MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

July 18, 2020 through December 31, 2020

KATHRYN L. LOOMIS
REPORTER OF DECISIONS

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
BRIDGET M. McCORMACK	2021
Chief Justice Pro Tem	
DAVID F. VIVIANO	2025
Justices	
STEPHEN J. MARKMAN	2021
BRIAN K. ZAHRA	2023
RICHARD H. BERNSTEIN	2023
ELIZABETH T. CLEMENT	2027
MEGAN K. CAVANAGH	2027

Commissioners

DANIEL C. BRUBAKER, Chief Commissioner

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

KAREN A. KOSTBADE

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	
CHRISTOPHER M. MURRAY	2021
Chief Judge Pro Tem	
JANE M. BECKERING	2025
Judges	
DAVID SAWYER	2023
MARK J. CAVANAGH	2021
KATHLEEN JANSEN	2025
JANE E. MARKEY	2021
PATRICK M. METER	2021
KIRSTEN FRANK KELLY	2025
KAREN FORT HOOD	2021
STEPHEN L. BORRELLO	2025
DEBORAH A. SERVITTO	2025
ELIZABETH L. GLEICHER	2025
CYNTHIA DIANE STEPHENS	2023
MICHAEL J. KELLY	2021
DOUGLAS B. SHAPIRO	2025
AMY RONAYNE KRAUSE	2021
MARK T. BOONSTRA	2021
MICHAEL J. RIORDAN	2025
MICHAEL F. GADOLA	2023
COLLEEN A. O'BRIEN	2023
BROCK A. SWARTZLE	2023
THOMAS C. CAMERON	2023
JONATHAN TUKEL	2021
ANICA LETICA	2021
JAMES R. REDFORD	2021

Chief Clerk: JEROME W. ZIMMER, Jr.

Research Director: JULIE ISOLA RUECKE

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2021[1]
2.	DONNA B. HOWARD	2021
	CHARLES T. LaSATA	2023
	ANGELA PASULA	2025
	JENNIFER L. SMITH	2021
3.	DAVID J. ALLEN	2021
	MARIAM BAZZI	2021
	ANNETTE J. BERRY	2025
	GREGORY D. BILL	2025
	ULYSSES W. BOYKIN	2021[2]
	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
	CHRISTOPHER D. DINGELL	2021
	PRENTIS EDWARDS, Jr.	2025
	CHARLENE M. ELDER	2021
	WANDA EVANS	2023
	EDWARD EWELL, Jr.	2025
	HELAL A. FARHAT	2021
	PATRICIA SUSAN FRESARD	2023
	SHEILA ANN GIBSON	2023
	JOHN H. GILLIS, Jr.	2021
	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
	NOAH P. HOOD	2021
	SUSAN L. HUBBARD	2023
	MURIEL D. HUGHES	2023

[1] To December 31, 2020.

[2] To December 31, 2020.

		Term Expires January 1 of
	EDWARD JOSEPH	2021
	TIMOTHY M. KENNY	2023
	DONALD KNAPP	2021
	QIANA D. LILLARD	2025
	KATHLEEN M. McCARTHY	2025
	CYLENTHIA LaTOYE MILLER	2021
	BRUCE U. MORROW	2023
	JOHN A. MURPHY	2023
	LYNNE A. PIERCE	2021
	LITA MASINI POPKE	2023
	KELLY RAMSEY	2023
	MARK T. SLAVENS	2023
	LESLIE KIM SMITH	2025
	MARTHA M. SNOW	2023
	CRAIG S. STRONG	2021[3]
	BRIAN R. SULLIVAN	2023
	LAWRENCE S. TALON	2021
	CARLA TESTANI	2021
	DEBORAH A. THOMAS	2025
	REGINA DANIELS THOMAS	2025
	MARGARET M. VAN HOUTEN	2021
	SHANNON N. WALKER	2021
	DARNELLA DENISE WILLIAMS-CLAYBOURN	2021
4.	SUSAN BEEBE JORDAN	2023
	RICHARD N. LaFLAMME	2023
	JOHN G. McBAIN, JR.	2021
	THOMAS D. WILSON	2025
5.	VICKY ALSPAUGH	2021
6.	JAMES M. ALEXANDER	2021[4]
	MARTHA ANDERSON	2021
	LEO BOWMAN	2025
	MARY ELLEN BRENNAN	2021
	RAE LEE CHABOT	2023
	JACOB JAMES CUNNINGHAM	2025
	KAMESHIA D. GANT	2021
	LISA ORTLIEB GORCYCA	2021
	NANCI J. GRANT	2021
	HALA Y. JARBOU	2023[5]
	SHALINA D. KUMAR	2021

[3] To December 31, 2020.

[4] To December 31, 2020.

[5] To September 26, 2020.

		Term Expires January 1 of
	DENISE LANGFORD-MORRIS	2025
	LISA LANGTON	2023
	JEFFREY S. MATIS	2021
	CHERYL A. MATTHEWS	2023
	JULIE A. McDONALD	2025
	PHYLLIS C. McMILLEN	2025
	DANIEL PATRICK O'BRIEN	2023
	YASMINE ISSHAK POLES	2023[6]
	VICTORIA ANN VALENTINE	2023
	MICHAEL D. WARREN, Jr.	2025
7.	DUNCAN M. BEAGLE	2023
	CELESTE D. BELL	2025
	JOSEPH J. FARAH	2023
	JOHN A. GADOLA	2021
	ELIZABETH ANNE KELLY	2025
	MARK W. LATCHANA	2021
	DAVID J. NEWBLATT	2023
	BRIAN S. PICKELL	2025
	MICHAEL J. THEILE	2021[7]
8.	SUZANNE KREEGER	2021
	RONALD J. SCHAFER	2023
9.	PAUL J. BRIDENSTINE	2025
	GARY C. GIGUERE, Jr.	2021
	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	2021
11.	WILLIAM W. CARMODY	2021[8]
12.	CHARLES R. GOODMAN	2021
13.	KEVIN A. ELSENHEIMER	2021
	THOMAS G. POWER	2023
14.	TIMOTHY G. HICKS	2023
	KATHY HOOGSTRA	2021
	WILLIAM C. MARIETTI	2023
	ANNETTE ROSE SMEDLEY	2025

[6] From December 28, 2020.

[7] To December 31, 2020.

[8] To December 4, 2020.

		Term Expires January 1 of
15.	P. WILLIAM O'GRADY	2021
16.	JAMES M. BIERNAT, Jr.	2025
	RICHARD L. CARETTI	2023
	DIANE M. DRUZINSKI	2021
	JENNIFER FAUNCE	2025
	JULIE GATTI	2027
	JAMES M. MACERONI	2021
	CARL J. MARLINGA	2023
	RACHEL RANCILIO	2023
	EDWARD A. SERVITTO, Jr.	2025
	MICHAEL E. SERVITTO	2023
	MARK S. SWITALSKI	2025
	MATTHEW S. SWITALSKI	2021
	JOSEPH TOIA	2021
	KATHRYN A. VIVIANO	2023
	TRACEY A. YOKICH	2025
17.	CURT A. BENSON	2025
	PAUL J. DENENFELD	2023
	CHRISTINA ELMORE	2025
	KATHLEEN A. FEENEY	2021
	DEBORAH McNABB	2023
	GEORGE JAY QUIST	2023
	J. JOSEPH ROSSI	2023
	PAUL J. SULLIVAN	2021[9]
	MARK A. TRUSOCK	2025
	CHRISTOPHER P. YATES	2025
	DANIEL V. ZEMAITIS	2021[10]
18.	HARRY P. GILL	2023
	JOSEPH K. SHEERAN	2021
19.	DAVID A. THOMPSON	2021
20.	KENT D. ENGLE	2023
	JON H. HULSING	2021
	KAREN J. MIEDEMA	2023
	JON VAN ALLSBURG	2025
21.	MARK H. DUTHIE	2025
	SARA SPENCER-NOGGLE	2021
22.	ARCHIE CAMERON BROWN	2023
	PATRICK J. CONLIN, Jr.	2021
	TIMOTHY P. CONNORS	2025
	CAROL A. KUHNKE	2025

[9] To December 31, 2020.

[10] To December 31, 2020.

		Term Expires January 1 of
	DAVID S. SWARTZ	2021[11]
23.	DAVID C. RIFFEL	2023
24.	DONALD A. TEEPLE	2021[12]
25.	JENNIFER A. MAZZUCHI	2021
26.	KEITH EDWARD BLACK	2021
27.	ROBERT D. SPRINGSTEAD	2025
28.	WILLIAM M. FAGERMAN	2021[13]
29.	MICHELLE M. RICK	2023[14]
	RANDY L. TAHVONEN	2021[15]
30.	ROSEMARIE E. AQUILINA	2021
	CLINTON CANADY, III	2023
	JOYCE DRAGANCHUK	2023
	JAMES S. JAMO	2025
	JANELLE A. LAWLESS	2021[16]
	LISA K. McCORMICK	2021
	WANDA M. STOKES	2021
31.	DANIEL J. KELLY	2021[17]
	CYNTHIA A. LANE	2023
	MICHAEL L. WEST	2025
32.	MICHAEL K. POPE	2021
33.	ROY C. HAYES, III	2021
34.	ROBERT BENNETT	2023
35.	MATTHEW J. STEWART	2021
36.	KATHLEEN M. BRICKLEY	2025
	JEFFREY J. DUFON	2021
37.	JOHN A. HALLACY	2025
	TINA YOST JOHNSON	2023
	BRIAN KIRKHAM	2023
	SARAH SOULES LINCOLN	2021
38.	MARK S. BRAUNLICH	2025
	MICHAEL A. WEIPERT	2023
	DANIEL S. WHITE	2021
39.	ANNA MARIE ANZALONE	2025
	MICHAEL R. OLSAVER	2021

[11] To December 31, 2020.

[12] To December 31, 2020.

[13] To December 31, 2020.

[14] To December 31, 2020.

[15] To December 31, 2020.

[16] To December 31, 2020.

[17] To December 31, 2020.

		Term Expires January 1 of
40.	NICK O. HOLOWKA	2023
	BYRON KONSCHUH	2021[18]
41.	MARY BROUILLETTE BARGLIND	2023
	CHRISTOPHER S. NINOMIYA	2021
42.	MICHAEL J. BEALE	2021
	STEPHEN CARRAS	2025
43.	MARK A. HERMAN	2023
44.	L. SUZANNE GEDDIS	2027
	MICHAEL P. HATTY	2025
	MATTHEW J. McGIVNEY	2021
45.	PAUL E. STUTESMAN	2025
46.	COLIN G. HUNTER	2023
	GEORGE J. MERTZ	2021
47.	JOHN B. ECONOMOPOULOS	2023
48.	MARGARET ZUZICH BAKKER	2023
	ROBERTS KENGIS	2021
49.	KIMBERLY L. BOOHER	2021
	SCOTT P. HILL-KENNEDY	2025
50.	JAMES P. LAMBROS	2025
51.	SUSAN K. SNIEGOWSKI	2021
52.	GERALD M. PRILL	2021
53.	AARON J. GAUTHIER	2021
54.	AMY G. GIERHART	2025
55.	THOMAS R. EVANS	2021
	ROY G. MIENK	2025
56.	JANICE K. CUNNINGHAM	2025
	JOHN DOUGLAS MAURER	2021
57.	CHARLES W. JOHNSON	2025

[18] To December 31, 2020.

DISTRICT JUDGES

		Term Expires January 1 of
1.	MICHAEL C. BROWN	2021
	WILLIAM PAUL NICHOLS	2025
	JACK VITALE	2023
2A.	JONATHAN L. POER	2021
	LAURA J. SCHAEDLER	2023
2B.	SARA S. LISZNYAI	2021[1]
3A.	BRENT R. WEIGLE	2021
3B.	JEFFREY C. MIDDLETON	2021
	ROBERT PATTISON	2025
4.	STACEY A. RENTFROW	2021
5.	GARY J. BRUCE	2023
	ARTHUR J. COTTER	2021
	GORDON GARY HOSBEIN	2021
	STERLING R. SCHROCK	2025
	DENNIS M. WILEY	2023
7.	ARTHUR H. CLARKE, III	2021
	MICHAEL T. McKAY	2023
8.	ANNE E. BLATCHFORD	2025
	CHRISTOPHER T. HAENICKE	2025
	KATHLEEN P. HEMINGWAY	2021
	JULIE K. PHILLIPS	2021
	RICHARD A. SANTONI	2021
	VINCENT C. WESTRA	2023
10.	PAUL K. BEARDSLEE	2021
	JASON C. BOMIA	2021
	FRANKLIN K. LINE, JR.	2021[2]
	TRACIE L. TOMAK	2025
12.	JOSEPH S. FILIP	2023
	DANIEL GOOSTREY	2025
	MICHAEL J. KLAEREN	2021
	R. DARRYL MAZUR	2021[3]
14A.	ANNA M. FRUSHOUR	2021
	J. CEDRIC SIMPSON	2025
	KIRK W. TABBEY	2023
14B.	CHARLES J. POPE	2021[4]
15.	JOSEPH F. BURKE	2025
	ELIZABETH POLLARD HINES	2023[5]
	KAREN Q. VALVO	2021

[1] To December 31, 2020.

[2] To December 31, 2020.

[3] To December 31, 2020.

[4] To December 31, 2020.

[5] To October 31, 2020.

		Term Expires January 1 of
16.	SEAN P. KAVANAGH	2021
	KATHLEEN J. McCANN	2025
17.	KRISTA LICATA HAROUTUNIAN	2021
	KAREN S. KHALIL	2023
18.	SANDRA A. FERENCE CICIRELLI	2025
	MARK A. McCONNELL	2021
19.	L. EUGENE HUNT, Jr.	2023
	SAM A. SALAMEY	2025
	MARK W. SOMERS	2021
20.	MARK J. PLAWECKI	2021
	DAVID TURFE	2025
21.	RICHARD L. HAMMER, Jr.	2021
22.	SABRINA L. JOHNSON	2025
23.	GENO D. SALOMONE	2025
	JOSEPH D. SLAVEN	2021
24.	JOHN T. COURTRIGHT	2021
	RICHARD A. PAGE	2023
25.	GREGORY A. CLIFTON	2021
	DAVID J. ZELENAK	2023
27.	ELIZABETH L. DISANTO	2025
28.	JAMES A. KANDREVAS	2021[6]
29.	BREEDA K. O'LEARY	2021
30.	BRIGETTE OFFICER HOLLEY	2023
31.	ALEXIS G. KROT	2021
32A.	DANIEL S. PALMER	2021[7]
33.	JENNIFER COLEMAN HESSON	2023
	JAMES KURT KERSTEN	2021
	MICHAEL K. McNALLY	2025
34.	TINA BROOKS GREEN	2025
	BRIAN A. OAKLEY	2023
	DAVID M. PARROTT	2021[8]
35.	MICHAEL J. GEROU	2023
	RONALD W. LOWE	2025
	JAMES A. PLAKAS	2021
36.	LYDIA NANCE ADAMS	2023
	ROBERTA C. ARCHER	2025
	CHRISTOPHER MICHAEL BLOUNT	2025
	NANCY McCAUGHAN BLOUNT	2021
	DEMETRIA BRUE	2021
	ESTHER LYNISE BRYANT	2021
	DONALD COLEMAN	2025
	KAHLILIA YVETTE DAVIS	2023
	DEBORAH GERALDINE FORD	2023
	RUTH ANN GARRETT	2025

[6] To December 31, 2020.

[7] To December 31, 2020.

[8] To December 31, 2020.

		Term Expires January 1 of
	KRISTINA ROBINSON GARRETT	2023
	AUSTIN WILLIAM GARRETT	2023
	RONALD GILES	2021
	ADRIENNE HINNANT-JOHNSON	2021
	SHANNON A. HOLMES	2021
	PATRICIA L. JEFFERSON	2021
	KENYETTA STANFORD JONES	2023
	ALICIA A. JONES-COLEMAN	2025
	KENNETH J. KING	2021
	DEBORAH L. LANGSTON	2025
	JACQUELYN A. McCLINTON	2021
	WILLIAM C. McCONICO	2025
	DONNA R. MILHOUSE	2025
	B. PENNIE MILLENDER	2023
	KEVIN F. ROBBINS	2025
	DAVID S. ROBINSON, Jr.	2025
	ALIYAH SABREE	2025
	MICHAEL E. WAGNER	2021
	LARRY D. WILLIAMS, Jr.	2023
37.	JOHN M. CHMURA	2025
	MICHAEL CHUPA	2021
	SUZANNE M. FAUNCE	2023
	MATTHEW P. SABAUGH	2025
38.	CARL F. GERDS III	2021[9]
39.	JOSEPH F. BOEDEKER	2021
	ALYIA MARIE HAKIM	2021
	KATHLEEN E. TOCCO	2025
40.	MARK A. FRATARCANGELI	2025
	JOSEPH CRAIGEN OSTER	2021
41A.	ANNEMARIE M. LEPORE	2021
	DOUGLAS P. SHEPHERD	2025
	STEPHEN S. SIERAWSKI	2023
	KIMBERLEY ANNE WIEGAND	2025
41B.	JACOB M. FEMMININEO, Jr	2021
	CARRIE LYNN FUCA	2023
	SEBASTIAN LUCIDO	2025
42-1.	DENIS R. LeDUC	2021[10]
42-2.	WILLIAM H. HACKEL, III	2025
43.	BRIAN C. HARTWELL	2021
	KEITH P. HUNT	2025
	JOSEPH LONGO	2023
44.	DEREK W. MEINECKE	2025
	JAMES L. WITTENBERG	2023
45.	MICHELLE FRIEDMAN APPEL	2023

[9] To December 31, 2020.

[10] To December 31, 2020.

		Term Expires January 1 of
	DAVID M. GUBOW	2021[11]
46.	CYNTHIA ARVANT	2023
	SHEILA R. JOHNSON	2021
	DEBRA NANCE	2025
47.	JAMES B. BRADY	2021
	MARLA E. PARKER	2023
48.	MARC BARRON	2023
	DIANE D'AGOSTINI	2025
	KIMBERLY F. SMALL	2021
50.	RONDA FOWLKES GROSS	2025
	MICHAEL C. MARTINEZ	2021
	PRESTON G. THOMAS	2023[12]
	CYNTHIA THOMAS WALKER	2021
51.	TODD A. FOX	2025
	RICHARD D. KUHN, JR.	2021
52-1.	ROBERT BONDY	2025
	THOMAS DAVID LAW	2023
	TRAVIS REEDS	2021
52-2.	JOSEPH G. FABRIZIO	2021
	KELLEY RENAE KOSTIN	2023
52-3.	LISA L. ASADOORIAN	2025
	NANCY TOLWIN CARNIAK	2023
	JULIE A. NICHOLSON	2021
52-4.	KIRSTEN NIELSEN HARTIG	2023
	MAUREEN M. MCGINNIS	2021
53.	DANIEL B. BAIN	2021
	SHAUNA MURPHY	2023
54A.	LOUISE ALDERSON	2023
	STACIA J. BUCHANAN	2021
	KRISTEN D. SIMMONS	2021
	CYNTHIA M. WARD	2025
54B.	RICHARD D. BALL	2023
	ANDREA ANDREWS LARKIN	2025
55.	DONALD L. ALLEN	2023
	RICHARD L. HILLMAN	2021
56A.	JULIE O'NEILL	2023
	JULIE H. REINCKE	2021[13]
56B.	MICHAEL LEE SCHIPPER	2025
57.	WILLIAM A. BAILLARGEON	2025
	JOSEPH S. SKOCELAS	2021
58.	CRAIG E. BUNCE	2025

[11] To December 31, 2020.

[12] To November 14, 2020.

[13] To December 31, 2020.

		Term Expires January 1 of
	SUSAN A. JONAS	2021[14]
	BRADLEY S. KNOLL	2021
	JUDITH K. MULDER	2023
59.	PETER P. VERSLUIS	2023
60.	HAROLD F. CLOSZ, III	2021[15]
	MARIA LADAS HOOPES	2021
	RAYMOND J. KOSTRZEWA Jr.	2025
	GEOFFREY THOMAS NOLAN	2023
61.	NICHOLAS S. AYOUB	2023
	DAVID J. BUTER	2021
	MICHAEL J. DISTEL	2025
	JENNIFER FABER	2023
	JEANINE NEMESI LaVILLE	2025
	KIMBERLY A. SCHAEFER	2021
62A.	PABLO CORTES	2021
	STEVEN M. TIMMERS	2025
62B.	WILLIAM G. KELLY	2021[16]
63.	JEFFREY J. O'HARA	2021
	SARA J. SMOLENSKI	2021
64A.	RAYMOND P. VOET	2021
64B.	DONALD R. HEMINGSEN	2021[17]
65A.	MICHAEL E. CLARIZIO	2021
65B.	STEWART D. McDONALD	2021
66.	WARD L. CLARKSON	2025
	TERRANCE P. DIGNAN	2021[18]
67-1.	DAVID J. GOGGINS	2021
67-2.	JESSICA J. HAMMON	2021
	JENNIFER J. MANLEY	2021
67-3.	VIKKI BAYEH HALEY	2021
67-4.	MARK C. McCABE	2021
	CHRISTOPHER R. ODETTE	2025
67-5.	WILLIAM H. CRAWFORD, II	2025
	G. DAVID GUINN	2021
	HERMAN MARABLE, Jr.	2025
	NATHANIEL C. PERRY, III	2021[19]
70-1.	TERRY L. CLARK	2025
	M. RANDALL JURRENS	2023
70-2.	ELIAN FICHTNER	2021
	ALFRED T. FRANK	2021

[14] To December 31, 2020.

[15] To December 31, 2020.

[16] To December 31, 2020.

[17] To December 31, 2020.

[18] To December 31, 2020.

[19] To December 31, 2020.

		Term Expires January 1 of
	DAVID D. HOFFMAN	2025
71A.	LAURA CHEGER BARNARD	2021
71B.	JASON ERIC BITZER	2021
72.	MONA S. ARMSTRONG	2021
	MICHAEL L. HULEWICZ	2023
	JOHN D. MONAGHAN	2025
74.	MARK E. JANER	2023
	TIMOTHY J. KELLY	2025
	DAWN A. KLIDA	2021
75.	MICHAEL CARPENTER	2021
76.	ERIC R. JANES	2021
77.	PETER M. JAKLEVIC	2021
78.	H. KEVIN DRAKE	2021
79.	PETER J. WADEL	2021[20]
80.	JOSHUA M. FARRELL	2021
82.	RICHARD E. NOBLE	2021
84.	AUDREY D. VAN ALST	2021
86.	ROBERT A. COONEY	2025
	MICHAEL S. STEPKA	2023
89.	MARIA I. BARTON	2021
90.	ANGELA LASHER	2021
92.	BETH A. GIBSON	2021
93.	MARK E. LUOMA	2021
94.	STEVE PARKS	2021
95A.	ROBERT J. JAMO	2021
95B.	JULIE A. LaCOST	2021
96.	ROGER W. KANGAS	2021
	KARL WEBER	2023
97.	NICHOLAS J. DAAVETTILA	2021

[20] To December 31, 2020.

