]

RULE 6.009. USE OF RESTRAINTS ON A DEFENDANT.

(A) Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, may not be used on a defendant during a court proceeding that is or could have been before a jury unless the court finds that the use of restraints is necessary due to one of the following factors:

(1) Instruments of restraint are necessary to prevent physical harm to the defendant or another person.

(2) The defendant has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior.

(3) There is a founded belief that the defendant presents a substantial risk of flight from the courtroom.

(B) The court's determination that restraints are necessary must be made outside the presence of the jury. If restraints are ordered, the court shall state on the record or in writing its findings of fact in support of the order.

(C) Any restraints used on a defendant in the courtroom shall allow the defendant limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a defendant be restrained using fixed restraints to a wall, floor, or furniture.

Staff comment: The proposed addition of MCR 6.009 would establish a procedure regarding the use of restraints on a criminal defendant in court proceedings that are or could be before a jury, and the proposed amendment of MCR 6.001 would make the new rule applicable to felony, misdemeanor, and automatic waiver cases.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by October 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-20. Your comments and the comments of others will be posted under the chapter affected by this proposal.

CAVANAGH, J. (*concurring*). I concur with this Court's order publishing for comment the proposed addition of MCR 6.009 regarding the use of restraints on adult criminal defendants. As an initial matter, I'm not

sure the constitutional floor set by *Deck v Missouri*, 544 US 622, 629 (2005), is as low as Justice ZAHRA claims. *Deck* reviewed American decisions dating back to 1871 and concluded that, while there was disagreement about the degree of discretion that trial judges possess, those cases "settled virtually without exception on a basic rule embodying notions of fundamental fairness: Trial courts may not shackle defendants routinely, but only if there is a particular reason to do so." *Deck*, 544 US at 627. Courts sometimes analyze whether violations of *Deck* are harmless by inquiring whether jurors saw a defendant's shackles. See *Brown v Davenport*, 596 US ___; 142 S Ct 1510 (2022). But that speaks to at most one of the three "fundamental legal principles" supporting the prohibition on routine shackling: the presumption of innocence, the right to counsel, and "a judicial process that is a dignified process." *Deck*, 544 US at 630-631. Even if the inquiry into whether the shackles were visible to jurors effectively analyzes the question of prejudice from unconstitutional shackling, we should strive to avoid the error in the first place, rather than knowingly commit the error while rendering it unreviewable. But, regardless of where the constitutional floor lies, we are not prohibited from considering more than the constitutional minimum, and at this point we are only publishing the proposed rule for comment. Because I would not deprive the public of the opportunity to comment on this proposal, I concur in the order publishing for comment.

ZAHRA, J. (*dissenting*). I dissent from this Court's order publishing for comment the proposed addition of MCR 6.009 regarding the use of restraints on adult criminal defendants. I would only publish for comment a rule that conforms to the constitutional requirements set by the Supreme Court of the United States' decision in *Deck v Missouri*, 544 US 622, 629 (2005) ("[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.") (emphasis added). See also *People v Arthur*, 495 Mich 861, 862 (2013) (concluding that, under *Deck*, no constitutional violation occurred where "the court sought to shield the defendant's leg restraints from the jury's view" and "the record on remand ma[de] clear that no juror actually saw the defendant in shackles"). Contrary to Justice CAVANAGH's suggestion, the holding of *Deck* only applies when the jury sees and is made aware of the restraints; otherwise, the " 'inherent[] prejudic[e]' " the Court described in *Deck* would not exist. *Deck*, 544 US at 635 (citation omitted); see also *id*. at 633 ("The appearance of the offender . . . in shackles . . . almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community[.]"); *id*. at 635 ("[W]here a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation."). Indeed, the published rule would extend *Deck* even to bench trials held before the very judge who would have earlier made the decision on

whether to shackle the defendant. Because this Court's order, as written, goes well beyond the constitutional floor set by *Deck*, I dissent.

VIVIANO, J., joins the statement of ZAHRA, J.

Order Entered June 15, 2022:

PROPOSED AMENDMENT OF MCR 6.201.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.201 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.201. DISCOVERY.

(A) [Unchanged.]

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

(1) [Unchanged.]

(2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation or contains the address, telephone or cell phone number, or any personal identifying information protected by MCR 1.109(9)(a), which may be redacted;

(3)-(5) [Unchanged.]