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2024
CARL F. JARBOE	2022
THEODORE A. METRY	2024
MATTHEW R. RUMORA	2022

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	THOMAS J. LaCROSS	2025
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	2021
Branch	KIRK A. KASHIAN	2025
Calhoun	MICHAEL L. JACONETTE	2023
Cass	SUSAN L. DOBRICH	2025
Cheboygan	DARYL P. VIZINA	2025
Chippewa	ERIC BLUBAUGH	2021
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	2021
Genesee	F. KAY BEHM	2025
Gogebic	ANNA ROSE TALASKA	2025
Grand Traverse	MELANIE STANTON	2025
Gratiot	KRISTIN M. BAKKER	2025
Hillsdale	MICHELLE SNELL BIANCHI	2025
Houghton	FRASER T. STROME	2025
Huron	DAVID L. CLABUESCH	2025
Huron	DAVID B. HERRINGTON	2021
Ingham	SHAUNA DUNNINGS	2025
Ingham	RICHARD J. GARCIA	2021
Ionia	ROBERT S. SYKES, Jr.	2025
Iosco	CHRISTOPHER P. MARTIN	2025
Iron	DONALD S. POWELL	2025
Isabella	STUART BLACK	2025
Jackson	DIANE M. RAPPLEYE	2025
Kalamazoo	TIFFANY ANKLEY	2021
Kalamazoo	CURTIS J. BELL	2025

County		Term Expires January 1 of
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	2021
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	KATHRYN A. GEORGE	2021
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	2021
Monroe	CHERYL E. LOHMEYER	2025
Montcalm	CHARLES W. SIMON, III	2025
Montmorency	BENJAMIN T. BOLSER	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	2021
Oakland	KATHLEEN A. RYAN	2023
Oceana	BRADLEY G. LAMBRIX	2025
Ogemaw	SCOTT M. WILLIAMS	2023[1]
Ontonagon	JANIS M. BURGESS	2025
Oscoda	CASSANDRA L. MORSE-BILLS	2025
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

[1] From August 10, 2020.

County		Term Expires January 1 of
Saginaw	BARBARA L. METER	2021
St. Clair	ELWOOD L. BROWN	2021
St. Clair	JOHN D. TOMLINSON	2025
St. Joseph	DAVID C. TOMLINSON	2025
Sanilac	GREGORY S. ROSS	2021
Shiawassee	THOMAS J. DIGNAN	2025
Tuscola	NANCY THANE	2025
Van Buren	DAVID DiSTEFANO	2025
Washtenaw	DARLENE A. O'BRIEN	2025
Washtenaw	JULIA OWDZIEJ	2021
Wayne	DAVID BRAXTON	2021
Wayne	FREDDIE G. BURTON, Jr.	2025
Wayne	JUDY A. HARTSFIELD	2021
Wayne	TERRANCE A. KEITH	2021
Wayne	LISA MARIE NEILSON	2023
Wayne	LAWRENCE PAOLUCCI	2023
Wayne	DAVID PERKINS	2025
Wayne	FRANK S. SZYMANSKI	2025
Wexford	EDWARD VAN ALST	2025

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
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RESCINDED ADMINISTRATIVE ORDER No. 2014-21

CONCURRENT JURISDICTION PLAN FOR THE 18TH DISTRICT COURT AND THE 29TH DISTRICT COURT

Entered September 16, 2020, effective immediately (File No. 2004-04) —REPORTER.

At the request of the 18th District Court, Administrative Order No. 2014-21 is hereby rescinded, effective immediately.

EXTENDED ADMINISTRATIVE ORDER No. 2015-1

EXTENSION OF ADMINISTRATIVE ORDER NO. 2015-1
(SUMMARY JURY TRIAL PILOT PROJECT)

Entered September 16, 2020, effective immediately (File No. 2014-24)—REPORTER.

On order of the Court, effective immediately, Administrative Order No. 2015-1 is extended until September 16, 2022.

ADMINISTRATIVE ORDER
No. 2020-20

ADMINISTRATIVE ORDER REGARDING
ELECTION-RELATED LITIGATION

Entered September 23, 2020, effective immediately (File No. 2020-03)—REPORTER.

Administrative Order No. 2020-20 — Election-Related Litigation Procedures.

In an effort to promote the efficient and timely disposition of election-related litigation, the Court adopts the following requirements and procedural rules, effective immediately.

1. Court proceedings regarding an election matter lawsuit may not be instituted and orders may not be issued except upon a written complaint filed pursuant to the pertinent MCR provision. A full and complete record of the proceedings must be kept.

2. Upon the filing of a complaint regarding an election matter, the following persons must be notified of the lawsuit as soon as practicable:

(a) Supreme Court Clerk

(b) State Director of Elections

(c) Attorney General Civil Litigation, Employment, & Elections Division (if the complaint is against the state or one of its subdivisions).

The State Court Administrator will circulate a memo before each election that identifies the names and contact information for the individuals and offices listed above.

3. The chief judge or chief judge's designee of the court in which the election matter lawsuit is filed must provide the following information to the Supreme Court Clerk:

(a) Case number and names of parties;

(b) Name of assigned judge and the telephone number where he or she can be reached;

(c) Brief statement of the issues;

(d) Brief statement of the case status; and

(e) An electronic copy of the final order or judgment, or an order granting a stay or injunctive relief at the email address provided in the memo referenced above.

4. On or before the date of an election, the Court of Appeals will publish on the home page of its website information for contacting that court's clerk's office after business hours and the steps required of a party who might wish to seek emergency appellate relief.

Staff Comment: This administrative order requires various notifications and information to be made regarding election-related litigation.

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. 2020-17

PRIORITY TREATMENT AND NEW PROCEDURE FOR LANDLORD/TENANT CASES

Entered October 22, 2020, effective immediately (File No. 2020-08) —REPORTER.

On order of the Court, the following amendment of Administrative Order No. 2020-17 is adopted, effective immediately.

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

Administrative Order No. 2020-17 — Priority Treatment and New Procedure for Landlord/Tenant Cases.

Since the early days of the pandemic, state and national authorities have imposed restrictions on the filing of many landlord/tenant cases. As those restrictions are lifted and courts return to full capacity and reopen facilities to the public, many will experience a large influx of landlord/tenant case filings. Traditionally, the way most courts processed these types of cases relied heavily on many cases being called at the same time in the same place, resulting in large congregations of individuals in enclosed spaces. That procedure is inconsistent with the restrictions that will be in place in many courts over the coming weeks and months as a way to limit the possibility of transmission

of COVID-19. In addition, courts are required to comply with a phased expansion of operations as provided under Administrative Order No. 2020-14, which may also impose limits on the number of individuals that may congregate in public court spaces.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases using a prioritization approach. This approach will help limit the possibility of further infection while ensuring that landlord/tenant cases are able to be filed and adjudicated efficiently. All courts having jurisdiction over landlord/tenant cases must follow policy guidelines established by the State Court Administrative Office. Courts should be mindful of the limitations imposed by federal law (under the CARES Act) as these cases are filed and processed, and follow the guidance in Administrative Order No. 2020-8 in determining the appropriate timing for beginning to consider these cases.

For courts that are able to begin conducting proceedings, the following provisions apply to landlord/tenant actions.

(1)-(10) [Unchanged.]

(11) A court shall discontinue ~~compliance with this order~~prioritization of cases when it has proceeded through all priority phases and no longer has any landlord/tenant filings that allege a breach of contract for the time period between March 20, 2020, and ~~June 30~~July 15, 2020 (the period in which there was a statewide moratorium on evictions). At that point, the court may notify the regional administrator of its completion of the prioritization process and will not be required to return to the procedure even if a subse-

quent case is filed that alleges rent owing during the period of the eviction moratorium. A court must continue compliance with all other aspects of this order while the Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, issued by the Centers for Disease Control and Prevention and published at 85 FR 55292, is in effect.

(12) In complying with the provisions of the CDC order referenced above and during the pendency of the order, trial courts must:

a. Require a plaintiff filing a LT case to also file a verification form indicating whether a declaration has been submitted by defendant or whether the case may proceed because it is not subject to the CDC order's moratorium. The verification shall be made on a SCAO-approved form, and a plaintiff shall have a continuing obligation to inform the court if a declaration has been submitted by defendant; in addition, a court may accept a declaration prepared pursuant to the CDC order from plaintiff or defendant.

b. Accept filings related to LT cases and proceed as follows:

(i) For cases that are not subject to the moratorium under the CDC order, the court shall proceed as provided in this order and MCR 4.201.

(ii) For cases that are subject to the moratorium under the CDC order, the court shall process the case through entry of judgment. A judgment issued in this type of case shall allow defendant to pay or move (under item 4 on DC 105 or similarly on non-SCAO forms) within the statutory period (MCL 600.5744) or by December 31, 2020, whichever date is later. MCR 4.201(L)(4)(a), which prohibits an order of eviction from being issued later than 56 days after the judgment enters unless a hearing is held, is suspended for

cases subject to the CDC moratorium. The 56 day period in that rule shall commence January 1, 2021 for those cases.

This order is effective until further order of the Court.

VIVIANO, J. (*dissenting*). Today, the Court suspends the statutory rules entitling property owners to recover their premises from tenants through summary proceedings in court. See MCL 600.5701 *et seq*. Normally, the plaintiff-owner is entitled to a writ enabling him or her to obtain possession as soon as 10 days after judgment enters in the plaintiff's favor. MCL 600.5744(5). In this administrative order, however, Subsection (12)(B)(ii) allows the district court to process the case through entry of judgment but prohibits the plaintiff from obtaining possession until at least December 31, 2020.

The only basis for the extraordinary act of administratively suspending a statute is a recent order from the Centers for Disease Control and Prevention (CDC) purporting to prohibit landlords from evicting certain tenants covered by the order. CDC, *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 85 Fed Reg 55,292 (September 4, 2020). But that order has been challenged on a host of grounds and, I believe, rests on a shaky legal foundation. The CDC relied on a single statute and an accompanying regulation. The statute provides:

> The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing

> such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary. [42 USC 264(a).]

The related regulation states:

> Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection. [42 CFR 70.2 (2019).[1]]

The CDC order relies on dubious legal authority. The statute and regulation give a broad power to do whatever the CDC Director "deems reasonably necessary" to prevent a disease's spread. But it seems a stretch to say that they authorize the CDC to tinker with state landlord-tenant laws, a topic that neither the statute nor regulation mention. The examples of permissible orders provided in the law and regulation reflect "terms or tools traditionally associated with public-health emergencies." *In re Certified Questions from the US Dist Court*, 506 Mich 332, 406; 958 NW2d 1 (2020) (VIVIANO, J., concurring in part and dissenting in part). The regulation was, in fact, promulgated as

[1] Although the statute mentions the Surgeon General, a subsequent administrative reorganization vested the powers in a different department, and they now fall under the CDC's purview. See generally *Reorganization Plan No. 3 of 1966*, 31 Fed Reg 8,855 (June 25, 1966).

part of a broader transfer of "regulatory authority with respect to interstate quarantine over persons" from the Food and Drug Administration to the CDC. Food and Drug Administration, *Control of Communicable Diseases; Apprehension and Detention of Persons With Specific Diseases; Transfer of Regulations*, 65 Fed Reg 49,906, 49,907 (August 16, 2000). I am unaware of any historical uses of eviction moratoriums in response to public-health crises. Cf. Witt, *American Contagions: Epidemics and the Law from Smallpox to COVID-19* (New Haven: Yale Univ Press, 2020) (describing legal frameworks for addressing past epidemics but not mentioning suspension of evictions until the COVID-19 pandemic). It appears, then, arguable that the CDC order is outside the authority granted under the statute or even the regulation.

Assuming that the statute and regulation encompass the power to put a halt to evictions nationwide, these laws run headlong into serious constitutional questions. The most obvious is the separation-of-powers problem that arises with such sweeping grants of power to executive agencies. We recently addressed that very issue and noted the present approach in federal courts that delegations to agencies are permissible if they contain intelligible principles to guide the exercise of the delegated authority. See *In re Certified Questions*, 506 Mich at 359-360 (opinion by MARKMAN, J.).

The CDC order here represents a vast delegation of power that might raise significant constitutional doubts. Under it, the executive could "restrict almost any type of activity. Pretty much any economic transaction or movement of people and goods could potentially spread disease in some way." Somin, The Volokh Conspiracy, *Trump's Eviction Moratorium Could Set a*

Dangerous Precedent [Updated] <https://reason.com/2020/09/02/trumps-eviction-moratorium-could-set-a-dangerous-precedent/> (posted September 2, 2020) (accessed October 21, 2020) [https://perma.cc/N2RQ-3EF4]. And it does not take a pandemic with a novel disease to invoke this authority: the regulation defines "communicable diseases" to include any illnesses due to "infectious agents" that can be transmitted directly or indirectly. 42 CFR 70.1 (2019). The seasonal flu and common cold fit this definition. All the Director needs to show is that he or she "deem[ed]" the order "reasonably necessary." 42 CFR 70.2 (2019). Under that line, it is questionable whether the order even needs to be reasonably necessary as long as the Director asserted it was so. See Somin, *supra*.

All of this makes me question whether the CDC order is valid under the regulation, the statute, or the federal Constitution. And I am not alone in raising these questions. To date, at least two challenges to the CDC's order have been brought in federal court and are currently pending. See *Brown v Azar* (Case No. 1:20-cv-03702) (ND Ga); *Tiger Lily LLC v US Dep't of Housing & Urban Dev* (Case No. 2:20-cv-02692) (WD Tenn).

Even if the order is valid, to rely on it as the sole basis for our administrative order today, we must further assume that it preempts our state law governing landlord-tenant evictions, MCL 600.5701 *et seq*. and MCR 4.201. This question is open to debate and, it seems to me, better resolved in an actual case than an administrative order. The statute itself disclaims any intent to preempt state laws that do not conflict with the exercise of authority under the statute. 42 USC 264(e). As noted above, nothing in 42 USC 264(a) or the regulation appears to grant power to make or enforce an eviction moratorium.

Without a valid CDC order that preempts our law, I am unaware of any authority for this Court to suspend until December 31, 2020, a plaintiff's ability to obtain a writ of restitution under MCL 600.5744.[2] The statute, as noted above, provides a district court power to enter the writ of restitution 10 days after entry of judgment in favor of the plaintiff. MCL 600.5744(5). The Legislature has established that "[e]xcept as otherwise provided in [the Revised Judicature Act], the procedure in summary proceedings shall be regulated by rules adopted by the supreme court and by local court rules not inconsistent therewith." MCL 600.5708. But we do not have the power to change the substantive relief to which the prevailing party is entitled in a landlord-tenant proceeding.

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[2] Our original eviction moratorium, in Administrative Order No. 2020-17, 505 Mich clii (2020), was adopted under 1963 Const, art 6, § 4, which grants this Court with general superintending control over all courts. AO 2020-17 also relied on, among other things, Administrative Order No. 2020-6, 505 Mich cxxxi (2020) (Order Expanding Authority for Judicial Officers to Conduct Proceedings Remotely). That order, in turn, referenced Executive Order No. 2020-33, which was the Governor's emergency and disaster declaration, and Administrative Order No. 2020-8, 505 Mich cxxxv (2020), which was adopted to comply with the federal Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), PL 116-136; 134 Stat 281. This Court recently held that all of the Governor's executive orders issued under the Emergency Powers of the Governor Act, MCL 10.31 *et seq*., including EO 2020-33, "are of no continuing legal effect." *House of Representatives v Governor*, 506 Mich 934, 934 (2020). Additionally, the eviction moratorium in the CARES Act lasted 120 days and ended months ago. 15 USC 9058(b). Thus, this Court's original action in adopting AO 2020-17 was based on the premise that the Governor's executive orders were valid and that there was a valid federally mandated eviction moratorium in place. One of these rationales turned out not to be true, and the other rationale is no longer valid. The lessons I take from this are that we should be much more circumspect before rushing to embrace an executive's sweeping assertion of legislative power, and that we are on much more solid ground when we tailor our rules to conform to laws duly enacted by the Legislature.

I believe the CDC's order rests on questionable legal grounds and very well might be struck down. Consequently, I would not rely on it as the basis to suspend the normal workings of our statutes. And without the order, we lack any authority for our present action. For these reasons, I dissent.

AMENDED ADMINISTRATIVE ORDER No. 1999-4

ESTABLISHMENT OF MICHIGAN TRIAL COURT RECORDS MANAGEMENT STANDARDS

Entered November 18, 2020, effective immediately (File No. 2017-28)—REPORTER.

On order of the Court, the effective date of the May 22, 2019 order amending Administrative Order No. 1999-4 (Establishment of Michigan Trial Court Records Management Standards) is extended from January 1, 2021 to July 1, 2021.

AMENDED ADMINISTRATIVE ORDER No. 2019-4

AMENDMENT OF ADMINISTRATIVE ORDER No. 2019-4

Entered November 18, 2020, effective immediately (File No. 2017-28)—REPORTER.

On order of the Court, the following order amending Administrative Order No. 2019-4 is adopted, effective immediately.

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

Administrative Order No. 2019-4 — Electronic Filing in the 3rd, 6th, 13th, 16th, and 20th Circuit Courts.

On order of the Court, the 3rd, 6th, 13th, 16th, and 20th Circuit Courts are authorized to continue their e-Filing programs in accordance with this order while the State Court Administrative Office develops and implements a statewide e-Filing system (known as MiFILE). This order rescinds and replaces Michigan Supreme Court Administrative Orders 2007-3 (Oakland County), 2010-4 (the 13th Judicial Circuit), 2010-6 (the 16th Judicial Circuit), 2011-1 (the 3rd Circuit Court), and 2011-4 (Ottawa County).

(1)-(3) [Unchanged.]

(4) Personal Identifying Information

(a)-(d) [Unchanged.]

(e) These rules regarding personal information will remain in effect until they are superseded by amendments of MCR 1.109, MCR 8.119, and Administrative Order 1999-4. Those amendments, adopted by the Court on May 22, 2019, are effective on J<u>uly</u>~~anuary~~ 1, 2021.

ADMINISTRATIVE ORDER No. 2020-21

ORDER ALLOWING NOTICE OF FILING TO EXTEND FILING PERIOD IN MICHIGAN SUPREME COURT AND MICHIGAN COURT OF APPEALS

Entered November 27, 2020, effective immediately (File No. 2020-08)—REPORTER.

As of November 20, 2020, nearly half of Michigan's prisons are considered outbreak sites of the COVID-19 virus. As a result, many prison facilities have restricted access to or closed the prison libraries, where self-represented inmates primarily work on pursuing their legal claims. These restrictions are impeding the ability of incarcerated individuals to complete the necessary legal pleadings to proceed with a criminal appeal.

Therefore, on order of the Court, pursuant to 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, the Court adopts the following alternative procedure for inmates who seek to file appeals with the Michigan Supreme Court and Michigan Court of Appeals in criminal cases only:

1. An incarcerated individual who is acting *in propria persona* (*in pro per*) and who intends to file an application for leave to appeal in the Michigan Supreme Court or a claim of appeal or an application for

leave in the Michigan Court of Appeals shall file a letter with the Supreme Court or Court of Appeals notifying it of that intent. The letter shall state that the incarcerated person is unable to complete and submit the necessary materials because of restrictions in place due to COVID-19, and shall be filed within the time for filing the application or claim of appeal under MCR 7.305(C)(2), MCR 7.204, or MCR 7.205. The letter will have the effect of tolling the filing deadline as of the date the letter was mailed from the correctional facility.

2. When the tolling period ends, an incarcerated person who submitted a timely notice letter to the Supreme Court or Court of Appeals will have the same number of days to file the claim of appeal or application that remained when the tolling period began.

3. The tolling period established by this order shall expire on January 4, 2021, unless it is extended by further order of the Court.

ADMINISTRATIVE ORDER No. 2020-22

REMOTE ONLINE FORMAT FOR FEBRUARY 2021 MICHIGAN BAR EXAMINATION

Entered December 4, 2020, effective immediately (File No. 2020-08) —REPORTER.

In recognition of the continuing COVID-19 pandemic, in light of current and anticipated pandemic-related restrictions, and in consultation with the Board of Law Examiners (Board), the Court orders, pursuant to the Court's constitutional and statutory authority to supervise and regulate the practice of law, 1963 Const, Art VI, Sec 5, and MCL 600.904, that the February 2021 Michigan bar examination be conducted online. The examination will be administered on February 23 and 24, 2021, and will follow the traditional format, consisting of an essay portion and the full 200 question Multistate Bar Examination (MBE).

The Board will inform applicants of the specific instructions for completing the online examination no later than February 1, 2021. Any applicant receiving accommodations under the Americans with Disabilities Act that would preclude remote testing will be allowed to test in person at a location to be determined, assuming that federal and state restrictions permit such examination. Any applicant who did not register to use

a laptop to complete the examination must contact the Board if the applicant is unable to use a computer to do so.

Applicants who complete the test in person will be required to adhere to federal and state health recommendations and requirements. Such requirements will, at a minimum, likely require the applicant to answer health-related screening questions, undergo a temperature check, use personal protective equipment, and comply with staggered test times to ensure social distancing mandates.

For applicants who do not wish to test in February 2021, applications to sit for the February 2021 bar examination will automatically be transferred to the July 2021 bar examination. In addition, applicants who wish to transfer their application to the next available examination should notify the Board of that decision no later than February 1, 2021, by email at BLE-Info@courts.mi.gov. Transfer fees will not be charged. Applicants who wish to withdraw from the process and notify the Board of that withdrawal by email, no later than February 1, 2021, will have their examination fees refunded by the Board and their character and fitness fees refunded by the State Bar of Michigan.

Applicants have the affirmative obligation to frequently check the Board's website, where updates, instructions, and other vital information will be provided.

ADMINISTRATIVE ORDER
No. 2020-23

ADMINISTRATIVE ORDER REGARDING PROFESSIONALISM
PRINCIPLES FOR LAWYERS AND JUDGES

Entered December 16, 2020, effective immediately (File No. 2019-32) —REPORTER.

Administrative Order No. 2020-23 — Professionalism Principles for Lawyers and Judges.

PREFACE

Rule 1 of the Rules Concerning the State Bar provides, in part, that the "State Bar of Michigan shall . . . aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this State." To achieve these goals, the State Bar of Michigan, acting in accord with the Michigan Supreme Court, has established twelve principles of professionalism ("Principles") as guidance to attorneys and judges concerning appropriate standards of personal conduct in the practice of law. These Principles are not intended to form the basis for discipline, professional negligence, or sanctions; or to alter the Michigan Rules of Professional Conduct, the Michigan Code of Judicial Conduct, or the Michigan Court Rules; or to recast the Lawyer's Oath, although

many of the Principles are derived from these sources. Rather, the Principles are meant only to be remindful that members of our profession must never lose sight of the foundational principles of personal conduct that have always guided us in even our most ordinary and routine professional dealings. Together and individually, we must exhibit the highest levels of professional conduct in order to maintain and preserve, and to advance, our profession and to ensure that we each become exemplars of all that is best in this profession. If by the statement of these Principles the Michigan Supreme Court or the State Bar of Michigan runs the risk of being viewed as repetitive of existing strictures and standards, we view our obligation as the superintending authorities of the legal profession in our state to accept that risk rather than allowing these Principles ever to wither or to be treated as mere cant.

PRINCIPLES OF PROFESSIONALISM

In fulfilling our professional responsibilities, we as attorneys, officers of the court, and custodians of our legal system, must remain ever-mindful of our obligations of civility in pursuit of justice, the rule of law, and the fair and peaceable resolution of disputes and controversies. In this regard, we adhere to the following principles adopted by the State Bar of Michigan and authorized by the Michigan Supreme Court.

* We show civility in our interactions with people involved in the justice system by treating them with courtesy and respect.

* We are cooperative with people involved in the justice system within the bounds of our obligations to clients.

* We do not engage in, or tolerate, conduct that may be viewed as rude, threatening or obstructive toward people involved in the justice system.

* We do not disparage or attack people involved in the justice system, or employ gratuitously hostile or demeaning words in our written and oral legal communications and pleadings.

* We do not act upon, or exhibit, invidious bias toward people involved in the justice system and we seek reasonably to accommodate the needs of others, including lawyers, litigants, judges, jurors, court staff, and members of the public, who may require such accommodation.

* We treat people involved in the justice system fairly and respectfully notwithstanding their differing perspectives, viewpoints, or politics.

* We act with honesty and integrity in our relations with people involved in the justice system and fully honor promises and commitments.

* We act in good faith to advance only those positions in our legal arguments that are reasonable and just under the circumstances.

* We accord professional courtesy, wherever reasonably possible, to other members of our profession.

* We act conscientiously and responsibly in taking care of the financial interests of our clients and others involved in the justice system.

* We recognize ours as a profession with its own practices and traditions, many of which have taken root over the passing of many years, and seek to accord respect and regard to these practices and traditions.

* We seek to exemplify the best of our profession in our interactions with people who are not involved in the justice system.

COMMENTARY

The Principles are intertwined and part of a whole, but each Principle deserves to be specifically identified because of its importance to the overall goal of professionalism. That these rules are both longstanding and matters of commonsense does not gainsay that even the most experienced members of our profession must occasionally pause and step back from the fray to assess their own comportment. It is precisely because ours is a distinctive and ancient profession that it is incumbent on each of us from time to time to reflect upon first principles of conduct. Underscoring and reemphasizing as these Principles do, such virtues as respect, cooperation, courtesy, fairness, honesty, good faith, and integrity in our everyday dealings, is hardly to define our professional obligations in a novel or remarkable manner, but it is necessary nonetheless that we occasionally remind ourselves of these fundamental obligations as we each engage in a profession in which these virtues are so ordinarily and regularly implicated.

While a lawyer is responsible for determinedly carrying out the representation of his or her clients, such representation should never be confused with what is unprofessional conduct. Unprofessional conduct increases the cost of litigation, consumes judicial resources with little concomitant benefit for the client, and undermines not only the legal profession and its reputation among those whom it serves, but erodes public respect for what are perhaps the greatest and most enduring aspects of our civilizational heritage, a

justice system in which all stand equally before the law and in which the rule of law is determinative of rights and responsibilities.

These Principles are intended to afford general guidance in the practice of law for lawyers and judges, inside and outside the courtroom, including within alternative dispute resolution processes, for we are each the custodians of our law in whatever forum it is being resolved. The following simple and straightforward propositions are intended only to give further detail and illustration to the Principles of Professionalism:

1. Lawyers

- We allow opposing counsel to make their arguments without distraction or interruption.
- We promptly respond to communications from clients and attorneys.
- We confer early and in good faith to discuss the possibility of settlement, although never for dilatory purposes.
- We accurately represent and characterize matters in our written and oral communications.
- We draft documents that accurately reflect parties' understandings, court's rulings, and pertinent circumstances.
- We do not engage in ex parte communications unless authorized by law.
- We only make objections reasonably grounded in rules of evidence and procedure.
- We are punctual in our professional interactions and are considerate of the schedules of judges, lawyers, parties, and witnesses.

• We act reasonably and in good faith in scheduling hearings, conferences, depositions, and other legal proceedings.

• We are respectful and considerate of personal emergencies and exigencies that may arise in the course of the scheduling process and attempt reasonably to accommodate such difficulties.

• We attempt to verify the availability of necessary participants and witnesses before court dates are set and give notice of scheduling changes and cancellations at the earliest practicable time.

• We only make good faith and reasonable requests for time extensions and we also agree to such requests if they are not prejudicial to the interests of our clients.

• We act in good faith in deciding when to file or to serve motions and pleadings.

• We only make discovery requests that are reasonable and relevant in their breadth, substance, and character.

• We respond promptly to reasonable discovery requests from opposing parties.

• We only engage in conduct during a deposition that is compatible with court rules and would be proper in the presence of a judicial officer.

• We readily stipulate to undisputed facts.

• We take care to thoroughly inform ourselves of the law that is relevant to a particular matter.

2. Judges

• We are patient and respectful of a party's right to be heard and fully and fairly afford such opportunities as are within our reasonable discretion.

• We fully and fairly consider each party's arguments.

- We do not condone incivility by one lawyer to another or to another's clients and we call such conduct to the attention of the offending lawyer on our own initiative and in appropriate ways.

- We see as paramount our obligations to the administration of justice and the rule of law and seek to facilitate the resolution of cases and controversies before us consistent with these objectives.

- We endeavor to work with other judges to foster cooperation in our shared goal of enhancing the administration of justice and the rule of law.

- We are courteous, respectful, and civil in our opinions, mindful that we contribute in substantial ways to the public's faith in our system of justice and our rule of law.

- We are punctual in convening the business of the court and considerate of the schedules of lawyers, parties, jurors, and witnesses.

- We are respectful of the personal emergencies and exigencies that may arise in the course of litigation and attempt reasonably to accommodate such difficulties in our scheduling determinations.

- We are committed to ensuring that judicial proceedings are conducted with the dignity and decorum deserving of the administration of the law and the application of the rule of law.

- We maintain control and direction of judicial proceedings, recognizing that we have both the obligation and the authority to ensure that such proceedings are conducted in a civil and fair-minded manner.

- We do not engage in practices and procedures that unnecessarily increase litigation expenses or contribute to litigative delays.

- We recognize that a lawyer has the right and duty to present a cause fully and fairly, and to make a full and accurate record, and that a litigant has the right to a full and fair hearing.
- We undertake all reasonable efforts to decide in a prompt manner all questions presented for decision.
- We assure that reasonable accommodations are afforded to people with disabilities, including lawyers, parties, witnesses and jurors.
- We ensure that self-represented litigants have equal access to the legal system while also reasonably holding them to equivalent legal standards as litigants represented by counsel.
- We ensure that our court staff treats litigants, attorneys, and other persons interacting with the justice system with dignity, respect, and helpfulness.
- We do not conflate our own personal perspectives and attitudes with the rule of law but view ourselves as the custodians and superintendents of the rule of law.
- We are patient in our response to human foible and we are impatient in allowing uncivil behavior to take place in the legal processes over which we serve as custodians.

AMENDED ADMINISTRATIVE ORDER No. 2020-17

PRIORITY TREATMENT AND NEW PROCEDURE FOR LANDLORD/TENANT CASES

Entered December 29, 2020, effective immediately (File No. 2020-08) —REPORTER.

Administrative Order No. 2020-17 — Priority Treatment and New Procedure for Landlord/Tenant Cases.

Since the early days of the pandemic, state and national authorities have imposed restrictions on the filing of many landlord/tenant cases. As those restrictions are lifted and courts return to full capacity and reopen facilities to the public, many will experience a large influx of landlord/tenant case filings. Traditionally, the way most courts processed these types of cases relied heavily on many cases being called at the same time in the same place, resulting in large congregations of individuals in enclosed spaces. That procedure is inconsistent with the restrictions that will be in place in many courts over the coming weeks and months as a way to limit the possibility of transmission of COVID-19. In addition, courts are required to comply with a phased expansion of operations as provided under Administrative Order No. 2020-14, which may also impose limits on the number of individuals that may congregate in public court spaces.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases using a prioritization approach. This approach will help limit the possibility of further infection while ensuring that landlord/tenant cases are able to be filed and adjudicated efficiently. All courts having jurisdiction over landlord/tenant cases must follow policy guidelines established by the State Court Administrative Office. Courts should be mindful of the limitations imposed by federal law (under the CARES Act) as these cases are filed and processed, and follow the guidance in Administrative Order No. 2020-8 in determining the appropriate timing for beginning to consider these cases.

For courts that are able to begin conducting proceedings, the following provisions apply to landlord/tenant actions.

(1)-(5) [Unchanged.]

(6) At the initial hearing noticed by the summons, the court must conduct a pretrial hearing consistent with SCAO guidance. At the pretrial hearing the parties must be verbally informed of all of the following:

a. Defendant has the right to counsel. MCR 4.201(F)(2).

b. The Michigan Department of Health and Human Services (MDHHS), the local Coordinated Entry Agency (CEA), Housing Assessment and Resource Agency (HARA), or the federal Help for Homeless Veterans program may be able to assist the parties with payment of some or all of the rent due.

c. Defendants DO NOT need a judgment to receive assistance from MDHHS, the HARA or the local CEA. The Summons and Complaint from the court case are sufficient for MDHHS.[3]

d. The availability of the Michigan Community Dispute Resolution Program (CDRP) and local CDRP Office as a possible source of case resolution. The court must contact the local CDRP to coordinate resources. The CDRP may be involved in the resolution of Summary Proceedings cases to the extent that the chief judge of each court determines, including conducting the pretrial hearing.

e. The possibility of a Conditional Dismissal pursuant to MCR 2.602 if approved by all parties. The parties must be provided with a form to effectuate such Conditional Dismissal.

(7)-(10) [Unchanged.]

(11) A court shall discontinue prioritization of cases when it has proceeded through all priority phases and no longer has any landlord/tenant filings that allege a breach of contract for the time period between March 20, 2020, and July 15, 2020 (the period in which there was a statewide moratorium on evictions). At that point, the court may notify the regional administrator of its completion of the prioritization process and will not be required to return to the procedure even if a subsequent case is filed that alleges rent owing during the period of the eviction moratorium. A court must continue compliance with all other aspects of this order while the Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, issued by the Centers for Disease Control and

[3] See State Emergency Relief Manual, Relocation Services, ERM 303, ERB 2019-005, Page 3 of 7.

Prevention; ~~and~~ published at 85 FR 55292; and extended under the Consolidated Appropriations Act, 2021 (HR 133), Division N, § 502; ~~–~~is in effect.

(12) In complying with the provisions of the CDC order referenced above and during the pendency of the order, trial courts must:

a. Require a plaintiff filing a LT case to also file a verification form indicating whether a declaration has been submitted by defendant or whether the case may proceed because it is not subject to the CDC order's moratorium. The verification shall be made on a SCAO-approved form, and a plaintiff shall have a continuing obligation to inform the court if a declaration has been submitted by defendant; in addition, a court may accept a declaration prepared pursuant to the CDC order from plaintiff or defendant.

b. Accept filings related to LT cases and proceed as follows:

(i) For cases that are not subject to the moratorium under the CDC order, the court shall proceed as provided in this order and MCR 4.201.

(ii) For cases that are subject to the moratorium under the CDC order, the court shall process the case through entry of judgment. A judgment issued in this type of case shall allow defendant to pay or move (under item 4 on DC 105 or similarly on non-SCAO forms) within the statutory period (MCL 600.5744) or by ~~December 31, 2020~~the first day after the expiration of the CDC order, whichever date is later. MCR 4.201(L)(4)(a), which prohibits an order of eviction from being issued later than 56 days after the judgment enters unless a hearing is held, is suspended for cases subject to the CDC moratorium. The 56 day

period in that rule shall commence ~~January 1, 2021~~on the first day after the expiration of the CDC order for those cases.

(13) Each chief judge of a district court shall hold a meeting before January 31, 2021, to evaluate the efficacy of the procedures set out in this order and discuss proposed changes that might improve the process. The meeting invitation must be extended to individuals involved in the local landlord/tenant process, including the following:

- the Michigan Department of Health and Human Services
- local legal aid associations and other tenant advocacy associations
- attorneys who appear on behalf of local landlords
- the local HARA (Housing Assessment and Resource Agency)

The chief judge shall submit a summary of the discussion and proposed recommendations to the regional administrator within two weeks following the meeting.

This order is effective until further order of the Court.

VIVIANO, J. (*concurring*). I concur with the administrative order issued today, which continues to administratively suspend statutes concerning summary landlord-tenant proceedings in court. When the Court last extended this order, I dissented because the extension was premised solely on an order from the Centers for Disease Control and Prevention (CDC) that attempted to prevent landlords from evicting tenants in certain circumstances. Centers for Disease Control and Prevention, *Temporary Halt in Residential Evictions*,

85 Fed Reg 55,292 (Sept 4, 2020). At the time, I questioned whether that CDC order was authorized by regulation, statute, or the Constitution, and since the order rested on a shaky legal foundation, I believed it to be an inadequate authority on which to justify the Court's action. Administrative Order No. 2020-17, as amended by order entered October 22, 2020, 506 Mich lxxiv, lxxvii-lxxxii (2020) (VIVIANO, J., dissenting).

Today, however, our administrative order now rests on a statute duly enacted by Congress and signed by the President that specifically references and extends the CDC order through January 31, 2021. Consolidated Appropriations Act, 2021 (HR 133), Division N, § 502. To be sure, questions remain concerning the validity of the CDC order and whether our state law governing landlord-tenant evictions has been preempted. But the new statute manifests Congress's intent for the substance of the CDC order to apply through the end of January 2021. The legislation thus provides more substantial legal authority for our administrative order, which I continue to believe should not rely on the CDC order alone. Given this new authority, I believe we are justified in issuing the order and that any challenges to it can be resolved in the normal course of litigation. I therefore concur.

MICHIGAN RULE CHANGES

Adopted September 16, 2020, effective immediately (File No. 2019-06) —REPORTER.

On order of the Court, this is to advise that the following amendment of Rule 6.302 of the Michigan Court Rules is adopted, effectively immediately, and that a public comment period has also begun. This notice is given to afford interested persons the opportunity to comment on the form or the merits of the amendment. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A) [Unchanged.]

(B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:

(1) [Unchanged.]

(2) the maximum possible prison sentence for the offense, including, if applicable, whether the law per-

mits or requires consecutive sentences, and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c;

(3)-(5) [Unchanged.]

The requirements of subrules (B)(3) and (B)(5) may be satisfied by a writing on a form approved by the State Court Administrative Office. If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(C)-(F) [Unchanged.]

Staff Comment: The amendment of MCR 6.302 makes the rule consistent with the Supreme Court's ruling in *People v Warren*, 505 Mich 196 (2020), and requires a judge to advise a defendant of the maximum possible prison sentence including the possibility of consecutive sentencing.

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 amendment may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-06. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Adopted September 23, 2020, effective January 1, 2021 (File No. 2015-21)—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 3.971, 3.972, 3.973, 3.977, 3.993, 7.202, and 7.204 of the Michigan Court Rules are adopted, effective January 1, 2021.

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

RULE 3.971. PLEAS OF ADMISSION OR NO CONTEST.

(A) [Unchanged.]

(B) Advice of Rights and Possible Disposition. Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:

(1)-(7) [Unchanged.]

(8) the respondent may be barred from challenging the assumption of jurisdiction in an appeal from an~~the~~ order terminating parental rights if they do not timely file an appeal of the initial dispositional order under MCR 7.204~~3.993(A)(1), 3.993(A)(2),~~ or a delayed appeal under MCR 3.993(C).

(C)-(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)-(2) [Unchanged.]

(3) the respondent may be barred from challenging the assumption of jurisdiction if they do not timely file

an appeal under MCR 7.2043.993(A)(1), 3.993(A)(2), or a delayed appeal under MCR 3.993(C).

(G) [Unchanged.]

RULE 3.973. DISPOSITIONAL HEARING.

(A)-(F) [Unchanged.]

(G) Respondent's Rights Upon Entry of Dispositional Order. When the court enters an initial order of disposition following adjudication the court shall advise the respondent orally or in writing:

(1)-(3) [Unchanged.]

(4) the respondent may be barred from challenging the assumption of jurisdiction or the removal of the minor from a parent's care and custody inan appeal from the order terminating parental rights if they do not timely file an appeal under MCR 7.2043.993(A)(1), 3.993(A)(2), or a delayed appeal under MCR 3.993(C).

(H)-(J) [Unchanged.]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(I) [Unchanged.]

(J) Respondent's Rights Following Termination.

(1) [Unchanged.]

(2) Appointment of Appellate CounselAttorney. Request and appointment of appellate counsel is governed by MCR 3.993.

(a) If a request is timely filed and the court finds that the respondent is financially unable to provide an attorney, the court shall appoint an attorney within 14 days after the respondent's request is filed. The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in this rule.

~~(b) In a case involving the termination of parental rights, the order described in (J)(2) and (3) must be entered on a form approved by the State Court Administrator's Office, entitled "Claim of Appeal and Order Appointing Counsel," and the court must immediately send to the Court of Appeals a copy of the Claim of Appeal and Order Appointing Counsel, a copy of the judgment or order being appealed, and a copy of the complete register of actions in the case. The court must also file in the Court of Appeals proof of having made service of the Claim of Appeal and Order Appointing Counsel on the respondent(s), appointed counsel for the respondent(s), the court reporter(s)/recorder(s), petitioner, the prosecuting attorney, the lawyer-guardian ad litem for the child(ren) under MCL 712A.13a(1)(f), and the guardian ad litem or attorney (if any) for the child(ren). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.~~

~~(3) Transcripts. If the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order the complete transcripts of all proceedings prepared at public expense.~~

(K) [Unchanged.]

RULE 3.993. APPEALS.

(A)-(C) [Unchanged.]

(D) Request and Appointment of Counsel.

(1) A request for appointment of appellate counsel must be made within 14 days after notice of the order is given or an order is entered denying a timely filed postjudgment motion.

(2) If a request for appointment of appellate counsel is timely filed and the court finds that the respondent is financially unable to provide an attorney, the court shall appoint an attorney within 14 days after the respondent's request is filed. The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in this rule.

(3) The order described in subrule (D)(2) must be entered on a form approved by the State Court Administrator's Office, entitled "Claim of Appeal and Order Appointing Counsel," and the court must immediately send to the Court of Appeals a copy of the Claim of Appeal and Order Appointing Counsel, a copy of the judgment or order being appealed, and a copy of the complete register of actions in the case. The court must also file in the Court of Appeals proof of having made service of the Claim of Appeal and Order Appointing Counsel on the respondent(s), appointed counsel for the respondent(s), the court reporter(s)/recorder(s), petitioner, the prosecuting attorney, the lawyer-guardian ad litem for the child(ren) under MCL 712A.13a(1)(f), and the guardian ad litem or attorney (if any) for the child(ren). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

(E) Transcripts. If the court appoints appellate counsel for respondent, the court must order the complete transcripts of all proceedings prepared at public expense.

RULE 7.202. DEFINITIONS.

For purposes of this subchapter:

(1)-(4) [Unchanged.]

(5) "custody case" means a domestic relations case in which the custody of a minor child is an issue, an adoption case, ~~or~~ a child protective proceeding, or a delinquency case in which a dispositional order removing the minor from the minor's home is an issue~~case in which the family division of circuit court has entered an order terminating parental rights or an order of disposition removing a child from the child's home~~;

(6) [Unchanged.]

RULE 7.204. FILING APPEAL OF RIGHT; APPEARANCE.

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. See MCR 7.203(A). The provisions of MCR 1.108 regarding computation of time apply. For purposes of subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(1) Except where another time is provided by law or court rule, an appeal of right in any civil case must be taken within 21 days. The period runs from the entry of:~~An appeal of right in a civil action must be taken within~~

(a) ~~21 days after entry of~~ the judgment or order appealed from;

(b~~c~~) an order appointing counsel~~14 days after entry of an order of the family division of the circuit court terminating parental rights under the Juvenile Code, or entry of an order denying a motion for new trial, rehearing, reconsideration, or other postjudgment relief from an order terminating parental rights, if the motion was filed within the initial 14-day appeal period or within further time the trial court may have allowed during that period; or~~

(~~c~~d) an order denying a request for appointment of counsel in a civil case in which an indigent party is entitled to appointed counsel, if the trial court received the request within the initial 21-day appeal period; or~~another time provided by law~~.

(d~~b~~) ~~21 days after the entry of~~ an order deciding a post-judgment motion for new trial, ~~a motion for~~ rehearing, ~~or~~ reconsideration, or ~~a motion for~~ other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period or within any further time that the trial court has allowed for good cause during that 21-day period.~~;~~

~~If a party in a civil action is entitled to the appointment of an attorney and requests the appointment within 14 days after the final judgment or order, the 14-day period for the taking of an appeal or the filing of a postjudgment motion begins to run from the entry of an order appointing or denying the appointment of an attorney. If a timely postjudgment motion is filed before a request for appellate counsel, the party may request counsel within 14 days after the decision on the motion.~~

(2)-(3) [Unchanged.]

(B)-(H) [Unchanged.]

Staff Comment: The amendments of MCR 3.971, 3.972, 3.973, 3.977, 3.993, 7.202 and 7.204 make the appeal process for child protective cases uniform (instead of having a separate process for cases involving termination of parental rights). The amendments also make the appeal period uniform (21 days) for all child protections cases.

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 September 23, 2020, effective January 1, 2021 (File No. 2019-13)—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 7.118 of the Michigan Court Rules is adopted, effective January 1, 2021.

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

RULE 7.118. APPEALS FROM THE MICHIGAN PAROLE BOARD.

(A)-(C) [Unchanged.]

(D) Application for Leave to Appeal.

(1)-(2) [Unchanged.]

(3) Manner of Filing. An application for leave must comply with MCR 7.105, must include statements of jurisdiction and venue, and must be served on the parole board and the prisoner. If the victim seeks leave, the prosecutor must be served. If the prosecutor seeks leave, the victim must be served if the victim requested notification under MCL 780.771.

(a) [Unchanged.]

(b) Service on a prisoner incarcerated in a state correctional facility must be accomplished by serving the application for leave on the warden or administrator, along with the form approved by the State Court Administrative Office for personal service on a prisoner. Otherwise, service must be accomplished by certified mail, return receipt requested, as described in MCR 2.103(C) and MCR 2.104(A)(2) or in compliance with MCR 2.105(A)(2). In addition to the pleadings,

service on the prisoner must also include a notice in a form approved by the State Court Administrative Office advising the prisoner that:

(i) the prisoner may respond to the application for leave to appeal through ~~retained~~ counsel or in propria persona, although no response is required, and that an indigent prisoner is entitled to appointment of counsel, and

(ii) [Unchanged.]

(c) [Unchanged.]

(d) If a prosecutor or victim files an application for leave to appeal, the circuit court shall appoint counsel for an indigent prisoner through the Michigan Appellate Assigned Counsel System.

(4) [Unchanged.]

(E)-(J) [Unchanged.]

Staff Comment: The amendment of MCR 7.118 requires counsel to be appointed to an indigent prisoner when an application for leave to appeal a grant of parole is filed by the prosecutor or victim. The right to counsel also would be included on the notice to be provided the prisoner.

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 September 23, 2020, effective January 1, 2021 (File No. 2019-26)—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 7.314 of the Michigan Court Rules is adopted, effective January 1, 2021.

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

RULE 7.314. CALL AND ARGUMENT OF CASES.

(A) [Unchanged.]

(B) Argument.

(1) In a calendar case in which one side is or both sides are entitled to oral argument, the time allowed for argument shall be provided in the order granting leave~~is 30 minutes for each side unless the Court orders otherwise. When only one side is scheduled for oral argument, 15 minutes is allowed unless the Court orders otherwise~~.

(2) [Unchanged.]

The time for argument may be extended by Court order on motion of a party filed at least 14 days before the session begins or by the Chief Justice during the argument.

Staff comment: The amendment of MCR 7.314 eliminates the oral argument time period and instead directs that the amount of time for oral argument be established in the order granting leave to appeal.

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 September 23, 2020, effective January 1, 2021 (File No. 2019-27)—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 6.310,

6.429, 6.431, 6.509, and 7.205 and addition of Rule 6.126 of the Michigan Court Rules are adopted, effective January 1, 2021.

[Rule 6.126 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 6.126. DECISION ON ADMISSIBILITY OF EVIDENCE.

Where the court makes a decision on the admissibility of evidence and the prosecutor or the defendant files an interlocutory application for leave to appeal seeking to reverse that decision, the court shall stay proceedings pending resolution of the application in the Court of Appeals, unless the court makes findings that the evidence is clearly cumulative or that an appeal is frivolous because legal precedent is clearly against the party's position. If the application for leave to appeal is filed by the prosecutor and the defendant is incarcerated, the defendant may request that the court reconsider whether pretrial release is appropriate.

RULE 6.310. WITHDRAWAL OR VACATION OF PLEA.

(A)-(B) [Unchanged.]

(C) Motion to Withdraw Plea After Sentence.