(C)-(K) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.201 would require redaction of certain information contained in a police report or interrogation record before providing it to the defendant.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by October 1, 2022 by clicking on the "Comment on this Proposal" link

under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-29. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered June 15, 2022:

PROPOSED AMENDMENT OF MCR 7.215.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.215 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.215. OPINIONS, ORDERS, JUDGMENTS, AND FINAL PROCESS FOR COURT OF APPEALS.

(A)-(E) [Unchanged.]

(F) Execution and Enforcement.

(1)-(2) [Unchanged.]

(3) Reissuance of Judgment or Order. Any party may request that an opinion or order be reissued with a new entry date by filing a letter with the Court of Appeals setting forth facts showing that the clerk or attorney failed to send the judgment or order as provided in subrule (E)(2). The Court of Appeals will not reissue the opinion or order unless persuaded that it was not promptly sent as required and that the failure resulted in the party being precluded from timely filing a motion for reconsideration or an application for leave to appeal with the Supreme Court. Such request will be submitted to the Chief Judge for administrative decision, and the decision will be communicated by letter from the clerk.

(G)-(J) [Unchanged.]

Staff Comment: The proposed amendment of MCR 7.215 would codify the Court of Appeals' practice for reissuing opinions and orders.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by October 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-39. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered June 15, 2022:

PROPOSED AMENDMENT OF MCR 6.502.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.502 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.502. MOTION FOR RELIEF FROM JUDGMENT.

(A)-(F) [Unchanged.]

(G) Successive Motions.

(1) [Unchanged.]

(2) A defendant may file a second or subsequent motion <u>based on any of the following: (a)</u> ~~based on~~ a retroactive change in law that occurred after the first motion for relief from judgment was filed<u>, (b)</u> ~~or~~ a claim of new evidence that was not discovered before the first such motion was filed<u>, or</u>:

<u>(c) a final court order vacating one or more of the defendant's convictions either described in the judgment from which the defendant is seeking relief or upon which the judgment was based.</u>

The clerk shall refer a successive motion to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

The court may waive the provisions of this rule if it concludes that there is a significant possibility that the defendant is innocent of the crime. For motions filed under both (G)(1) and (G)(2), the court shall enter an appropriate order disposing of the motion.

(3) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.502 would allow a third exception to the "one and only one motion" rule based on a final court order vacating one or more of a defendant's convictions either described in the judgment or upon which the judgment was based.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by October 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-48. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered June 15, 2022:

PROPOSED AMENDMENT OF MCR 3.703.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.703 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.703. COMMENCING A PERSONAL PROTECTION ACTION.

(A) Filing. A personal protection action is an independent action commenced by filing a petition and submitting a proposed order with a court. The proposed order shall be prepared on a form approved by the State Court Administrative Office. The petitioner shall complete in the proposed order only the case caption and the fields with identifying information, including protected personal identifying information, that are required for LEIN entry. The personal identifying information form required by MCR 1.109(D)(9)(b)(iii) shall not be filed under this rule. There are no fees for filing a personal protection action and no summons is issued. A personal protection action may not be commenced by filing a motion in an existing case or by joining a claim to an action.

(B)-(G) [Unchanged.]

Staff comment: The proposed amendment of MCR 3.703 is necessary for design and implementation of the statewide electronic-filing system, will provide the court with necessary PPII in an appropriate format, and will reduce workload preparing personal protection orders. This particular amendment aligns with the Court's recent amendment of MCR 1.109(D)(9)(b)(iii), allowing proposed orders submitted to the court to contain protected personal identifying information (PPII), which the courts will continue to protect as if prepared or issued by the court under MCR 8.119(H)(5).

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by October 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2022-09. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered June 22, 2022:

PROPOSED AMENDMENT OF MCR 7.202.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.202 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for

each public hearing are posted on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings] page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.202. DEFINITIONS.

For purposes of this subchapter:

(1)-(6) [Unchanged.] (7) "governmental immunity" includes immunity of the state, a tribal government, or a political subdivision from suit or liability.

Staff Comment: The proposed amendment of MCR 7.202 would provide a definition of governmental immunity to include the state's, a tribal government's, or a political subdivision's immunity from suit or liability.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by October 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules] page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-35. Your comments and the comments of others will be posted under the chapter affected by this proposal.