(1) The defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal under MCR 7.205(A)(2)(a) and (b)(i)-(iii)~~6 months after sentence or within the time provided by subrule (C)(2)~~.

~~(2) If 6 months have elapsed since sentencing, the defendant may file a motion to withdraw the plea if:~~

~~(a) the defendant has filed a request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period,~~

~~(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G), and~~

~~(c) the motion to withdraw the plea is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.~~

(3)-(5) [Renumbered (2)-(4) but otherwise unchanged.]

(D)-(E) [Unchanged.]

RULE 6.429. CORRECTION AND APPEAL OF SENTENCE.

(A) [Unchanged.]

(B) Time for Filing Motion.

(1)-(2) [Unchanged.]

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within the time for filing an application for leave to appeal under MCR 7.205(A)(2)(a) and (b)(i)-(iii).~~:~~

~~(a) within 6 months of entry of the judgment of conviction and sentence, or,~~

~~(b) if 6 months have elapsed since entry of the judgment of conviction and sentence, the defendant may file a motion to correct an invalid sentence if:~~

~~(i) the defendant has filed a request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period,~~

~~(ii) The defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G), and~~

~~(iii) The motion to correct invalid sentence is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order or denying the appointment of counsel, the 42-day period runs from the date of that order.~~

(4)-(5) [Unchanged.]

(C) [Unchanged.]

RULE 6.431. NEW TRIAL.

(A) Time for Making Motion.

(1)-(2) [Unchanged.]

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed within the time for filing an application for leave to appeal under MCR 7.205(A)(2)(a) and (b)(i)-(iii).~~:~~

~~(a) within 6 months of entry of the judgment of conviction and sentence, or~~

~~(b) If 6 months have elapsed since entry of the judgment of conviction and sentence, the defendant may file a motion for new trial if:~~

~~(i) the defendant has filed a request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period,~~

~~(ii) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G), and~~

~~(iii) the motion for a new trial is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.~~

(4)-(5) [Unchanged.]

(B)-(D) [Unchanged.]

RULE 6.509. APPEAL.

(A) Availability of Appeal. Appeals from decisions under this subchapter are by application for leave to appeal to the Court of Appeals pursuant to MCR 7.205(A)(1). The 6-month time limit provided by MCR 7.205(A~~G~~)(4~~3~~)(a), runs from the decision under this subchapter. Nothing in this subchapter shall be construed as extending the time to appeal from the original judgment.

(B)-(D) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A) Time Requirements. The time limit for an application for leave to appeal is jurisdictional. See MCR 7.203(B). The provisions of MCR 1.108 regarding computation of time apply. For purposes of this subrule,

"entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions. ~~An application for leave to appeal must be filed within~~

(1) Except as otherwise provided in this rule, an application for leave to appeal must be filed within:

(a) 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule; or

(b~~2~~) 21 days after entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period.

(2) In a criminal case involving a final judgment or final order entered in that case, an application for leave to appeal filed on behalf of the defendant must be filed within the later of:

(a) 6 months after entry of the judgment or order; or

(b) 42 days after:

(i) an order appointing appellate counsel or substitute counsel, or denying a request for appellate counsel, if the defendant requested counsel within 6 months after entry of the judgment or order to be appealed;

(ii) the filing of transcripts ordered under MCR 6.425(G)(1)(f), if the defendant requested counsel within 6 months after entry of the judgment or order to be appealed;

(iii) the filing of transcripts ordered under MCR 6.433, if the defendant requested the transcripts within 6 months after entry of the judgment or order to be appealed;

(iv) an order deciding a timely filed motion to withdraw plea under MCR 6.310(C), motion for directed verdict under MCR 6.419(C), motion to correct an invalid sentence under MCR 6.429(B), or motion for new trial under MCR 6.431(A); or

(v) an order deciding a timely filed motion for reconsideration of an order described in subrule (A)(2)(b)(iv).

A defendant relying on subrule (A)(2)(b) must provide a statement, supported by relevant documentation, explaining how the application meets the requirements of the subrule.

~~For purposes of subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.~~

(3) In an appeal from an order terminating parental rights, an application for leave to appeal must be filed within 63 days, as provided by MCR 3.993(C)(2).~~If an application for leave to appeal in a criminal case is received by the court after the expiration of the periods set forth above or the period set forth in MCR 7.205(G), and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to applications for leave to appeal from decisions or orders rendered on or after March 1, 2010. This exception also applies to an inmate housed in a~~

~~penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.~~

(4) Delayed Application for Leave to Appeal.

(a) For appeals governed by subrule (A)(1), when an application is not filed within the time provided by that subrule, a delayed application for leave to appeal may be filed within 6 months of the entry of a judgment or order described in that subrule.

(b) For appeals governed by subrule (A)(1) or (2), if the Court of Appeals dismisses a claim of appeal for lack of jurisdiction, a delayed application for leave to appeal may also be filed within 21 days of the entry of the dismissal order or an order denying reconsideration of that order, provided that:

(i) the delayed application is taken from the same lower court judgment or order as the claim of appeal, and

(ii) the claim of appeal was filed within the applicable time period in subrule (A)(1) or (2).

A delayed application under this rule must contain a statement of facts explaining the reasons for delay. The appellee may challenge the claimed reasons in the answer. The court may consider the length of and the reasons for delay in deciding whether to grant the delayed application.

(5) In a criminal case, if an inmate in the custody of the Michigan Department of Corrections, or in the custody of another state or federal penal institution, submits an application or delayed application for leave to appeal as a pro per party that is received by the court after the expiration of the periods set forth in this rule, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution where the

inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid.

(6) In a criminal case, except as provided in subrule (4)(b), the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.

(B)-(D) [Unchanged.]

(E) Decision.

(1) [Unchanged.]

(2) The court may grant or deny the application,; enter a final decision,; grant other relief,; or request additional material from the record~~; or require a certified concise statement of proceedings and facts from the court, tribunal, or agency whose order is being appealed. The clerk shall enter the court's order and mail copies to the parties~~.

(3)-(4) [Unchanged.]

(F) Expedited Decision~~Emergency Appeal~~. When a party requires a decision on an application by a date certain, the party may file a motion for immediate consideration of the application as provided in MCR 7.211(C)(6). When a motion for immediate consideration is filed, the time for submission of the application and motion is governed by MCR 7.211(C)(6). In all other respects, submission, decision, and further proceedings are as provided in subrule (E).

~~(1) If the order appealed requires acts or will have consequences within 56 days of the date the application is filed, appellant shall alert the clerk of that fact~~

~~by prominent notice on the cover sheet or first page of the application, including the date by which action is required.~~

~~(2) When an appellant requires a hearing on an application in less than 21 days, the appellant shall file and serve a motion for immediate consideration, concisely stating facts showing why an immediate hearing is required. A notice of hearing of the application and motion or a transcript is not required. An answer may be filed within the time the court directs. If a copy of the application and of the motion for immediate consideration are personally served under MCR 2.107(C)(1) or (2), the application may be submitted to the court immediately on filing. If mail service is used, it may not be submitted until the first Tuesday 7 days after the date of service, unless the party served acknowledges receipt. In all other respects, submission, decision, and further proceedings are as provided in subrule (E).~~

~~(3) Where the trial court makes a decision on the admissibility of evidence and the prosecutor or the defendant files an interlocutory application for leave to appeal seeking to reverse that decision, the trial court shall stay proceedings pending resolution of the application in the Court of Appeals, unless the trial court makes findings that the evidence is clearly cumulative or that an appeal is frivolous because legal precedent is clearly against the party's position. The appealing party must pursue the appeal as expeditiously as practicable, and the Court of Appeals shall consider the matter under the same priority as that granted to an interlocutory criminal appeal under MCR 7.213(C)(1). If the application for leave to appeal is filed by the prosecutor and the defendant is incarcerated, the defendant may request that the trial court reconsider whether pretrial release is appropriate.~~

~~(G) Late Appeal.~~

~~(1) When an appeal of right was not timely filed or was dismissed for lack of jurisdiction, or when an application for leave was not timely filed, the appellant may file an application as prescribed in subrule (B), file 5 copies of a statement of facts explaining the delay, and serve 1 copy on all other parties. The answer may challenge the claimed reasons for delay. The court may consider the length of and the reasons for delay in deciding whether to grant the application. In all other respects, submission, decision, and further proceedings are as provided in subrule (E).~~

~~(2) In a criminal case, the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.~~

~~(3) Except as provided in subrules (G)(4)and (G)(5), leave to appeal may not be granted if an application for leave to appeal is filed more than 6 months after the later of:~~

~~(a) entry of a final judgment or other order that could have been the subject of an appeal of right under MCR 7.203(A), but if a motion described in MCR 7.204(A)(1)(b) was filed within the time prescribed in that rule, then the 6 months are counted from the time of entry of the order denying that motion; or)~~

~~(b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period, then the 6 months are counted from the entry of the order deciding the motion.~~

~~(4) The limitation provided in subrule (G)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for directed verdict of acquittal, to withdraw a plea, or to correct an invalid sentence, if the motion was filed within the time provided in MCR 6.310(C), MCR 6.419(C), MCR 6.429(B), and MCR 6.431(A), or if~~

~~(a) the defendant has filed a delayed request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period,~~

~~(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the delayed request for counsel or for substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G), and~~

~~(c) the application for leave to appeal is filed in accordance with the provisions of this rule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel, or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.~~

~~A motion for rehearing or reconsideration of a motion mentioned in subrule (G)(4) does not extend the time for filing an application for leave to appeal, unless the motion for rehearing or reconsideration was itself filed within 21 days after the trial court decides the motion mentioned in subrule (G)(4), and the application for leave to appeal is filed within 21 days after the court decides the motion for rehearing or reconsideration.~~

A defendant who seeks to rely on one of the exceptions in subrule (G)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the register of actions of the lower court, tribunal, or agency, or other documentation showing that the application is filed within the time allowed.

(5) Notwithstanding the 6-month limitation period otherwise provided in subrule (G)(3), leave to appeal may be granted if a party's claim of appeal is dismissed for lack of jurisdiction within 21 days before the expiration of the 6-month limitation period, or at any time after the 6-month limitation period has expired, and the party files a late application for leave to appeal from the same lower court judgment or order within 21 days of the dismissal of the claim of appeal or within 21 days of denial of a timely filed motion for reconsideration. A party filing a late application in reliance on this provision must note the dismissal of the prior claim of appeal in the statement of facts explaining the delay.

(6) The time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2).

(H) Certified Concise Statement.

(1) When the Court of Appeals requires a certified concise statement of proceedings and facts, the appellant shall, within 7 days after the order requiring the certified concise statement is certified, serve on all other parties a copy of a proposed concise statement of proceedings and facts, describing the course of proceedings and the facts pertinent to the issues raised in the application, and notice of hearing with the date, time, and place for settlement of the concise statement.

(2) Hearing on the proposed concise statement must be within 14 days after the proposed concise statement and notice is served on the other parties.

~~(3) Objections to the proposed concise statement must be filed in writing with the trial court and served on the appellant and any other appellee before the time set for settlement.~~

~~(4) The trial court shall promptly settle objections to the proposed concise statement and may correct it or add matters of record necessary to present the issues properly. When a court's discretionary act is being reviewed, the trial court may add to the statement its reasons for the act. Within 7 days after the settlement hearing, the trial court shall certify the proposed or a corrected concise statement of proceedings and facts as fairly presenting the factual basis for the questions to be reviewed as directed by the Court of Appeals. Immediately after certification, the trial court shall send the certified concise statement to the Court of Appeals clerk and serve a copy on each party.~~

Staff comment: The amendments of MCR 6.310, 6.429, 6.431, 6.509, and 7.205 and addition of MCR 6.126 clarify and simplify the rules regarding procedure in criminal appellate matters.

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 September 23, 2020, effective January 1, 2021 (File No. 2019-29)—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 and 7.312 of the Michigan Court Rules are adopted, effective January 1, 2021.

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

RULE 7.212. BRIEFS.

(A)-(I) [Unchanged.]

(J) Appendix.

(1) ~~In all civil cases (except those pertaining to child protection proceedings, including termination of parental rights, and non-criminal delinquency proceedings under chapter XIIA of the Probate Code and adoptions under chapter X), and in all appeals from administrative agencies, except those described in section (J)(5) of this rule, the appellant shall file and serve an appendix. The appellant's appendix shall contain a table of contents and copies of the following documents if they exist:~~Requirements. Except as provided in subrules (1)(a)-(f) of this rule, the appellant must file an individual or joint appendix with the appellant's brief. An appellee may file an appendix with the appellee's brief if the appellant's appendix does not contain all the information set forth in subrule (3) of this rule. The appellee's appendix should not contain any of the documents contained in the appellant's appendix except when including additional pages to provide a more complete context, but should only contain additional information described in subrule (3) that is relevant and necessary to the determination of the issues on appeal. To avoid duplication in cases with more than one appellant or appellee, the parties are encouraged to submit a joint appendix pursuant to subsection (4) rather than separate appendixes. An appendix is not required in appeals from:

(a) Criminal proceedings.

(b) Child protective proceedings.

(c) Delinquency proceedings under chapter XIIA of the Probate Code.

(d) Adoption proceedings under chapter X.

(e) Involuntary mental health treatment proceedings under the Mental Health Code.

(f) The Michigan Public Service Commission where the record is available on the Commission's e-docket, or the Michigan Tax Tribunal where the record is available on the Tribunal's tax docket lookup page. In those cases, the parties' briefs shall cite to the document number and relevant pages in the electronic record.

(2) Form. The appendix must include a cover page or pages with the case caption that sets forth the parties' names and their designations (e.g., plaintiff-appellant), along with the appellate court and trial court or tribunal docket numbers. The cover page(s) must also state whether the appendix is an "Appellant's Appendix," "Appellee's Appendix," or "Joint Appendix." Following the cover page(s), the appendix must include a table of contents that identifies each document with reasonable specificity and indicates both the appendix number or letter and the page number on which the first page of the document appears in the appendix. An appendix must be numbered sequentially in a prominent location at the bottoms of the pages. When the appendix is composed of multiple volumes, pagination must continue from one volume to the next. For multiple appendix volumes, each volume must include a cover page and table of contents, and the first volume must contain a complete table of contents referencing all volumes of the appendix.

(a) For an appendix filed in paper form, one signed copy that is separately bound from the brief shall be filed. Each separate document in the appendix must be

preceded by a title page that identifies the appendix number or letter and the title of the document. The binding method should allow the easy dismantling of the appendix for scanning.

(b) For an appendix filed electronically:

(i) The appendix must be separate from the electronically-filed brief and should be transmitted as a single PDF document unless the file size is too large to do so, in which case the appendix should be divided into separate volumes.

(ii) The appendix must be text searchable and include bookmarks for each document in the appendix and for important information or sections within the documents.

(iii) The table of contents should, if possible without unduly burdening the filer, link to the documents contained in the appendix or in that volume of the appendix.

(3) Content. The appendix must include copies of the following documents if they exist:

(a) The trial court or tribunal judgment or order(s) appealed from, including any written opinion, memorandum, findings of fact and conclusions of law stated on the record, in conjunction with the judgment or order(s) appealed from.;

(b) ~~A copy of t~~The trial court or tribunal register of actions~~docketdocket sheet;~~.

(c) The relevant pages of any transcripts cited in support of the argument~~appellant's position on appeal~~. When~~re~~ appropriate, pages that precede or follow~~the appellant may attach pages preceding and succeeding~~ the cited page should be included~~cited if helpful~~ to provide context to the citation. Submitting entire transcripts is discouraged unless necessary for the under-

standing of an argument. If a complete trial, deposition, or administrative transcript is filed, an~~the~~ index to such transcript must be included if one was provided by the court reporter. Transcripts must contain only a single transcript page per document page, not multiple pages combined on a single document page. ~~Only noncompressed (one sheet to a page) transcripts may be filed;~~

(d) When~~If~~ a jury instruction is challenged, the language~~a copy~~ of the instruction, any portion of the transcript containing a discussion of the instruction, and any relevant request for the instruction.~~; and~~

(e) Any other exhibit, pleading, or ~~other~~ evidence that was submitted to the trial court and that is relevant and necessary for the Court to consider in deciding the appeal. Briefs submitted in the trial court are not required to be included in the appendix unless they pertain to a contested preservation issue.

~~For material that is subject to an existing protective order, or for evidence that is not subject to such an order, but which contains information that is confidential or privileged, the procedures of MCR 7.211(C)(9) apply.~~

(4) Joint Appendix.

(a) The parties may stipulate to using a joint appendix, so designated, containing the matters that are deemed necessary to fairly decide the questions involved. A joint appendix shall meet the requirements of subrules (J)(2) and (3) and shall be included with the initial appellant's brief or, for a joint appendix of multiple appellees, with the first appellee's brief to be filed.

(b) The stipulation to use a joint appendix may specify that any party may file, as a supplemental appendix, additional portions of the record not covered by the joint appendix.

~~(2) The appellee shall file and serve an appendix with its responsive brief only if the appellant's appendix does not contain all the information set forth in section (J)(1) of this rule. The appellee's appendix shall not contain any of the documents contained in the appellant's appendix, but shall only contain additional information described in section (J)(1) that is relevant and necessary to the determination of the issues raised in the appeal.~~

~~(3) Each volume of any appendix shall contain no more than 250 pages. The table of contents shall identify each document with reasonable definiteness, and indicate the volume and page of the appendix where the document is located. The cover to the appendix shall indicate in bold type whether it is the "Appellant's Appendix" or "Appellee's Appendix."~~

~~(a) For a paper appendix, each document shall also be tabbed. A paper appendix shall be bound separate from the brief. Five copies of the paper appendix shall be filed with the court.~~

~~(b) If an appendix is to be filed electronically, it must be filed as an independent .pdf file or a series of independent .pdf files. The table of contents for electronically filed appendixes shall contain bookmarks, linking to each document in the appendix.~~

~~(4) In cases involving more than one appellant or appellee, including cases consolidated for appeal, to avoid duplication each side shall, where practicable, file a joint rather than separate appendixes.~~

~~(5) This subsection does not apply to appeals arising from the Michigan Public Service Commission (in which the record is available on the Commission's e-docket) or the Michigan Tax Tribunal (in which the record is available on the Tribunal's tax docket lookup~~

~~page). In those cases, the parties shall cite to the document number and relevant pages.~~

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

(A)-(C) [Unchanged.]

(D) Appendix~~es~~. Unless the Court orders otherwise, briefs in a calendar case or in a case being argued on an application must be filed with an individual or joint appendix that conforms with the requirements, form, and content of MCR 7.212(J), except that the exclusions listed in MCR 7.212(J)(1)(a)-(f) do not apply to the Supreme Court. The individual or joint appendix must also include a copy of the Court of Appeals opinion or order being appealed but need not include the briefs submitted in the Court of Appeals unless they pertain to a contested preservation issue.

~~(1) Form. Appendixes must be prepared in conformity with MCR 7.212(B), and shall be similarly endorsed as briefs under MCR 7.312(C) but designated as an appendix. Appendixes must be printed on both sides of the page and, if they encompass more than 20 sheets of paper, must also be submitted on electronic storage media in a file format that can be opened, read, and printed by the Court.~~

~~(2) Appellant's Appendix. An appendix filed by the appellant must be entitled "Appellant's Appendix," must be separately bound, and numbered separately from the brief with the letter "a" following each page number (e.g., 1a, 2a, 3a). Each page of the appendix must include a header that briefly describes the character of the document, such as the names of witnesses for testimonial evidence or the nature of the documents for record evidence. The appendix must include a table of contents and, when applicable, must contain:~~

(a) the relevant docket entries of the trial court or tribunal and the Court of Appeals arranged in a single column;

(b) the trial court judgment, order, or decision in question and the Court of Appeals opinion or order being appealed;

(c) any relevant finding or opinion of the trial court;

(d) any relevant portions of the pleadings or other parts of the record; and

(e) any relevant portions of the transcript, including the complete jury instructions if an issue is raised regarding a jury instruction.

The items listed in subrules (D)(2)(a) to (e) must be presented in chronological order.

(3) Joint Appendix.

(a) The parties may stipulate to use a joint appendix, so designated, containing the matters that are deemed necessary to fairly decide the questions involved. A joint appendix shall meet the requirements of subrule (D)(2) and shall be separately bound and served with the appellant's brief.

(b) The stipulation to use a joint appendix may provide that either party may file, as a supplemental appendix, any additional portion of the record not covered by the joint appendix.

(4) Appellee's Appendix. An appendix, entitled "Appellee's Appendix," may be filed. The appellee's appendix must comply with the provisions of subrule (D)(2) and be numbered separately from the brief with the letter "b" following each page number (e.g., 1b, 2b, 3b). Materials included in the appellant's appendix or joint appendix may not be repeated in the appellee's appendix, except to clarify the subject matter involved.

(E)-(J) [Unchanged.]

Staff comment: The amendments of MCR 7.212 and 7.312 allow practitioners to efficiently produce an appendix for all appellate purposes by making the appendix rule consistent within the Court of Appeals and Supreme Court.

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 September 23, 2020, effective January 1, 2021 (File No. 2019-31)—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 amendment of Rule 7.216 of the Michigan Court Rules is adopted, effective January 1, 2021.

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

RULE 7.216. MISCELLANEOUS RELIEF.

(A)-(B) [Unchanged.]

(C) Vexatious Proceedings; Vexatious Litigator.

(1)-(2) [Unchanged.]

(3) Vexatious Litigator. If a party habitually, persistently, and without reasonable cause engages in vexatious conduct under subrule (C)(1), the Court may, on its own initiative or on motion of another party, find the party to be a vexatious litigator and impose filing restrictions on the party. The restrictions may include prohibiting the party from continuing or instituting legal proceedings in the Court without first obtaining

leave, prohibiting the filing of actions in the Court without the filing fee or security for costs required by MCR 7.209 or MCR 7.219, or other restriction the Court deems just.

Staff comment: The amendment of MCR 7.216 enables the Court of Appeals to impose filing restrictions on a vexatious litigator, similar to the Supreme Court's rule (MCR 7.316).

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 September 30, 2020, effective January 1, 2021 (File Nos. 2018-33, 2019-20, and 2019-38)—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 6.425, 6.428, 7.208, and 7.211 of the Michigan Court rules are adopted, effective January 1, 2021.

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

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A) Presentence Report; Contents.

(1) [Unchanged.]

(2) On request, the probation officer must give the defendant's attorney notice and a reasonable opportunity to attend the presentence interview.

(2) [Renumbered (3) but otherwise unchanged.]

~~(3) Regardless of the sentence imposed, the court must have a copy of the presentence report and of any psychiatric report sent to the Department of Correc~~

~~tions. If the defendant is sentenced to prison, the copies must be sent with the commitment papers.~~

(B) [Unchanged.]

~~(C) Presentence Report; Disclosure After Sentencing. After sentencing, the court, on written request, must provide the prosecutor, the defendant's lawyer, or the defendant not represented by a lawyer, with a copy of the presentence report and any attachments to it. The court must exempt from disclosure any information the sentencing court exempted from disclosure pursuant to subrule (B).~~

(D) [Relettered (C) but otherwise unchanged.]

(~~E~~D) Sentencing Procedure.

(1) [Unchanged.]

(2) ~~Resolution of~~ Challenges and Corrections.

(a) If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge, ~~or~~ determines that it will not take the challenged information into account in sentencing, or otherwise determines that the report should be corrected, it must order~~direct~~ the probation officer to ~~(i)~~ correct the report. ~~or delete the challenged information in the report, whichever is appropriate, and~~ If ordered to correct the report, the probation officer must ~~(ii)~~ provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections, certify that the report has been corrected, and ensure that no prior version of the report is used for classification, programming, or parole purposes.

(b) [Unchanged.]

(3) [Unchanged.]

(E) Presentence Report; Retention and Disclosure after Sentencing. Regardless of the sentence imposed, the Department of Corrections must retain the presentence report reflecting any corrections ordered under subrule (D)(2). On written request or order of the court, the Department of Corrections must provide the prosecutor, the defendant's lawyer, or the defendant if not represented by a lawyer, with a copy of the report. On written request, the court must provide the prosecutor, the defendant's lawyer, or the defendant if not represented by a lawyer, with copies of any documents that were presented for consideration at sentencing, including the court's initial copy of the presentence report if corrections were made after sentencing. If the court exempts or orders the exemption of any information from disclosure, it must follow the exemption requirements of subrule (B).

(F)-(G) [Unchanged.]

RULE 6.428. RESTORATION OF APPELATE RIGHTS~~REISSUANCE OF JUDGMENT~~.

If the defendant ~~did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys retained or appointed to represent the defendant on direct appeal from the judgment either disregarded the defendant's instruction to perfect a timely appeal of right, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right~~, whether convicted by plea or at trial, was denied the right to appellate review or the appointment of appellate counsel due to errors by the defendant's prior attorney or the court, or

other factors outside the defendant's control, the trial court shall issue an order restarting the time in which to file an appeal or request counsel~~of right~~.

RULE 7.208. AUTHORITY OF COURT OR TRIBUNAL APPEALED FROM.

(A) [Unchanged.]

(B) Postjudgment Motions in Criminal Cases.

(1) Within~~No later than 56 days after the commencement of~~ the time for filing the defendant-appellant's brief as provided by MCR 7.212(A)(1)(a)(iii), the defendant may file in the trial court a motion for a new trial, for judgment of acquittal, to withdraw a plea, or to correct an invalid sentence.

(2) [Unchanged.]

(3) The trial court shall hear and decide the motion within 56~~28~~ days of filing, unless the court determines that an adjournment is necessary to secure evidence needed for the decision on the motion or that there is other good cause for an adjournment.

(4)-(6) [Unchanged.]

(C)-(J) [Unchanged.]

RULE 7.211. MOTIONS IN COURT OF APPEALS.

(A)-(B) [Unchanged.]

(C) Special Motions. If the record on appeal has not been sent to the Court of Appeals, except as provided in subrule (C)(6), the party making a special motion shall request the clerk of the trial court or tribunal to send the record to the Court of Appeals. A copy of the request must be filed with the motion.

(1) Motion to Remand.

(a) ~~Within the time provided for filing the appellant's brief, t~~The appellant may move to remand to the trial court. The motion must identify an issue sought to be reviewed on appeal and show:

(i)-(ii) [Unchanged.]

A motion under this subrule must be supported by affidavit or offer of proof regarding the facts to be established at a hearing.

(b)-(c) [Unchanged.]

(d) If a motion to remand is filed~~granted~~, further proceedings in the Court of Appeals are stayed until the motion is denied or the trial court proceedings are completed~~completion of the proceedings in the trial court pursuant to the remand~~, unless the Court of Appeals orders otherwise.

(e)-(f) [Unchanged.]

(2)-(9) [Unchanged.]

(D)-(E) [Unchanged.]

Staff comment: The amendments, submitted by the State Appellate Defender Office, make several substantive changes. The amendments expand certain time periods within which to file and dispose of post-judgment motions (MCR 7.208 and 7.211), and reconfigure and expand the Reissuance of Judgment Rule (MCR 6.428) (renaming it Restoration of Judgment Rule). Finally, the amendments of MCR 6.425 require a probation officer to give defendant's attorney notice and a reasonable opportunity to attend the presentence interview, require a probation agent to not only correct a report but certify the correction has been made and provide for additional requirements regarding use of and access to the presentence investigation report.

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 October 28, 2020, effective January 1, 2021 (File No. 2002-37)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rules 1.109, 2.002, 2.302, 2.306, 2.315, 3.101, 3.222, 3.618, and 8.119 of the Michigan Court Rules are adopted, effective January 1, 2021.

[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) Form and Captions of Documents.

(a) All documents prepared for filing in the courts of this state and all documents issued~~prepared~~ by the courts for placement in a case file must be legible and in the English language, comply with standards established by the State Court Administrative Office, and be on good quality 8½ by 11 inch paper or transmitted through an approved electronic means and maintained as a digital image. Except for attachments, ~~T~~the font size must be 12 or 13 point for body text and no less than 10 point for footnotes, except with regard to forms approved by the State Court Administrative Office. Transcripts filed with the court must contain only a single transcript page per document page, not multiple pages combined on a single document page.

(b)-(g) [Unchanged.]

(2)-(8) [Unchanged.]

(E)-(F) [Unchanged.]

(G) Electronic Filing and Service.

(1) [Unchanged.]

(2) Electronic-Filing and Electronic-Service Standards. Courts shall implement electronic filing and electronic service capabilities in accordance with this rule and shall comply with the standards established by the State Court Administrative Office. Confidential and nonpublic information or documents and sealed documents~~must be~~ that are electronically filed or electronically served must be filed or served in compliance with these standards to ensure secure transmission of the information.

(3) Scope and Applicability.

(a)-(d) [Unchanged.]

(e) If a party or attorney in a case is registered as an authorized user in the electronic-filing system, ~~A~~a court must~~may~~ electronically send to that authorized user any~~serve~~ notice~~s~~, order~~s~~, opinion~~s~~, or~~and~~ other document~~s~~ 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) For the required case types, attorneys must electronically file documents in courts where electronic filing has been implemented, unless an attorney filing on behalf of a party is exempted from electronic filing under subrule (j) because of a disability. All other filers are required to electronically file documents only in courts that have been granted approval to mandate electronic filing by the State Court Administrative Office under AO 2019-~~XX~~2.

(g) [Unchanged.]

(h) Upon request, the following persons are exempt from electronic filing without the need to demonstrate good cause:

(i) a person who has a disability as defined under the Americans with Disabilities Act that prevents or limits the person's ability to use the electronic filing system;

(ii)-(iii) [Unchanged.]

(i) A request for an exemption must be filed with the court in paper where the individual's case will be or has been filed as follows: ~~. If the individual filed paper documents at the same time as the request for exemption, the clerk shall process the documents for filing. If the documents meet the filing requirements of subrule (D), they will be considered filed on the day they were submitted.~~

(i) The request for an exemption must be on a form approved by the State Court Administrative Office, must specify the reasons that prevent the individual from filing electronically, and be verified under MCR 1.109(D)(3). The individual may file supporting documents along with the request for the court's consideration. There is no fee for the request.

~~(ii) The request must specify the reasons that prevent the individual from filing electronically. The individual may file supporting documents along with the request for the court's consideration.~~

(ii) A request made under subrule (h) shall be approved by the clerk of the court on a form approved by the State Court Administrative Office. If the clerk of the court is unable to grant an exemption, the clerk shall immediately submit the request for judicial review.

~~(iii)~~ A judge must review ~~the request and any supporting documentation and~~requests that are not granted by a clerk, requests made under subrule (g), and requests made under subrule (h)(i). The judge shall issue an order granting or denying the request within two business days of the date the request was filed.

(j) If the individual filed paper documents at the same time as the request for exemption under subrule (i), the clerk shall process the documents for filing. If the documents meet the filing requirements of subrule (D), they will be considered filed on the day they were submitted.

(k)~~(iv)~~ The clerk of the court must hand deliver or promptly mail the clerk approval granted or order entered under subrule (i) to the individual. The clerk must place the request, any supporting documentation, and the clerk approval or order in the case file. If the request was made under subrule (h)(i), both the Request for Exemption from Use of MiFILE and the Request for Reasonable Accommodations, along with any supporting documentation and the clerk approval or order shall be maintained confidentially. If there is no case file, the documents must be maintained in a group file.

(l)~~(v)~~ An exemption granted under this rule is valid only for the court in which it was filed and for the life of the case unless the individual exempted from filing electronically registers with the electronic-filing system. In that event, the individual waives the exemption and becomes subject to the rules of electronic filing and the requirements of the electronic-filing system. An individual who waives an exemption under this rule may file another request for exemption.

(4)-(5) [Unchanged.]

(6) Electronic-Service Process.

(a) General Provisions.

(i) [Unchanged.]

(ii) Service of process of all other documents electronically filed shall be accomplished electronically among authorized users through the electronic-filing system, ~~unless one or more parties have~~ If a party has been exempted from electronic filing~~,~~ or ~~a party has not filed a response or answer or~~ has not registered with the electronic-filing system ~~and that party's e-mail address is unknown. In those circumstances~~, service shall be made on that party by any other method required by Michigan Court Rules.

(iii)-(v) [Unchanged.]

(b)-(c) [Unchanged.]

(7) Transmission Failures.

(a)-(c) [Unchanged.]

(d) In the event the electronic-filing system fails to transmit a document selected for service, if deemed necessary to ensure due process rights are protected, the State Court Administrator shall provide notice to the affected persons in either of the following ways:

(i) file, as a nonparty, a notice of defective service in each affected case and, as deemed appropriate, serve the notice, or

(ii) send notice of a system-wide transmission failure to each affected system user.

(e) If notice is provided under subrule (d), the clerk of the court where the affected case is filed must enter the event in the case history in accordance with MCR 8.119(D)(1)(a).

(f) A fee shall not be assessed on a motion filed claiming that rights in the case were adversely affected by transmission failure of a document selected for service.

RULE 2.002. WAIVER OF FEES FOR INDIGENT PERSONS.

(A) Applicability and Scope.

(1)-(3) [Unchanged.]

(4) If fees are waived under this rule before judgment, the waiver continues through the date of judgment unless ordered otherwise under subrule (J). If fees are waived under this rule postjudgment, the waiver continues through the date of adjudication of the postjudgment proceedings. In probate proceedings, "postjudment" means any proceeding in the case after the original petition is adjudicated. If jurisdiction of the case is transferred to another court, the waiver continues in the receiving court according to this rule unless ordered otherwise by the receiving court under subrule (J). If an interlocutory appeal is filed in another court, the waiver continues in the appellate court.

(5) [Unchanged.]

(B)-(K) [Unchanged.]

RULE 2.302. DUTY TO DISCLOSE; GENERAL RULES GOVERNING DISCOVERY.

(A)-(G) [Unchanged.]

(H) Filing and Service of Disclosure and Discovery Materials.

(1) Unless required by a particular rule, disclosures, requests, responses, depositions, and other discovery materials may not be filed with the court except as follows:

(a) If the materials are to be used in connection with a motion, they must ~~either be filed separately or~~ be attached to the motion, response, or an accompanying affidavit;

(b) If the materials are to be used at trial, they shall not be filed with the court, but must be submitted to the judge and made an exhibit under MCR 2.518 or MCR 3.930;

(c) [Unchanged.]

(2)-(4) [Unchanged.]

RULE 2.306. DEPOSITIONS ON ORAL EXAMINATION OF A PARTY.

(A)-(E) [Unchanged.]

(F) Certification and Transcription; Filing; Copies.

(1)-(2) [Unchanged.]

(3) Except as provided in subrule (C)(3) or in MCR 2.315(E), a deposition may not be filed with the court unless it has first been transcribed. If a party requests that the transcript be filed, the person conducting the examination or the stenographer shall promptly file the certified transcript with the court in which the action is pending via the statewide electronic-filing system, by delivering it personally to the court, or by registered or certified mail to the clerk of the court~~, after transcription and certification:~~ and shall give prompt notice of its filing to all other parties, unless the parties agree otherwise by stipulation in writing or on the record.

~~(a)~~ If the transcript is personally delivered to the court, ~~securely seal the transcript~~it must be securely sealed in an envelope endorsed with the title and file number of the action and marked "Deposition of [*name of witness*]~~,~~," ~~and promptly file it with the court in~~

~~which the action is pending or send it by registered or certified mail to the clerk of that court for filing;~~

~~(b) give prompt notice of its filing to all other parties, unless the parties agree otherwise by stipulation in writing or on the record.~~

(G) [Unchanged.]

RULE 2.315. VIDEO DEPOSITIONS.

(A)-(D) [Unchanged.]

(E) Filing; Notice of Filing. If a party requests that the deposition be filed, the person who made the recording shall

(1)-(3) [Unchanged.]

A video deposition cannot be electronically filed with the court.

(F)-(I) [Unchanged.]

RULE 2.603. DEFAULT AND DEFAULT JUDGMENT.

(A) Entry of Default; Notice; Effect.

(1) If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the clerk must enter the default of that party if that fact is:

(a) known to the clerk of the court, or

(b) ~~and that fact is~~ verified in the manner prescribed by MCR 1.109(D)(3) and filed with the court in ~~the~~a request for default~~, the clerk must enter the default of that party~~.

(2)-(3) [Unchanged.]

(B)-(E) [Unchanged.]

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A)-(B) [Unchanged.]

(C) Forms. The State Court Administrative Office~~state court administrator~~ shall publish approved forms for use in garnishment proceedings. The verified request and writ forms and the garnishment release form approved by the State Court Administrative Office must be used. Where e-Filing is implemented, when a request and writ form is filed with a court, the instructions and blank proof of service must not be filed. ~~Separate forms shall be used for periodic and nonperiodic garnishments. The verified statement, writ, and~~The disclosure filed in garnishment proceedings must be substantially in the form approved by the State Court Administrative Office~~state court administrator~~.

(D) Request for and Issuance of Writ. The clerk of the court that entered the judgment shall review the request. The clerk shall issue a writ of garnishment if the writ appears to be correct, complies with these rules and the Michigan statutes, and if the plaintiff, or someone on the plaintiff's behalf, makes and files a statement verified in the manner provided in MCR 1.109(D)(3) stating:

(1)-(3) [Unchanged.]

(4) whether the garnishee is to make all payments directly to the plaintiff or the plaintiff's attorney or to send the funds to the court.

(E) Writ of Garnishment.

(1) The writ of garnishment ~~must have attached or must include a copy of the~~and the verified ~~statement~~ request~~ing~~ for issuance of the writ must be included on the same form.~~, and~~ The writ must include information that will permit the garnishee to identify the defendant, such as the defendant's address, social security number, employee identification number, federal tax identification number, employer number, or account number, if known.

(2) [Unchanged.]

(3) The writ shall direct the garnishee to:

(a)-(d) [Unchanged.]

(e) ~~in the discretion of the court and~~ in accordance with subrule (J), ~~order the garnishee~~ either ~~to~~

~~(i)~~ make all payments directly to the plaintiff or the plaintiff's attorney or

~~(ii)~~ send the funds to the court~~,~~ ~~in the manner~~as specified by the plaintiff in the ~~writ~~request under subrule (D)(4).

(4) [Unchanged.]

(5) The writ shall inform the defendant that unless the defendant files objections within 14 days after the service of the writ on the defendant or as otherwise provided under MCL 600.4012,

(a) without further notice the property or debt held ~~pursuant to~~under the garnishment may be applied to the satisfaction of the plaintiff's judgment, and

(b) periodic payments due to the defendant may be withheld and paid according to subrule (3)(e) until the judgment is satisfied ~~and in the discretion of the court paid directly to the plaintiff~~.

(6) [Unchanged.]

(F)-(I) [Unchanged.]

(J) Payment.

(1) After 28 days from the date of the service of the writ on the garnishee, the garnishee shall transmit all withheld funds to the plaintiff, plaintiff's attorney, or the court as directed by the court pursuant to subrule (E)(3)(e) unless notified that objections have been filed.

(2)-(7) [Unchanged.]

(K)-(T) [Unchanged.]

RULE 3.222. UNIFORM COLLABORATIVE LAW ACT PROCESS AND AGREEMENTS.

(A)-(B) [Unchanged.]

(C) Establishing Jurisdiction and Starting the Statutory Waiting Period. At any time after a collaborative law participation agreement is signed, if the parties are not already under the court's jurisdiction, the parties may commence an action to submit to the court's jurisdiction.

(1) [Unchanged.]

(2) To commence an action at any time before the conclusion of the collaborative law process, the parties shall file a petition for court jurisdiction and declaration of intent to file a proposed final judgment or proposed final order on a form approved by the State Court Administrative Office.

(a) The petition shall be brought "In the Matter of" the names of Party A and Party B and shall state the type of action corresponding to the assigned case type code under~~in~~ MCR 8.117 ~~(listed under Case File~~ Management Standard [A][6]). The petition shall:

(i)-(v) [Unchanged.]

The petition may also contain a request to waive the six-month statutory waiting period under MCL 552.9f.

(b)-(e) [Unchanged.]

(D)-(F) [Unchanged.]

RULE 3.618. EMANCIPATION OF MINOR.

(A)-(F) [Unchanged.]

(G) Order. To fulfill requirements of the Social Security Administration, the court must provide the minor with a copy of the order of emancipation that includes the minor's full social security number, if the

minor has one. The court shall not include the minor's social security number on the order maintained in the court's file.

(1) The minor must show his or her social security card to the judge at the hearing and the judge shall enter the number on the minor's copy of the order. If the minor does not bring his or her social security card to the hearing or does not have a social security card, the minor can present his or her social security card to the clerk of the court at a later date, and after verifying the identity of the minor, the clerk of the court shall enter the social security number on a copy of the order to be given to the minor.

(2) The order must be entered on a form approved by the State Court Administrative Office, consisting of two parts. The first part is placed in the case file and shall not contain the minor's social security number. The second part shall contain the minor's social security number and a statement that the order is a certified copy of the order on file with the court except that the social security number appears only on the minor's copy of the order. The minor's copy of the order shall be signed by the clerk of the court. There is no fee for the certified copy.

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, 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) Records Kept by the Clerk of the Court. The clerk of the court shall maintain the following case records in accordance with the Michigan Trial Court Records Management Standards. Documents and other materials made nonpublic or confidential by court rule, statute, or order of the court pursuant to subrule (I) must be designated accordingly and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court under subrule (I) that makes a document or other materials in that case nonpublic or confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed.

(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~~order or judgment of~~ the court, and the returns showing execution. ~~Each entry~~The case history entry of each item filed shall be dated with ~~not only~~ the date of filing (if relevant)~~, but with~~ 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 ~~entry~~issuance and the initials of ~~and shall indicate~~ the person recording the action.

(b) [Unchanged.]

(2)-(4) [Unchanged.]

(E)-(L) [Unchanged.]

Staff comment: The amendments of MCR 1.109, 2.002, 2.302, 2.306, 2.315, 2.603, 3.101, 3.222, 3.618, and 8.119 are the latest revisions made as part of the design and implementation of the statewide electronic-filing system. The amendment of MCR 2.603(A), which requires a clerk to enter a default if a party's failure to plead or otherwise defend becomes known to the clerk, is intended to return the rule to its former posture. Under the rule's previous language, which was inadvertently deleted in making structural changes in the rule, the clerk was required to enter a default if a party's failure to plead or defend "is made to appear by affidavit or otherwise." The same policy would apply under the language adopted by amendment in this order.

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 November 18, 2020, effective immediately (File No. 2017-28)—REPORTER.

On order of the Court, the effective date of the May 22, 2019 order amending MCR 1.109 and MCR 8.119 is extended from January 1, 2021 to July 1, 2021.

Adopted November 18, 2020, effective immediately (File No. 2020-22)—REPORTER.

On order of the Court, this is to advise that the amendment of Rule 6.110 of the Michigan Court Rules is adopted, effectively immediately. Concurrently, individuals are invited to comment on the form or the merits of the amendment during the usual public comment period. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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

RULE 6.110. THE PRELIMINARY EXAMINATION.

(A)-(B) [Unchanged.]

(C) Conduct of Examination. A verbatim record must be made of the preliminary examination. The court shall allow the prosecutor and the defendant to subpoena and call witnesses~~Each party may subpoena witnesses~~, offer proofs, and examine and cross-examine witnesses at the preliminary examination. The court must conduct the examination in accordance with the Michigan Rules of Evidence.

(D)-(I) [Unchanged.]

Staff comment: The amendment of MCR 6.110 requires courts to allow a witness called by the prosecutor or defendant to appear at a preliminary examination as provided for by MCL 766.12. This proposal was submitted by the State Bar of Michigan.

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 sent to the Supreme Court Clerk in writing or electronically by March 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-22. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Adopted December 16, 2020, effective immediately (File No. 2020-35)—REPORTER.

On order of the Court, the following local court rule for the Wayne County Probate Court is adopted, effective immediately.

LOCAL COURT RULE 5.101. MANDATORY FILING BY E-MAIL BY ATTORNEYS.

(A) Scope and Applicability. This local court rule applies to all filings by attorneys in the Wayne County Probate Court.

(B) Mandatory Filing via Electronic Mail. Attorneys are required to file all items via email in a single .pdf attachment for each filing. Multiple .pdf attachments can be submitted in one email.

(C) Exception for Original Wills.

(1) A scanned copy of an original will is to be submitted as part of the .pdf file for the case. The original will must be sent via mail, certified mail, or a delivery service to the court and received within 14 days of the date of filing via electronic mail. The court reserves the right to dismiss the case if the original will is not submitted within this period.

(2) An original will delivered by the custodian to the court pursuant to MCL 700.2516 where no case is being opened must be sent by mail, certified mail, or a delivery service to the court.

(D) Filing Instructions. Details regarding the electronic filing and payment protocols will be posted on the court's home page, including an email address and phone number for questions and resolving issues related to this process.

(E) Request for Exemption.

(1) Upon request, an attorney who has a disability that prevents or limits his or her ability to use electronic mail is exempt from filing via electronic mail without the need to demonstrate good cause.

(2) All other requests for an exemption must be filed with the court and shall be granted if the attorney can demonstrate good cause. There is no fee for the request. The request must specify the reasons that prevent the attorney from filing electronically. The attorney may file supporting documents along with the request for the court's consideration. The court shall consider the following factors in determining whether the party has demonstrated good cause:

(i) Whether the attorney has a lack of reliable access to an electronic device that includes access to the Internet;

(ii) Whether the attorney must travel an unreasonable distance to access a public computer or has limited access to transportation and is unable to access an electronic mail system from home;

(iii) Whether the attorney has the technical ability to use and understand email;

(iv) Whether access from a home computer system or the ability to gain access at a public computer terminal present a safety issue for the attorney;

(v) Any other relevant factor raised by the attorney.

(3) A judge must review the request and any supporting documentation and issue an order granting or denying the request within two business days of the date the request was filed. The court must promptly email or mail the order to the attorney. The court must place the request, any supporting documentation, and the order in its records, which must be maintained in a group file.

(F) Expiration Date. This local court rule will expire upon the entry of a local administrative order by the State Court Administrative Office designating the Wayne County Probate Court Phase Four of its plan to return to full capacity.

Staff comment: This rule was requested by Wayne County Probate Court to promote more efficient processing of filings.

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.

SUPREME COURT CASES

PEOPLE v SMITH

Docket No. 160995. Decided July 21, 2020.

Derek J. Smith was convicted by a jury in the Wayne Circuit Court of two counts of assault with intent to do great bodily harm (AWIGBH), MCL 750.84; three counts of assault with a dangerous weapon (felonious assault), MCL 750.82; one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; one count of being a felon in possession of a firearm (felon-in-possession), MCL 750.224f; and two counts of misdemeanor assault and battery, MCL 750.81. Smith was sentenced by the trial court to 71 months to 10 years in prison for AWIGBH, 1 to 4 years for felonious assault, 1 to 5 years for felon-in-possession, and 93 days for assault and battery, to be served concurrently. The court also sentenced Smith to two years in prison for felony-firearm, to be served consecutively with and preceding the other felony sentences. On appeal, the Court of Appeals affirmed Smith's convictions, but it determined that two offense variables had been incorrectly scored and remanded for resentencing. On remand, the trial court, Kevin J. Cox, J., resentenced Smith to serve 3 to 10 years in prison for AWIGBH, but left the other sentences unchanged. Smith filed an application for leave to appeal in the Court of Appeals, arguing that the trial court erred when it imposed the felony-firearm sentence consecutively with the AWIGBH sentences because the jury had not explicitly found that he possessed a firearm during the commission of the AWIGBH offenses. The Court of Appeals denied Smith's application, and Smith sought leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 503 Mich 884 (2018). On remand, the Court of Appeals, M. J. KELLY, P.J., and FORT HOOD and SWARTZLE, JJ., held in an unpublished per curiam opinion that the felony-firearm sentence could not be imposed consecutively with the AWIGBH sentences because the jury was not required to find that Smith possessed or used a firearm to commit AWIGBH, unlike the convictions for felonious assault and felon-in-possession. The Court of Appeals remanded the case to the trial court for it to

determine whether felonious assault or felon-in-possession was the predicate felony for the felony-firearm conviction and to amend Smith's judgment of sentence so that the felony-firearm sentence was consecutive only with the predicate offense. The prosecutor sought leave to appeal in the Supreme Court.

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

1. The felony-firearm sentence cannot be consecutive with the two AWIGBH sentences because although AWIGBH was listed in the information as a predicate felony for felony-firearm, the jury did not explicitly find that Smith possessed a firearm when the AWIGBH offenses were committed.

2. The felony-firearm sentence may be imposed consecutively with only one other felony sentence. The jury necessarily found that Smith possessed a firearm during the commission of the three counts of felonious assault and the one count of felon-in-possession. Therefore, the Court of Appeals appropriately remanded the case to the trial court to impose the two-year felony-firearm sentence to run consecutively with a single felony sentence.

Affirmed.

1. CRIMINAL LAW — SENTENCING — POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY — PREDICATE FELONIES — CONSECUTIVE SENTENCES.

Under MCL 750.227b, a person who is convicted of possessing a firearm during the commission of a felony (felony-firearm) shall be sentenced to a prison term of two years, to be served consecutively with and preceding any sentence imposed for the conviction of the underlying or predicate felony; when the fact-finder does not explicitly find that the defendant committed a particular predicate felony while in possession of a firearm, the felony-firearm sentence cannot be consecutive with that particular predicate felony sentence.

2. CRIMINAL LAW — SENTENCING — POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY — PREDICATE FELONIES — CONSECUTIVE SENTENCES.

When a defendant has been convicted of multiple felony offenses in addition to one count of possessing a firearm during the commission of a felony (felony-firearm), the sentence for felony-firearm may be imposed consecutively with only one predicate felony sentence.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason Williams*, Chief of Research, Training, and Appeals, and *Margaret Gillis Ayalp*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Malaika Ramsey-Heath* and *Jacqueline Ouvry*) for Derek James Smith.

MEMORANDUM OPINION. A jury found defendant guilty of two counts of assault with intent to do great bodily harm (AWIGBH), MCL 750.84; three counts of assault with a dangerous weapon (felonious assault), MCL 750.82; one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; one count of being a felon in possession of a firearm (felon-in-possession), MCL 750.224f; and two counts of misdemeanor assault and battery, MCL 750.81.[1] The trial court sentenced him to concurrent prison terms of 71 months to 10 years for the AWIGBH convictions, 1 to 4 years for the felonious-assault convictions, 1 to 5 years for the felon-in-possession conviction, and 93 days in jail for the assault-and-battery convictions. In addition, the trial court sentenced him to two years in prison for the felony-firearm conviction, to be served consecutively with and preceding the remaining felony sentences.

Defendant appealed in the Court of Appeals, which affirmed his convictions but remanded to the trial court for resentencing on the basis that two offense variables had been incorrectly scored. *People v Smith*, unpublished per curiam opinion of the Court of Ap-

[1] The jury acquitted defendant of three counts of assault with intent to commit murder, MCL 750.83, finding him guilty of the lesser offense of AWIGBH on two counts and not guilty on the third count.

peals, issued November 22, 2016 (Docket No. 328477). On remand, the trial court resentenced defendant to 3 to 10 years in prison for the AWIGBH convictions and maintained the original sentences for the remaining convictions. The felony-firearm sentence was again imposed to run consecutively with the remaining felony sentences. The trial court denied defendant's motion to correct an invalid sentence or for a new trial.

Defendant next filed an application for leave to appeal in the Court of Appeals arguing that the trial court erred by having imposed the felony-firearm sentence to run consecutively with the AWIGBH sentences when the jury had not explicitly found that he possessed a firearm during the commission of the AWIGBH offenses. The Court of Appeals denied his application "for lack of merit in the grounds presented." *People v Smith*, unpublished order of the Court of Appeals, entered April 17, 2018 (Docket No. 340991). Defendant then sought leave to appeal in this Court and, in lieu of granting leave to appeal, we remanded to the Court of Appeals for consideration as on leave granted. *People v Smith*, 503 Mich 884 (2018). On remand, the Court of Appeals agreed with defendant that the felony-firearm sentence could not be imposed to run consecutively with the AWIGBH sentences and accordingly remanded to the trial court for resentencing. *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued November 19, 2019 (Docket No. 340991). The Court explained that "unlike the convictions of felonious assault and felon-in-possession, the jury was not required to find that Smith possessed or used a firearm to commit AWIGBH." *Id*. at 3. Therefore, the Court "remand[ed] to the trial court so it may determine which felony—felonious assault or felon-in-possession—was the predicate offense for the felony-firearm conviction and

to amend the judgment of sentence so that Smith's sentence for felony-firearm is consecutive to the sentence for the predicate offense only . . . ." *Id*. The Court denied the prosecutor's motion for reconsideration and defendant's motion for immediate effect. *People v Smith*, unpublished order of the Court of Appeals, entered December 27, 2019 (Docket No. 340991). The prosecutor now seeks leave to appeal in this Court, arguing that the felony-firearm sentence should be consecutive with one of the AWIGBH sentences and that the Court of Appeals erred by ruling to the contrary.

At the time relevant to this case,[2] the statute governing felony-firearm, MCL 750.227b, provided in relevant part as follows:

> (1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony, and shall be imprisoned for two years. . . .
>
> (2) A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

In *People v Clark*, 463 Mich 459, 460-461; 619 NW2d 538 (2000), the defendant was charged with 15 weapon-related offenses, including two counts of felony-firearm and two counts of possession of a bomb with unlawful intent, MCL 750.210. The information

[2] Effective July 1, 2015, MCL 750.227b was amended by the Legislature. See 2015 PA 26. Those amendments do not affect our analysis, but we apply the version of the statute in effect when defendant committed the instant offenses in February 2015. See MCL 750.227b, as enacted by 1990 PA 321.

alleged that each possession-of-a-bomb-with-unlawful-intent felony constituted the predicate felony for purposes of the corresponding felony-firearm count. *Id*. at 461. The jury found the defendant guilty as charged, and the trial court provided in its sentence that the two felony-firearm sentences would be, as *Clark* stated, "consecutive to[3] all thirteen of the other [sentences]." *Id*. at 462. We remanded to the trial court for resentencing, agreeing with the defendant that his two felony-firearm sentences should be consecutive only with the two sentences for possession of a bomb with unlawful intent:

> From the plain language of the felony-firearm statute, it is evident that the Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony. Subsection 2 clearly states that the felony-firearm sentence "shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the *felony* or attempt to commit the *felony*." It is evident that the emphasized language refers back to the predicate offense discussed in subsection 1, i.e., the offense during which the defendant possessed a firearm. No language in the statute permits consecutive sentencing with convictions other than the predicate offense.
>
> In this instance, the jury found that the defendant possessed a firearm while he possessed two bombs with unlawful intent. While it might appear obvious that the

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[3] Referring to a felony-firearm sentence as "consecutive to" another felony sentence is imprecise because it suggests that the felony-firearm sentence is served *after* the sentence for the predicate felony. In fact, the felony-firearm sentence is served *before* the sentence for the predicate felony. MCL 750.227b(3) currently provides, and MCL 750.227b(2) previously provided, that "[a] term of imprisonment prescribed by this section . . . shall be served *consecutively with and preceding* any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony." (Emphasis added.) See MCL 750.227b, as enacted by 1990 PA 321.

> defendant also possessed a firearm while committing the other crimes of which he was convicted, neither a trial court nor an appellate court can supply its own findings with regard to the factual elements that have not been found by a jury. [*Id*. at 463-464.][4]

In a footnote to the final quoted sentence above, we further observed in dictum:

> At the discretion of the prosecuting attorney, the complaint and the information could have listed additional crimes as underlying offenses in the felony-firearm count, or the prosecutor could have filed more separate felony-firearm counts. [*Id*. at 464 n 11.]

In the instant case, we agree with the Court of Appeals that the felony-firearm sentence cannot be consecutive with the two AWIGBH sentences because, although AWIGBH was listed in the information as a predicate felony for felony-firearm, the jury did not explicitly find that defendant possessed a firearm during the commission of the AWIGBH offenses. And because the jury did not explicitly make such a finding, "neither a trial court nor an appellate court can supply its own findings." *Id*. at 464. Furthermore, we agree with the Court of Appeals that the felony-firearm sentence here may be imposed consecutively with only *one* other felony sentence. *People v Coleman*, 327 Mich App 430, 441; 937 NW2d 372 (2019) ("A felony-firearm sentence must . . . be served consecutively with the sentence for the one predicate felony."). Because the jury necessarily found that defendant possessed a firearm when committing multiple felonies, the three counts of felonious assault and the one count of felon-in-possession, the Court of Appeals employed the appropriate remedy by remanding the case to the trial court and ordering

[4] *Clark* applied the same version of MCL 750.227b that we apply today. See *Clark*, 463 Mich at 460 n 2.

that the judgment of sentence be amended to indicate that the two-year sentence for felony-firearm is to be served consecutively with only a single felony sentence.[5]

Finally, we take this opportunity to clarify the import of footnote 11 in *Clark*. It is undoubtedly true that the complaint and the information may list multiple and alternate felonies as the predicate felony for a single felony-firearm count when the underlying facts of the case support such a charging decision.[6] However, in cases such as the instant case in which the prosecutor does so and the jury does not explicitly find that the defendant committed a particular predicate felony with a firearm, the felony-firearm sentence cannot be consecutive with that predicate felony sentence. Instead, in such cases, the prosecutor might be better advised to file multiple felony-firearm counts, each of which is predicated upon a particular and unique felony.[7] In any event, we reiterate that when

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[5] We note that the Court of Appeals was perhaps imprecise in remanding to the trial court "so it may determine which felony—felonious assault or felon-in-possession—was the predicate offense for the felony-firearm conviction . . . ." *Smith*, unpub op at 3. This language could imply that the trial court possesses *two* alternatives for imposing a consecutive sentence, either felonious assault or felon-in-possession. However, given that the felony-firearm sentence may only be imposed consecutively with one predicate felony, the trial court actually possesses *four* alternatives for imposing a consecutive sentence, the three felonious-assault sentences and the one felon-in-possession sentence.

[6] But we further agree with *Coleman* that footnote 11 merely "instructs that had the prosecution listed multiple predicate felonies in the felony information, there might have been options as to which felony would ultimately run consecutive to the felony-firearm sentence." *Coleman*, 327 Mich App at 442.

[7] We note that the prosecutor represented at oral argument in the Court of Appeals that the Wayne County Prosecutor's Office, following *Coleman*, "has begun to list . . . one felony-firearm count per underlying predicate felony."

the finder of fact does not explicitly find that the defendant committed a particular predicate felony with a firearm, the felony-firearm sentence cannot be consecutive with the sentence for that predicate felony. Accordingly, we affirm the judgment of the Court of Appeals.

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

SANFORD v MICHIGAN

Docket No. 159636. Argued on application for leave to appeal May 6, 2020. Decided July 23, 2020.

Davontae Sanford brought an action in the Court of Claims against the state of Michigan, seeking compensation under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*., after another man confessed to the crimes committed in 2007 to which plaintiff had pleaded guilty when he was 15 years old: four counts of second-degree murder and carrying a firearm during the commission of a felony. On April 4, 2008, plaintiff was sentenced to concurrent terms of 37 to 90 years in prison for the murder convictions, plus a consecutive two-year term for the felony-firearm conviction, with credit for the 198 days he spent in the Wayne County Juvenile Detention Facility. After an investigation into the other man's confession and with the stipulation of the prosecutor, the circuit court vacated plaintiff's convictions and sentences on June 6, 2016, and plaintiff was released from the custody of the Michigan Department of Corrections on June 8, 2016. Defendant admitted that plaintiff was entitled to $408,356.16 in compensation for the 8 years and 61 days he spent in a state correctional facility pursuant to the WICA's damages formula set forth in MCL 691.1755(2)(a), but defendant disputed whether plaintiff was entitled to $27,124.02 in compensation for the 198 days he spent in local detention. The Court of Claims, MICHAEL J. TALBOT, J., held that the time plaintiff spent in local detention was not compensable under the WICA, and it awarded plaintiff $408,356.16. Plaintiff appealed as of right, and the Court of Appeals (SWARTZLE, P.J., and CAVANAGH and CAMERON, JJ.), affirmed the Court of Claims in an unpublished per curiam opinion issued April 9, 2019 (Docket No. 341879). Plaintiff sought leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 505 Mich 963 (2020).

In an opinion by Justice ZAHRA, joined by Justices MARKMAN, VIVIANO, and CLEMENT, the Supreme Court, in lieu of granting leave to appeal, *held*:

Plaintiff was not entitled to compensation under the WICA for the time he spent in detention before his conviction because his preconviction detention was not "wrongful" under the statute. The Court of Appeals judgment was affirmed in result.

1. Under MCL 691.1753, an individual convicted under Michigan law and subsequently imprisoned in a state correctional facility for one or more crimes that he or she did not commit may bring an action for compensation against the state in the Court of Claims as allowed by the WICA. To bring an action for compensation under the WICA, a plaintiff must show by clear and convincing evidence that he or she served at least part of the sentence for those crimes, that the conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty, and that new evidence demonstrates that the plaintiff did not perpetrate the crime.

2. The compensation provision of the WICA, MCL 691.1755(2), states in part that if a court finds that a plaintiff was wrongfully convicted and imprisoned, the court must award the plaintiff $50,000 for each year from the date the plaintiff was imprisoned until the date the plaintiff was released from prison. The most natural reading of MCL 691.1755(2) is that the adverb "wrongfully" modifies both of the verbs that immediately follow it: "convicted" and "imprisoned." Therefore, the imprisonment referred to in MCL 691.1755(2) must be "wrongful." Applying MCL 691.1755(2)(a) to calculate the amount of compensation owed, the relevant date for application of the compensation formula is the date on which a plaintiff was wrongfully imprisoned. Consequently, regardless of where a plaintiff's imprisonment took place, it must have been wrongful in order to be compensable under the WICA.

3. The WICA does not define the word "wrongful," but both lay and legal dictionaries define it as "unfair" or "unjust." Under these definitions, plaintiff was not wronged by his preconviction detention because it was neither unfair nor unjust under the WICA. The unfairness or injustice addressed by the WICA is the imprisonment of an innocent person following a conviction. The WICA provides no compensation for individuals who are detained and then subsequently acquitted or released without a conviction. Further, the WICA repeatedly refers to imprisonment that occurs after a conviction, which demonstrates that the Legislature did not intend to compensate a plaintiff for the time he or she spent in preconviction detention. This conclusion was consistent with the WICA's status as a waiver of the state's sovereign immunity, given that plaintiff's preconviction detention was purely the result of local decision-making.

Court of Appeals judgment affirmed in result.

Chief Justice MCCORMACK, joined by Justices BERNSTEIN and CAVANAGH, dissenting, would have held that plaintiff was entitled

to compensation for all the time during which he was imprisoned for a crime that he did not commit. She stated that for purposes of the WICA, detention is "wrongful" if a plaintiff can satisfy the statute's eligibility requirements, which plaintiff did, and she stated that the majority's interpretation of the WICA engrafts a new limitation on compensable detention that the statute's text does not support. She disagreed with the majority's blanket determination that pretrial detention is never unfair or unjust, noting that pretrial detention of an innocent person, like posttrial detention of an innocent person, is unfair and unjust, as this case illustrated. She agreed with the parties and the courts below that the question of compensation turns on the meaning of "imprisoned" in MCL 691.1755(2), and she would have held that under the rule in *People v Spann*, 469 Mich 904 (2003), the imprisonment described in MCL 691.1755(2)(a) refers to any period of detention or confinement in the context of the criminal proceeding that led to a wrongful conviction, whether in juvenile or adult detention facilities and whether before or after conviction. For these reasons, Chief Justice MCCORMACK would have reversed the Court of Appeals and remanded this case to the Court of Claims for modification of the judgment award to compensate plaintiff for the 198-day period at issue in this appeal.

STATUTES — WRONGFUL IMPRISONMENT COMPENSATION ACT — PRECONVICTION DETENTION.

Under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*., an individual convicted under Michigan law and subsequently imprisoned in a state correctional facility for one or more crimes that he or she did not commit may bring an action for compensation against the state in the Court of Claims as allowed by the WICA; a plaintiff is not entitled to compensation under the WICA for time spent in detention before being convicted.

Goodman Hurwitz & James, PC (by *William H. Goodman* and *Julie H. Hurwitz*) for the plaintiff.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Christopher M. Allen*, Assistant Solicitor General, for the defendant.

Amicus Curiae:

David A. Moran, *Imran J. Syed*, and *Megan Richardson* for Eric Anderson and David Gavitt.

ZAHRA, J. The issue presented in this case is one of first impression arising from the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*., a relatively new law that became effective March 29, 2017. The WICA waives sovereign immunity and creates a cause of action for certain people wrongfully imprisoned by the state of Michigan. The question before this Court is whether the WICA authorizes compensation for the time plaintiff spent in detention before he was wrongfully convicted of a crime. We conclude that it does not, because plaintiff's preconviction detention was not "wrongful" for purposes of the WICA. We therefore affirm the result reached by the Court of Appeals.

I. BASIC FACTS AND PROCEEDINGS

Plaintiff, who was 15 years old at the time, pleaded guilty to four counts of second-degree murder and carrying a firearm during the commission of a felony in connection with a highly publicized and notorious quadruple homicide in Detroit on September 17, 2007. On April 4, 2008, he was sentenced by the circuit court to concurrent terms of 37 to 90 years in prison for the murder convictions, plus a consecutive 2-year term for the felony-firearm conviction, with credit for the 198 days he spent in the Wayne County Juvenile Detention Facility.

In May 2015, the Michigan State Police reopened the investigation into the murders after a self-proclaimed hit man and convicted murderer confessed to them. This newly discovered evidence indicated that plaintiff had not committed the crimes to which he had pleaded guilty and of which he was convicted. As a result of this investigation and with the stipulation of the prosecutor, the circuit court vacated plaintiff's

convictions and sentences on June 6, 2016, and plaintiff was released by the Michigan Department of Corrections (MDOC) on June 8, 2016. From April 8, 2008, to June 8, 2016, plaintiff spent 8 years and 61 days in the custody of the MDOC.

On July 27, 2017, plaintiff filed a complaint in the Court of Claims seeking compensation from defendant under the WICA. Defendant admitted that plaintiff was entitled to $408,356.16 in compensation for the 8 years and 61 days he spent in a state correctional facility pursuant to the WICA's damages formula set forth in MCL 691.1755(2)(a). But the parties disputed whether plaintiff was entitled to $27,124.02 in compensation for the 198 days he spent in local detention. The Court of Claims held that the time plaintiff spent in local detention is not compensable under the WICA, and it awarded plaintiff $408,356.16.

Plaintiff appealed as of right, and the Court of Appeals affirmed the Court of Claims in an unpublished per curiam opinion. Plaintiff sought leave to appeal in this Court, and in lieu of granting leave, we ordered oral argument on the application, directing the parties to file supplemental briefs addressing "whether the plaintiff is entitled to compensation under the Wrongful Imprisonment Compensation Act, MCL 691.1751 *et seq*., for time spent in a juvenile facility before he was convicted of a crime."[1]

II. STANDARD OF REVIEW

This Court reviews de novo questions of statutory interpretation.[2] The role of this Court in interpreting statutory language is to "ascertain the legislative in-

[1] *Sanford v Michigan*, 505 Mich 963; 937 NW2d 117 (2020).

[2] *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014).

tent that may reasonably be inferred from the words in a statute."[3] "The focus of our analysis must be the statute's express language, which offers the most reliable evidence of the Legislature's intent."[4] When the statutory language is clear and unambiguous, judicial construction is limited to enforcement of the statute as written.[5]

III. ANALYSIS

Before March 29, 2017, people who were wrongfully imprisoned by the state of Michigan had no recourse against it for compensation. "From the time of Michigan's statehood, this Court's jurisprudence has recognized that the state, as sovereign, is immune from suit unless it consents . . . ."[6] The WICA is an express waiver of the state's sovereign immunity. Specifically, MCL 691.1753 permits "[a]n individual convicted under the law of this state and subsequently imprisoned in a state correctional facility for 1 or more crimes that he or she did not commit" to "bring an action for compensation against this state in the court of claims as allowed by this act." To do so, the plaintiff must show that he or she "served at least part of the sentence" for those crimes.[7] A "state correctional facility" is defined in the WICA as "a correctional facility maintained and operated by the department of corrections."[8]

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[3] *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008).

[4] *Badeen v PAR, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014).

[5] *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008).

[6] *Pohutski v City of Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002), citing *Manion v State Hwy Comm'r*, 303 Mich 1, 19; 5 NW2d 527 (1942).

[7] MCL 691.1754(1)(a).

[8] MCL 691.1752(d).

The WICA's section governing compensation and burden of proof, MCL 691.1755, states in pertinent part:

> (1) In an action under this act, the plaintiff is entitled to judgment in the plaintiff's favor if the plaintiff proves all of the following by clear and convincing evidence:
>
> (a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.
>
> (b) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty. However, the plaintiff is not entitled to compensation under this act if the plaintiff was convicted of another criminal offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial.
>
> (c) New evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial.
>
> (2) Subject to subsections (4) and (5),[9] if a court finds that a plaintiff was wrongfully convicted and imprisoned, the court shall award compensation as follows:
>
> (a) Fifty thousand dollars for each year from the date the plaintiff was imprisoned until the date the plaintiff was released from prison, regardless of whether the plain-

[9] MCL 691.1755(4) provides that "[c]ompensation may not be awarded under subsection (2) for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction." MCL 691.1755(5) provides that "[c]ompensation may not be awarded under subsection (2) for any injuries sustained by the plaintiff while imprisoned." Neither subsection is applicable in this case.

> tiff was released from imprisonment on parole or because the maximum sentence was served. For incarceration of less than a year in prison, this amount is prorated to 1/365 of $50,000.00 for every day the plaintiff was incarcerated in prison.

In this case, plaintiff's entitlement to compensation is not in dispute, as defendant concedes that plaintiff has established the requirements set forth in MCL 691.1755(1). The narrow question presented relates to the scope of the compensation available under the WICA—specifically, whether under MCL 691.1755(2) plaintiff is entitled to compensation for the time he spent in detention before his conviction.

In analyzing these provisions, we must keep in mind that the WICA does not broadly direct courts to make those who were wrongfully imprisoned whole. Indeed, no amount of compensation could sufficiently remedy the deprivation of liberty suffered by those entitled to compensation under the WICA. But, as a matter of public policy, the Legislature has waived its sovereign immunity to provide a defined class of wrongfully imprisoned people a path to limited compensation. It is the exclusive province of the Legislature to define when and to what extent the state of Michigan relinquishes its sovereign immunity.

Plaintiff asserts that the WICA is properly considered a remedial statute, which calls for a liberal construction from this Court.[10] Defendant counters that the WICA constitutes a waiver of sovereign immunity, which must be strictly construed.[11] But, in

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[10] See *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 611; 566 NW2d 571 (1997).

[11] *Pohutski*, 465 Mich at 681 ("[T]he state, as sovereign, is immune from suit unless it consents, and . . . any relinquishment of sovereign immunity must be strictly interpreted.").

giving meaning to the WICA, we decline to rely on the interpretive rules advocated for by either party. A " 'rule of liberal construction will not override other rules where its application would defeat the intention of the legislature or the evident meaning of an act.' "[12] And "[t]his Court has more recently tended to restrain calls for liberal or strict construction, opting instead for a reasonable construction of all legal texts."[13] Consequently, we find no need to place a thumb on the scale in favor of one party over the other, and this Court will take a reasonable-construction approach in giving meaning to the unambiguous language of the WICA.

From this perspective, we turn to the issue of statutory interpretation. We conclude that the WICA provides sufficient textual clues to support the Court of Appeals' holding that plaintiff may not be compensated for the time he spent in detention before his conviction, although we reach this conclusion for different reasons.

Plaintiff concedes that, in order to qualify for any compensation under the WICA, a plaintiff must serve some time in a state correctional facility, a requirement established by MCL 691.1753, MCL 691.1754(1), and MCL 691.1755(1)(a). Plaintiff and defendant primarily disagree about the meaning of the term "imprisoned" as used in the compensation provision of MCL 691.1755(2)(a). Plaintiff argues that dictionary definitions of the terms "imprison" and "imprisonment" are

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[12] *People v Prieskorn*, 424 Mich 327, 340; 381 NW2d 646 (1985), quoting 3 Sands, Sutherland Statutory Construction (4th ed), § 60.01.

[13] *McQueer v Perfect Fence Co*, 502 Mich 276, 293 n 29; 917 NW2d 584 (2018), citing *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 71; 894 NW2d 535 (2017), and Corrigan & Thomas, *"Dice Loading" Rules of Statutory Interpretation*, 59 NYU Ann Surv Am L 231, 231-233 (2003).

broad enough to encompass confinement in a local facility, meaning the entirety of his detention is compensable. In contrast, defendant contends that "imprisoned" for purposes of this subsection refers solely to confinement in a state correctional facility. The Court of Appeals agreed with defendant's interpretation, concluding that the "threshold requirement" of "imprisonment in a state correctional facility" imposed after conviction "anchors" the amount of compensation referred to in MCL 691.1755(2)(a).[14] But this Court need not define the exact contours of the term "imprisoned" as used in MCL 691.1755(2)(a) in order to resolve this case. Regardless of which types of detention might generally qualify as "imprisonment," the WICA clearly requires that any compensable imprisonment be "wrongful," and preconviction detention is simply not wrongful in this context.

It cannot be disputed that the WICA is intended to compensate only those who were wrongfully imprisoned. Indeed, the act is named the "*wrongful imprisonment* compensation act,"[15] and it is described as an act "to provide compensation and other relief for individuals *wrongfully imprisoned* for crimes . . . ."[16] The par-

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[14] *Sanford v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued April 9, 2019 (Docket No. 341879), p 3.

[15] MCL 691.1751 (emphasis added).

[16] 2016 PA 343 (emphasis added). "Sometimes, too, the title or heading is the longhand reference for an elliptical text." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 222. To further elucidate this proposition, the authors of *Reading Law* rely on a remarkably apt opinion from this Court: *Burrows v Delta Transp Co*, 106 Mich 582; 64 NW 501 (1895). In *Burrows*, the title of the act at issue provided "that steam vessels shall provide fire screens, etc., while section 1 of the body of the act provide[d] that all vessels . . . shall have fire screens, etc. . . ." *Id*. at 605. This Court held that "the mere omission of the word 'steam' before the word 'vessels,' in section 1 of the act, . . . does not render the act repugnant in its terms. Clearly, it means

ticular compensation subsection at issue, MCL 691.1755(2), provides that a court shall award compensation under Subsection (2)(a) "if a court finds that a plaintiff was *wrongfully convicted and imprisoned* . . . ."[17] The most natural reading of MCL 691.1755(2) is that the adverb "wrongfully" modifies both verbs immediately following it, which are separated by the conjunctive "and."[18] Thus, the imprisonment referred to in MCL 691.1755(2) must be "wrongful." Applying MCL 691.1755(2)(a) to calculate the amount of compensation owed, the relevant date for application of the compensation formula is the date on which a plaintiff was *wrongfully* imprisoned. This is an unremarkable conclusion, as even plaintiff's counsel acknowledged at oral argument that "wrongfully" modifies "imprisoned" in MCL 691.1755(2)(a). Consequently, regardless of where a plaintiff's "imprisonment" took place, it must have been "wrongful" in order to be compensable under the WICA.

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all steam vessels . . . ." *Id*. at 605-606. The same is true here, as the WICA does not mean to allow compensation for any "imprisonment," but clearly means to compensate "wrongful imprisonment."

[17] Emphasis added.

[18] A general rule of statutory construction is that the meaning of a word or phrase "is determined by its context, the rules of grammar, and common usage." Model Statute and Rule Construction Act, § 2; see also McCaffrey, Statutory Construction (1953), § 21; Crawford, Construction of Statutes (1940), § 196; 2A Sands, Sutherland Statutory Construction (4th ed), § 47.01, text and commentary; *Porto Rico R, Light & Power Co v Mor*, 253 US 345, 348; 40 S Ct 516; 64 L Ed 944 (1920) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."); *Reading Law*, p 147 (explaining that, under the "Series-Qualifier Canon," "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series," regardless of whether the modifier is an adjective or an adverb) (boldface omitted).

The WICA does not define the word "wrongful," so we turn to dictionary definitions of the term.[19] "Wrongful," when accorded its common and approved usage as found in a lay dictionary,[20] means "wrong" and "unjust."[21] The most relevant definition of "wrong" in that dictionary is "an injurious, unfair, or unjust act: action or conduct inflicting harm without due provocation or just cause."[22] *Black's Law Dictionary* (11th ed) similarly defines "wrongful" in pertinent part as "[c]haracterized by unfairness or injustice." Given that these definitions are substantially the same, we need not determine whether "wrongful" constitutes a legal term of art, but can rely on either dictionary.[23]

Under these definitions, plaintiff was not "wronged" by his preconviction detention.[24] The preconviction

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[19] "An undefined statutory term must be accorded its plain and ordinary meaning." *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008), citing MCL 8.3a. "A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning." *Brackett*, 482 Mich at 276. Courts should ordinarily use a dictionary that is contemporaneous with the statute's enactment. *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 563 n 58; 886 NW2d 113 (2016). In contrast, a legal term of art "must be construed in accordance with its peculiar and appropriate legal meaning." *Brackett*, 482 Mich at 276, citing MCL 8.3a.

[20] See MCL 8.3a.

[21] *Merriam-Webster's Collegiate Dictionary* (11th ed) (formatting altered).

[22] *Id*.

[23] If the definitions of a phrase are the same in both a lay dictionary and legal dictionary, it is unnecessary to determine whether the phrase is a term of art, and it does not matter to which type of dictionary this Court resorts. *Brackett*, 482 Mich at 276.

[24] We hold only that plaintiff is not entitled to compensation for the time he spent in detention before his conviction. Because plaintiff does not specifically argue that he should be compensated for the time he spent in detention after his conviction but before sentencing or his placement in the custody of the MDOC, we decline to consider this issue.

detention was neither "unfair" nor "unjust" under the WICA. The "unfairness or injustice" addressed by the WICA is the imprisonment of an innocent person *following* a conviction. The WICA undisputedly provides no compensation for individuals who are detained and then subsequently acquitted or released without a conviction. Indeed, the WICA repeatedly refers to imprisonment *following* a conviction. For example, MCL 691.1753 creates a claim for individuals who are "convicted . . . and *subsequently* imprisoned." MCL 691.1754(1)(a) and MCL 691.1755(1)(a) require a plaintiff to show that he or she was "convicted," "sentenced to a term of imprisonment," and served part of "the sentence," clearly envisioning imprisonment subsequent to a conviction. MCL 691.1755(2) allows compensation for plaintiffs who were "wrongfully convicted and imprisoned." MCL 691.1757 refers to an individual who was "convicted, imprisoned, and released from custody." And MCL 691.1752(a) refers to charges that resulted in "the conviction and imprisonment of the plaintiff." All these provisions refer to imprisonment that occurs *after* a conviction, demonstrating that the Legislature did not intend to compensate a plaintiff for the time he or she spent in preconviction detention.

This conclusion that the WICA does not compensate plaintiff for the time he spent in detention before his conviction is consistent with the WICA's status as a waiver of the state's sovereign immunity. It makes sense that the Legislature would decline to compensate plaintiff for preconviction detention that was purely the result of local decision-making. The Legislature could have written the WICA as a wrongful-prosecution act or a wrongful-arrest-compensation act, but it did not do so. Rather, the "wrong" addressed by the WICA is imprisonment following a conviction, not preconviction detention. While it is unfortunate that

plaintiff spent any time in detention before his wrongful conviction, a reading of the WICA in its entirety reveals that the Legislature did not intend to hold the state accountable to plaintiff for his preconviction detention.

IV. CONCLUSION

We hold that plaintiff may not be compensated under the WICA for the time he spent in detention before his conviction. The WICA permits compensation for wrongful imprisonment, and plaintiff's preconviction detention was not "wrongful" under the WICA. We therefore affirm the result reached by the Court of Appeals.

MARKMAN, VIVIANO, and CLEMENT, JJ., concurred with ZAHRA, J.

MCCORMACK, C.J. (*dissenting*). Everyone agrees that the plaintiff, Davontae Sanford, is eligible for compensation under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*. The only disagreement is the period for which compensation is due: should the time that Mr. Sanford spent in a juvenile detention facility before and after his guilty plea be counted? The parties' disagreement on this question reflects their competing understandings of the word "imprisoned." The majority goes a different way. It answers the question in the negative because it believes Mr. Sanford's pretrial detention, unlike the time he served after his plea, was not "wrongful." While the Court defines "wrongful" as "characterized by unfairness or injustice," it's not clear to me why that definitional work matters. The majority makes no attempt to decide whether Mr. Sanford's pretrial de-

tention was fair or just, instead declaring that only detention following conviction is "unfairness or injustice" according to the WICA.

I respectfully disagree. This interpretation of the WICA engrafts a new limitation on compensable detention that the statute's text does not support: the statute doesn't allow us to decide whether we think Mr. Sanford's pretrial detention was wrongful, unfair, or unjust. But even applying the majority's new eligibility hurdle, I disagree with the majority's blanket determination that pretrial detention is never unfair or unjust. Pretrial detention of an innocent person, like post-trial detention of an innocent person, is unfair and unjust. This case illustrates. And for the WICA, it is "wrongful" if a plaintiff can satisfy the statute's eligibility requirements, which everyone agrees Mr. Sanford has.

I agree with the parties and the courts below that the question of compensation turns on the meaning of "imprisoned" in the WICA's compensation section. See MCL 691.1755(2). Based on the statute's text, our precedent, the remedial nature of the act, and common sense, I conclude that Mr. Sanford was "imprisoned" every day that he was confined in a juvenile detention facility for a crime that he did not commit and is therefore due compensation for the time he was detained before and after his conviction. I would reverse the Court of Appeals judgment and remand this case to the Court of Claims for modification of the judgment award. I respectfully dissent.

I. "WRONGFUL" CONVICTION AND IMPRISONMENT

The WICA defines *who is eligible for compensation* in MCL 691.1755(1) and *how an eligible plaintiff must be compensated* in MCL 691.1755(2). Two questions, two steps.

Step One. As for eligibility, "the plaintiff is entitled to judgment" if he or she proves, by clear and convincing evidence, that he or she was convicted of a crime, the conviction led to "imprisonment in a state correctional facility," the conviction was reversed or vacated as a result of new evidence showing the plaintiff "did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction," and the charges were subsequently dismissed or a retrial led to a not-guilty verdict. MCL 691.1755(1)(a) through (c).

Step Two. Once eligible for compensation, the statute directs how to calculate an award: "[I]f a court finds that a plaintiff was wrongfully convicted and imprisoned, the court shall award compensation as [set forth in MCL 691.1755(2)(a) through (c).]" MCL 691.1755(2). And in MCL 691.1755(2)(a), the WICA guarantees payment of $50,000 for every year that the eligible plaintiff was "imprisoned."

The question the parties asked us to decide is whether the WICA provides Mr. Sanford with compensation for the 198 days he was detained in a juvenile detention facility before, during, and after his trial.[1]

[1] Mr. Sanford was arrested on September 18, 2003, convicted on March 18, 2004, sentenced on April 4, 2004, and transferred to the custody of the MDOC on April 8, 2004. The parties have focused their arguments on the 198-day period beginning with the date of arrest (September 18, 2003) and ending with the date of sentencing (April 4, 2004). As the majority's analysis shows, this period comprises preconviction time (between arrest and plea) and also time following conviction but before sentencing. It is not clear why Mr. Sanford's 198-day tally does not include the four days of detention between his sentencing and transfer to the MDOC. His interpretation of the WICA would require compensation for this period, because it was time that he was "imprisoned." Neither the state nor Mr. Sanford (nor the majority) has identified any reason for viewing these four days differently than the postconviction, presentencing period.

Whether that time is compensable, they say, depends on how the Court should understand the term "imprisoned" in MCL 691.1755(2)(a). Not surprisingly, that is also how the Court of Appeals analyzed the case. Siding with the state, the panel concluded that the WICA provides compensation only for time that a person is imprisoned in a correctional facility operated by the Michigan Department of Corrections (MDOC) because "[t]he first threshold requirement in [MCL 691.1755(1)(a)], referring 'to a term of imprisonment in a state correctional facility' imposed after conviction, . . . anchors the amount of compensation, which is calculated 'from the date the plaintiff was imprisoned[.]' " *Sanford v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued April 9, 2019 (Docket No. 341879), p 3. That is, blending Step One (eligibility) and Step Two (compensation calculation), the panel held that the eligibility requirement that a plaintiff serve time *in a state correctional facility* should be read into the compensation section's use of the term "imprisoned."

The majority takes a different path. The Court states that it is *not* deciding "the exact contours of the term 'imprisoned' as used in MCL 691.1755(2)(a) . . . ." In its place, the majority claims that the prefatory, eligibility-referencing clause of the compensation section—"if a court finds that a plaintiff was wrongfully convicted and imprisoned"—resolves this appeal. This clause, the majority asserts, effectively adds another eligibility requirement: once eligible for compensation, the WICA then limits compensation only for detention that is "wrongful." The majority defines "wrongful" to mean "characterized by unfairness or injustice." And because "[t]he WICA undisputedly provides no compensation for individuals who are detained and then subsequently acquitted or released

without a conviction," the majority concludes that the only "unfairness or injustice" that the WICA contemplates "is the imprisonment of an innocent person *following* a conviction."

I respectfully disagree. What made *all* of Mr. Sanford's detention "wrongful" for purposes of the WICA was the fact that he satisfied the act's eligibility requirements. And he satisfied those requirements because he was innocent before and after his conviction. The majority has conflated the eligibility requirements with the compensation determination.

The WICA's eligibility section requires a plaintiff to make a specific showing about the wrongfulness of his or her detention. It requires the plaintiff to prove that he or she was convicted of a crime, the conviction led to imprisonment in a state correctional facility, the conviction was reversed or vacated as a result of new evidence showing that the plaintiff did not commit the crime, and the charges were subsequently dismissed or a retrial led to a not-guilty verdict. MCL 691.1755(1)(a) through (c). The plaintiff who establishes these elements is a plaintiff who "is entitled to judgment" in his or her favor. MCL 691.1755(1).

The next section of the statute is the compensation section. It starts with this introductory clause: "Subject to [MCL 691.1755(4) and (5)], *if a court finds that a plaintiff was wrongfully convicted and imprisoned*, the court shall award compensation as follows . . . ." MCL 691.1755(2) (emphasis added). This prefatory language refers to a plaintiff who meets the eligibility requirements in MCL 691.1755(1); it describes a plaintiff who, like Mr. Sanford, "is entitled to judgment" under the WICA and then directs the court to award compensation to this plaintiff "as follows . . . ."

The majority's contrary interpretation confuses the act's eligibility requirements with its compensation formula. That is, the term "wrongfully" in MCL 691.1755(2) does not layer on a new eligibility requirement, nor does it limit an eligible plaintiff's compensation based on a court's subjective sense of whether some or all of the plaintiff's detention was "fair" or "just."

In concluding otherwise, the majority appeals to its sense of fairness—why should Mr. Sanford receive compensation for pretrial detention when that remedy is not available for innocent defendants who are acquitted at trial? The answer, of course, is that Mr. Sanford satisfied the act's specific eligibility requirements. And that result is hardly remarkable. After all, the WICA, like any legislation, is the result of numerous policy choices, many of which reflect compromises. For example, by conditioning eligibility on "imprisonment in a state correctional facility," the Legislature excluded from compensation people who are (wrongly) convicted of misdemeanor offenses, even when that conviction results in a term of imprisonment in a local detention facility. And by excluding people who are never convicted at all, perhaps the Legislature recognized that a verdict of "not guilty" is not the same as "innocent," and asking courts to determine whether an acquitted-defendant-turned-WICA-plaintiff is innocent would be difficult. That decision would be in accord with the requirement that a WICA plaintiff present new evidence demonstrating that he or she did not perpetrate the crime for which he or she was convicted. See MCL 691.1755(1)(c). Or perhaps the WICA's eligibility requirements reflect the view that a conviction can be uniquely harmful, in ways that a criminal trial ending in an acquittal is not.

We don't know what led to the Legislature's decision to fashion the particular eligibility requirements it did, but they are clear. The Legislature could have said that the act's eligibility requirements also limit what part of a plaintiff's detention is compensable. Or it could simply have said that no pretrial detention is compensable, as the majority says today. But it didn't. So I wouldn't either. I would stick with the statute's text rather than import the eligibility requirements to its compensation formula through a prefatory clause.[2]

There are other indications that the majority's interpretation is not the best one. As the majority recognizes, "wrongful" can mean "characterized by unfairness or injustice." Yet it views pretrial detention as categorically *not* wrongful, no matter the facts. That is, all pretrial detention is fair and just, as far as the statute is concerned. But consider a hypothetical plaintiff who discovers, years after conviction and well into a long sentence, that the state had withheld exculpa-

[2] The majority thinks it "makes sense" that the Legislature would not provide compensation for pretrial detention of an innocent person because that detention is the result of "local decision-making." But of course postconviction detention is also the result of local decision-making in every case where pretrial detention was the result of local decision-making. That is, the investigation of crimes in this state is typically performed by local police, and prosecuted in our district and circuit courts by county prosecutors. So when a criminal defendant is convicted of a crime and sentenced to a term of imprisonment in a state correctional facility—imprisonment that the majority agrees is compensable—that imprisonment is the result of local decision-making. And that is what happened here: the very same local decision-makers asked a court to detain Mr. Sanford before and after his plea.

Yes, the WICA operates as a waiver of state sovereign immunity, in that the Legislature has now permitted suit against the state to provide redress for lost liberty where before it did not. But had the Legislature intended to provide a remedy only for convictions that resulted from "state" decision-making, it would have limited the cause of action to plaintiffs whose cases were prosecuted by the state's Attorney General.

tory evidence from the plaintiff's arrest. This hypothetical plaintiff's incarceration was unjust and unfair from the moment this evidence was withheld, if not earlier. I believe most would agree. But the majority holds that this hypothetical plaintiff would not be entitled to any compensation for the time he or she served before being convicted, because such detention was not "wrongful."

The weakness in the majority's rule is also showcased by its incomplete analysis. The Court does not resolve whether Mr. Sanford is due compensation for the time between his conviction and sentencing (or between his sentencing and transfer to the MDOC). The majority identifies his *conviction* as the moment Mr. Sanford's detention became "wrongful," but the Court refuses to answer whether Mr. Sanford's detention before sentencing was "wrongful" under the WICA. The majority acknowledges this gap in its analysis but declines to address it, saying only that Mr. Sanford "does not specifically argue that he should be compensated for the time he spent in detention after his conviction but before sentencing or his placement in the custody of the MDOC . . . ."

But Mr. Sanford has always argued that his entire period of detention (before and after conviction) is compensable. True, Mr. Sanford does not present an argument *specific* to the postconviction, presentencing period. But that makes sense because throughout this litigation, the state and the courts have viewed the compensation issue as turning on the meaning of "imprisoned" in MCL 691.1755(2). And what is left for him to argue? The majority says that "the 'wrong' addressed by the WICA is imprisonment following a conviction," and Mr. Sanford has always argued that he was imprisoned between conviction and sentencing.

The Court does not have to accept either party's argument as the correct view of the law, but its decision today—that compensation is limited to the periods of detention that are "wrongful"—should be applied to fully resolve Mr. Sanford's claim. And applying what appears to be the majority's view of when imprisonment becomes wrongful—the moment of his conviction—I do not understand why the majority declines to grant Mr. Sanford partial relief in this appeal, for the period following his conviction and before his sentence and transfer to the MDOC.

II. THE WICA PROVIDES COMPENSATION FOR ALL OF THE TIME THAT MR. SANFORD WAS "IMPRISONED"

This leads to the question briefed by the parties and decided by the courts below: the meaning of "imprisoned" in the compensation section of the WICA.

Neither "imprisoned" nor its variants ("imprisonment" and "prison") are defined by the WICA, so the parties offer competing dictionary definitions. Mr. Sanford says that these terms refer to state-enforced detention or confinement in the context of a criminal proceeding, regardless of when or where that detention or confinement occurs. See *Black's Law Dictionary* (11th ed) (defining "prison" as "[a] building or complex where people are kept in long-term confinement as punishment for a crime, *or in short-term detention while waiting to go to court as criminal defendants*") (emphasis added); *Black's Law Dictionary* (6th ed) (defining "imprison" as "[t]o put in a prison; to put in a place of confinement. To confine a person, or restrain his liberty, in any way"). The state counters with its own definitions, arguing that these terms refer to the confinement of *convicted* people and only when that confinement occurs at a facility operated by the state

(and not, for example, a county jail). See, e.g., *Black's Law Dictionary* (7th ed) (defining "prison" as "[a] state or federal facility of confinement for convicted criminals, esp. felons"). Both parties say that their interpretation reflects the WICA's plain and ordinary meaning.

We have addressed this question, and our answer supports Mr. Sanford's position. In *People v Spann*, 469 Mich 904 (2003), this Court considered MCL 333.7401(3), the consecutive-sentencing provision of the controlled substances act (CSA), MCL 333.7401 *et seq*. Section 7401(3) creates an exception to Michigan's general preference for concurrent sentencing; it allows the trial court to make a sentence for certain violations of the CSA consecutive with "any term of imprisonment imposed for the commission of another felony." The question in *Spann* was whether the CSA's reference to a "term of imprisonment" included a jail sentence. Unlike the state's position here, the prosecution in *Spann* argued that "term of imprisonment" unambiguously referred to incarceration in a correctional facility operated by the MDOC *and* incarceration in a county jail. The Court of Appeals agreed that the statutory language encompassed a term of incarceration in the county jail. *People v Spann*, 250 Mich App 527, 529; 655 NW2d 251 (2002). But the panel viewed it as a close question, stating that "the language of subsection 7401(3) is susceptible to differing interpretations" because "term of imprisonment" could arguably mean either "confinement in a state prison" or, more broadly, " '[t]he state of being confined; a period of confinement.' " *Spann*, 250 Mich App at 530-531, quoting *Black's Law Dictionary* (7th ed). It resolved the interpretive issue by reasoning that a broader interpretation—that including a sentence of jail incarceration—would further the legislative purpose of "deter[ring] controlled substance crimes for the protection of the public health, safety, and welfare." *Id*.

We affirmed by order. *Spann*, 469 Mich at 904. But we disagreed with the Court of Appeals that the phrase "term of imprisonment" was ambiguous. We explained that

> [u]ndefined statutory terms should be given their plain and ordinary meanings, for which dictionaries may be consulted. . . . Further, the Legislature often has used the term 'imprisonment' to mean confinement in jail as well as confinement in prison. . . . Thus, while declaring the term ambiguous, even the analysis used by the Court of Appeals in this case demonstrated that the statute is not ambiguous. [*Id*. at 905.]

Our decision in *Spann* supports Mr. Sanford's position that he is owed compensation for the entire 198-day period he spent incarcerated before being transferred to the MDOC, because it was all time that he was confined for crimes he did not commit. MCL 691.1755(2)(a) directs that the compensable period begins "the date the plaintiff was imprisoned." In Mr. Sanford's case, that date is September 18, 2003, the day of his arrest, which marked the beginning of his continued imprisonment until his release in June 2016.[3]

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[3] Indeed, our "jail credit" statute, MCL 769.11b, required the trial court to grant Mr. Sanford credit for time served in the juvenile detention facility "prior to [his] sentencing because of being denied or unable to furnish bond for the offense of which he is convicted . . . ." By requiring the court to credit time spent detained before trial against a sentence imposed after conviction, the Legislature has shown that pre- and postsentencing detention comprise one continuous sentence of incarceration.

In Mr. Sanford's case, the jail credit was for a period of around 6½ months. But as amici point out, it is not uncommon for criminal defendants to be detained upwards of a year while awaiting trial, and in some jurisdictions far longer than that. It seems unlikely that the Legislature intended eligible plaintiffs to receive more or less compensation depending on the speedy trial practice of the jurisdiction in which they are prosecuted. In the context of the WICA, and the remedy it

The state also argues that language from the eligibility section of the WICA informs the meaning of "imprisonment" in the compensation section. Because the Legislature conditions eligibility in MCL 691.1755(1)(a) on a plaintiff's having been "sentenced to a term of imprisonment *in a state correctional facility*," the argument goes, the Court should read that same limitation into "imprisoned" when interpreting the compensation section, MCL 691.1755(2)(a). But this turns on its head the principle that "when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion." *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011), citing *Russello v United States*, 464 US 16, 23; 104 S Ct 296; 78 L Ed 2d 17 (1983).

And what's more, if the Legislature intended the term "prison" and its variants to refer only to a "correctional facility maintained and operated by the department of corrections," see MCL 691.1752(d) (defining "state correctional facility" for the WICA), then there is no reason for it to have referred to both prisons and state correctional facilities, as it did in MCL 691.1755. Compare MCL 691.1755(1)(a) (referring to "a term of imprisonment *in a state correctional facility*") with MCL 691.1755(2)(a) (explaining that the $50,000-per-year award "is prorated to 1/365 of $50,000.00 for every day the plaintiff was incarcerated *in prison*").[4] In other words, the state's contextual

provides to people who are convicted of crimes they did not commit, pretrial imprisonment is no less wrongful, or less deserving of compensation, than the postconviction imprisonment that succeeds it.

[4] "Prison" and "state correctional facility" are the only terms used in the WICA to describe a location where "imprisonment" might occur. Absent from the act are words like "jail" and "juvenile detention facility."

argument would have this Court interpret these terms interchangeably, ignoring the Legislature's precise language in MCL 691.1755(1)(a), describing who is eligible for compensation under the WICA, and its markedly broader language in MCL 691.1755(2)(a), describing what compensation is due for those who are eligible to receive it.

For all these reasons, I believe the imprisonment described in MCL 691.1755(2)(a) refers to any period of detention or confinement in the context of the criminal proceeding that led to a wrongful conviction, whether in juvenile or adult detention facilities, and whether before or after conviction. That interpretation tracks this Court's rule that "imprisonment" unambiguously refers to confinement in facilities other than a state correctional facility operated by the MDOC. *Spann*, 469 Mich at 905. It also gives meaning to the Legislature's choice to limit compensation eligibility to people who are convicted of a crime and "imprisoned in a state correctional facility" but to calculate compensation for time that an eligible plaintiff was "imprisoned." It explains the Legislature's decision to use the statutorily defined term "state correctional facility" while also using the undefined word "prison." It follows our state's longstanding rules governing sentencing, under which a criminal defendant's pretrial detention is credited to the postconviction sentence. And finally, it aligns with the remedial purpose of the WICA, which is to provide people convicted of crimes they did not commit with compensation for the great wrong done to them.

III. CONCLUSION

I believe Mr. Sanford is entitled to compensation for all of the time during which he was "imprisoned" for a

crime that he did not commit, which includes the 198-day period at issue in this appeal. I would reverse the Court of Appeals and remand this case to the Court of Claims for modification of the judgment award to account for this time. I respectfully dissent.

BERNSTEIN and CAVANAGH, JJ., concurred with MCCORMACK, C.J.

BISIO v THE CITY OF THE VILLAGE OF CLARKSTON

Docket No. 158240. Argued March 5, 2020 (Calendar No. 4). Decided July 24, 2020.

Susan Bisio sued the City of the Village of Clarkston in the Oakland Circuit Court for allegedly violating the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. Bisio filed a FOIA request with Clarkston seeking documents related to city business, including correspondence between Clarkston's city attorney and a consulting firm concerning a development project and vacant property in the city. Clarkston denied Bisio's request with regard to certain documents in the city attorney's file. The city attorney, a private attorney who contracted with the city to serve as its city attorney, claimed that the requested documents were not "public records" as defined by MCL 15.232(i). The city attorney reasoned that he was not a "public body," as defined by MCL 15.232(h), and because the requested documents were never in the possession of the city, which was a public body, the requested documents were not public records subject to a FOIA request. The trial court, Leo Bowman, J., granted summary disposition in favor of Clarkston, concluding that the documents at issue were not public records because there was no evidence to show that Clarkston had used or retained them in the performance of an official function or that the city attorney had shared the documents with Clarkston to assist the city in making any decision. The Court of Appeals, BECKERING, P.J., and M. J. KELLY and O'BRIEN, JJ., affirmed the trial court's ruling in an unpublished per curiam opinion but reasoned that Bisio's FOIA request was properly denied because the city attorney was merely an agent of Clarkston and the definition of "public body" in MCL 15.232(h) did not encompass an agent of a public body. The Supreme Court granted Bisio's application for leave to appeal. 504 Mich 966 (2019).

In an opinion by Justice MARKMAN, joined by Justices ZAHRA, BERNSTEIN, CLEMENT, and CAVANAGH, the Supreme Court *held*:

1. The purpose of FOIA is to facilitate full participation in the democratic process by providing the people of Michigan with full and complete access to information regarding the affairs of government, public officials, and public employees. Except in

cases of specifically delineated exceptions, a person who submits a FOIA request to a public body for a public record is entitled to inspect, copy, or receive copies of the requested public record. What ultimately determines whether a writing is a public record under FOIA is whether a public body prepared, owned, used, possessed, or retained it in the performance of an official function. MCL 15.232(h)(*i*) provides that "public body" means a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government. Thus, while the term "public body" suggests a collective entity, the statutory language provides that a *single officer or individual* may be considered a public body under FOIA. Moreover, MCL 15.232(h) indicates that a *single office* may also be considered a "public body" for purposes of FOIA. MCL 15.232(h)(*i*) expressly excludes the governor and lieutenant governor from the definition of public body, as well as "the executive office of the governor or lieutenant governor" and employees of those offices. Because these two executive offices do not constitute a state officer, employee, agency, department, division, bureau, board, commission, council, or authority under MCL 15.232(h)(*i*) as those terms are commonly understood, it must be that these two executive offices are "other bod[ies]" under MCL 15.232(h)(*i*). Therefore, an "other body" under this provision of the statute must include an "office" within the executive branch of state government, which is consistent with MCL 15.232(h)(*iv*). Under MCL 15.232(h)(*iv*), a public body includes any "other body that is created by state or local authority or is primarily funded by or through state or local authority," excluding "the judiciary, including the office of the county clerk and its employees when acting in the capacity of" circuit court clerk. The exclusion of the office of the county clerk from the statutory definition of public body indicates that the office constitutes an "other body" that would otherwise be included in the definition. Therefore, an "other body" in both MCL 15.232(h)(*i*) and MCL 15.232(h)(*iv*) must include an "office."

2. Clarkston's city charter expressly recognizes several administrative officers, including "the City Attorney." The charter further provides that the named administrative officers occupy "offices" within the city. Because the charter thus creates an office of the city attorney, this office is a public body in that it constitutes an "other body" created by local authority under MCL 15.232(h)(*iv*). It cannot be reasonably disputed that the office of the city attorney retained the documents at issue in the performance of an official function pursuant to MCL 15.232(i). Therefore, the documents were public records for the purposes of FOIA.

Judgment of the Court of Appeals reversed and case remanded.

Chief Justice MCCORMACK, concurring, agreed with the majority that the documents requested by Bisio were public records subject to disclosure under FOIA, but she wrote separately to address the issue the court granted leave to decide: whether common-law agency principles apply to FOIA such that the records created by a public body's agent while representing the public body in government affairs are subject to disclosure. She concluded that common-law agency principles are applicable. Therefore, Clarkston's city attorney was an agent of the city, and as such his written communications with third parties were public records, regardless of whether the documents were ever in the city's possession. Because the city attorney created the requested documents while representing Clarkston in the course of conducting government business, the documents were subject to disclosure under FOIA. Common-law agency principles apply to FOIA because the common law applies to statutory law unless it is affirmatively abrogated by the Legislature. Because there was no evidence that the Legislature intended that the common-law theory of agency not apply to FOIA, she presumed that it is applicable. Further, because a city is an artificial entity that can only act through its agents and employees, if agency principles were not applicable to FOIA, no records from a municipal corporation would be subject to disclosure.

Justice VIVIANO, dissenting, disagreed with the majority's decision to adopt a theory of the case presented in an amicus brief and believed that the dispute in the case concerned whether Clarkston was required to turn over its city attorney's files on the basis of an agency theory. The parties conceded that the city attorney was not, individually, a public body, and moreover, that an individual does not qualify as a public body under MCL 15.232(h)(*iv*). Justice VIVIANO disagreed that Clarkston's city charter created an "office of the city attorney" and instead concluded that the charter established the city attorney as an administrative officer of the city. As used in the charter, an "office" is simply a position of public authority occupied by an officer. Because the city attorney was not a collective entity, but an individual, the city attorney could not be a public body under FOIA. Further, the majority's holding would radically expand the definition of "public body" under FOIA such that it would be interpreted to encompass all officers of local governmental units. Justice VIVIANO would have affirmed the Court of Appeals because it reached the right result for the right reasons on the issue presented.

FREEDOM OF INFORMATION ACT — PUBLIC BODIES — ANY OTHER BODY CREATED BY LOCAL AUTHORITY — OFFICE OF THE CITY ATTORNEY.

Under MCL 15.231 of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., "all persons . . . 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"; MCL 15.232(i) provides that a public record subject to disclosure is a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function from the time it is created; MCL 15.232(h) defines the term "public body" as including any other body that is created by state or local authority; under MCL 15.232(h), a single officer, a single individual, and a single office may, in particular circumstances, be considered a "public body" for purposes of FOIA; when a city charter creates an office of the city attorney, such office is a public body because the office is an other body that is created by local authority under MCL 15.232(h)(*iv*).

Kemp Klein Law Firm (by *Richard Bisio*) for Susan Bisio.

O'Connor, DeGrazia, Tamm & O'Connor, PC (by *Julie McCann O'Connor* and *James E. Tamm*) for the City of the Village of Clarkston.

Amicus Curiae:

Butzel Long, PC (by *Robin Luce Herrmann* and *Joseph E. Richotte*) for the Michigan Press Association; the Michigan Association of Broadcasters; the Reporters Committee for Freedom of the Press; the Detroit Chapter of the Society of Professional Journalists; The New York Times Company; The Detroit News; The Detroit Free Press; the E.W. Scripps Company; New World Communications of Detroit, Inc., on behalf of its television station WJBK—FOX 2 Detroit; Nexstar Media Group, Inc.; Zillow Group, Inc.; the Better Business Bureau of Eastern Michigan; Meredith Corporation; and the Michigan Coalition on Open Government.

Herschel P. Fink for The Detroit Free Press.

Honigman, LLP (by *James E. Stewart* and *Leonard M. Niehoff*) for The Detroit News.

Miller, Canfield, Paddock and Stone, PLC (by *Irene Bruce Hathaway* and *Steven D. Mann*) for the Michigan Municipal League and the Michigan Townships Association.

MARKMAN, J. This case concerns the definition of "public record" set forth in MCL 15.232(i) of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. This definition provides that "public record," as used within the act, means "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." Here, plaintiff Susan Bisio sent a FOIA request to defendant seeking documents pertaining to city business. Defendant, through its city attorney, denied the request with respect to certain documents contained in the files of the city attorney, reasoning that the city attorney did not constitute a "public body" for purposes of MCL 15.232(i) and therefore that the requested documents were not "public records" subject to disclosure under FOIA. Both the trial court and the Court of Appeals upheld the denial. For the reasons set forth herein, we conclude that those documents do satisfy the statutory definition of "public records." Because the Court of Appeals concluded to the contrary, we respectfully reverse its judgment and remand to the trial court for further proceedings consistent with this opinion.

I. FACTS & PROCEEDINGS

In June 2015, plaintiff filed a FOIA request with defendant seeking, in pertinent part, correspondence

between its city attorney, Thomas J. Ryan, and a consulting firm concerning a development project and vacant property within the city. Defendant denied the request with respect to documents contained within the city attorney's file, and the city attorney explained his reasoning to plaintiff in an October 2015 letter:

> [MCL 15.232(i)] states: "Public record" means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.[1] The basis for the denial was, in my opinion as city attorney, [that] I am not a "public body". Thus, the information sought was neither created nor obtained by a public body, i.e. The City of the Village of Clarkston and thus was not a public record. . . . Thus, the very touchstone of a request for a "public record" by a "public body," your information requested was never received or in the possession of the public body, i.e. The City of the Village of Clarkston . . . .

In December 2015, plaintiff sued defendant for an alleged FOIA violation with respect to the requested documents in an effort to compel their disclosure. The parties filed competing motions for summary disposition; plaintiff argued that the documents constituted "public records" under MCL 15.232(i), while defendant argued to the contrary.[2] The trial court ultimately granted summary disposition in favor of defendant and denied plaintiff's motion for summary disposition as

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[1] The subsections in MCL 15.232 that are relevant to this case were relettered in June 2018, although their language remained virtually unchanged. See 2018 PA 68. For the purposes of this opinion, we refer to the present lettering and language.

[2] MCL 15.243(1)(g) of FOIA provides that a public body may exempt from disclosure as a public record "[i]nformation or records subject to the attorney-client privilege." Although this exemption was discussed below, we do not address the exemption today. Instead, we address only the threshold question whether the documents at issue constitute "public records" under MCL 15.232(i).

moot. In addressing this matter, the trial court agreed with plaintiff that "[i]t is sufficient . . . for a document to be considered a 'public record' if a public body's agent (such as a public body's attorney) prepared, owned, used, possessed, or retained documentation in the performance of an official function." The trial court then framed the issue as whether "defendant used the contested records (the actual correspondence) as a basis for its decision or merely used Attorney Ryan's advice or oral report for a decision." The trial court continued:

> Having reviewed the documentary evidence, this Court finds that the contested records are not "public records" because there is no evidence to support that defendant used or retained them in the performance of an official function or that Attorney Ryan shared the contested records (the actual correspondence) to assist defendant in making a decision. Summary disposition pursuant to MCR 2.116(C)(10) is, therefore, appropriate.

Plaintiff appealed and the Court of Appeals unanimously affirmed on somewhat different grounds. *Bisio v City of the Village of Clarkston*, unpublished per curiam opinion of the Court of Appeals, issued July 3, 2018 (Docket No. 335422). The Court observed that under FOIA, only "public records" are subject to disclosure, and it noted that a "public record" is defined as " 'a writing prepared, owned, used, in the possession of, or retained by a *public body* in the performance of an official function, from the time it is created.' " *Id*. at 4, quoting what is now MCL 15.232(i) (emphasis added). The Court reasoned that the statute's definition of "public body," now set forth in MCL 15.232(h), does not encompass an *agent* of a public body. *Bisio*, unpub op at 5. Therefore, the Court concluded that because the city attorney was merely an agent of the defendant public body and not himself a "public body," the documents at

issue in his possession were not "public records" properly subject to disclosure. *Id*. at 5-6.

Plaintiff next sought leave to appeal in this Court, which we granted, directing the parties to address the following two issues:

> (1) whether the Court of Appeals erred in holding that the documents sought by the plaintiff were not within the definition of "public record" in § 2(i) of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*.; and (2) whether the defendant city's charter-appointed attorney was an agent of the city such that his correspondence with third parties, which were never shared with the city or in the city's possession, were public records subject to the FOIA, see *Breighner v Michigan High Sch Athletic Ass'n*, 471 Mich 217, 233 nn 6 & 7 (2004); *Hoffman v Bay City School Dist*, 137 Mich App 333 (1984). [*Bisio v City of the Village of Clarkston*, 504 Mich 966 (2019).]

II. STANDARD OF REVIEW

"This Court reviews de novo the trial court's decision to grant a motion for summary disposition." *Mich Federation of Teachers & Sch Related Personnel v Univ of Mich*, 481 Mich 657, 664; 753 NW2d 28 (2008). "This Court [also] reviews de novo as a question of law issues of statutory interpretation." *State News v Mich State Univ*, 481 Mich 692, 699; 753 NW2d 20 (2008). "We give effect to the Legislature's intent as expressed in the language of the statute by interpreting the words, phrases, and clauses according to their plain meaning." *Id*. at 699-700.

III. ANALYSIS

"The purpose of FOIA is to provide to the people of Michigan 'full and complete information regarding the affairs of government and the official acts of those who

represent them as public officials and public employees,' thereby allowing them to 'fully participate in the democratic process.' " *Amberg v Dearborn*, 497 Mich 28, 30; 859 NW2d 674 (2014), quoting MCL 15.231(2). "As a result, except under certain specifically delineated exceptions, see MCL 15.243, a person who 'provid[es] 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' is entitled 'to inspect, copy, or receive copies of the requested public record of the public body.' " *Amberg*, 497 Mich at 30, quoting MCL 15.233(1).

MCL 15.232(i) defines "public record" as follows:

> "Public record" means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software. This act separates public records into the following 2 classes:
>
> (*i*) Those that are exempt from disclosure under [MCL 15.243].
>
> (*ii*) All public records that are not exempt from disclosure under [MCL 15.243] and that are subject to disclosure under this act.[3]

And MCL 15.232(h) defines "public body" as follows:

> "Public body" means any of the following:
>
> (*i*) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state govern-

[3] The predecessor to MCL 15.232(i)(*ii*), in effect when this case was originally filed in the trial court, stated as follows: "All public records that are not exempt from disclosure under [MCL 15.243] and which are subject to disclosure under this act." See 1996 PA 553. In all other respects, the definition of "public record" was unchanged by the June 2018 amendments of MCL 15.232. See 2018 PA 68.

> ment, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
>
> (*ii*) An agency, board, commission, or council in the legislative branch of the state government.
>
> (*iii*) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
>
> (*iv*) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.[4]

"In short, what ultimately determines whether records . . . are public records within the meaning of FOIA is whether the public body prepared, owned, used, possessed, or retained them in the performance of an official function." *Amberg*, 497 Mich at 32.[5]

The parties here do not dispute that the documents at issue are "writing[s]" or that the documents were "prepared, owned, used, in the possession of, or retained" by the city attorney under MCL 15.232(i). The crux of the dispute is simply whether the documents

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[4] The predecessor to MCL 15.232(h)(*iv*), in effect when this case was originally filed in the trial court, stated as follows: "The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body." See 1996 PA 553. In all other respects, the definition of "public body" was unchanged by the June 2018 amendments of MCL 15.232. See 2018 PA 68.

[5] "The language 'from the time it is created' in the definition of the term 'public record' was initially included in [MCL 15.232(i)] to make clear that FOIA applied to records 'irrespective of the date the documents were prepared,' i.e., to records created before FOIA took effect." *Amberg*, 497 Mich at 31 n 1, quoting OAG, 1979–1980, No. 5500, pp 255, 263-264 (July 23, 1979).

may be deemed "prepared, owned, used, in the possession of, or retained" by a "*public body*" for the purposes of MCL 15.232(i).[6] To resolve this dispute, we must consider the definition of "public body" set forth in MCL 15.232(h).

In doing so, we initially note that MCL 15.232(h) defines the term "public body" in a somewhat unorthodox fashion. As we recognized in *Herald Co v Bay City*, 463 Mich 111; 614 NW2d 873 (2000), "the ordinary definition of 'body' " includes definitions such as " 'a group of individuals regarded as an entity' and 'a number of persons, concepts, or things regarded collectively; a group.' " *Id*. at 129-130 & n 10, quoting *The American Heritage Dictionary of the English Language* (New College ed). That is, the term "public body" suggests a "collective entity." See *id*. at 129. However, MCL 15.232(h) provides that a single officer or individual may, in particular circumstances, be considered a "public body" for purposes of FOIA. See MCL 15.232(h)(*i*) (providing that "public body" includes "[a] state officer [or] employee").

But more importantly, MCL 15.232(h) indicates that a single *office* may also be considered a "public body" for purposes of FOIA.[7] MCL 15.232(h)(*i*) provides that

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[6] Defendant does not concede that the documents in dispute were "prepared, owned, used, in the possession of, or retained . . . *in the performance of an official function*" for the purposes of MCL 15.232(i). However, we conclude that the "in the performance of an official function" requirement was satisfied here because the office of the city attorney "retained" the documents in furtherance of the municipal regulatory interests of defendant. *Id*.

[7] We recognize that this argument was offered only by amici—specifically, the Michigan Press Association and other related press organizations—on behalf of plaintiff. Nonetheless, we exercise our judgment to take cognizance of this argument because the instant case implicates a pure question of statutory interpretation and may correctly

"public body" means a "state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government . . . ," while MCL 15.232(h)(*i*) further provides that, notwithstanding these terms, "public body" does not include "the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof." It is thus noteworthy that MCL 15.232(h)(*i*) separately excludes "the governor [and] lieutenant governor," as well as "the executive office of the governor [and] lieutenant governor." By expressly distinguishing between the individual state officers—the governor and the lieutenant governor—and the executive offices of

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be resolved, in our judgment, on the basis of this argument. See, for example, *Council of the Village of Allen Park v Allen Park Village Clerk*, 309 Mich 361, 363; 15 NW2d 670 (1944) (affirming an earlier case that was decided on the basis of an argument "not argued by counsel representing the parties," but instead "argued in the brief *amicus curiae*"). See also *Mapp v Ohio*, 367 US 643, 646 n 3; 81 S Ct 1684; 6 L Ed 2d 1081 (1961) (overruling *Wolf v Colorado*, 338 US 25; 69 S Ct 1359; 93 L Ed 1782 (1949), in a case in which, "[a]lthough appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that *Wolf* be overruled, the *amicus curiae*, who was also permitted to participate in the oral argument, *did* urge the Court to overrule *Wolf*") (emphasis added). Furthermore, we note that plaintiff has consistently argued throughout this case that the documents at issue constitute "public records" because, among other reasons, the city attorney holds an "office" within defendant and therefore the documents were retained "in the performance of an official function." See MCL 15.232(i). In this regard, our decision to address the argument offered by the amici is similar to the circumstances in *Teague v Lane*, 489 US 288, 300; 109 S Ct 1060; 103 L Ed 2d 334 (1989), in which the United States Supreme Court explained that "[t]he question of retroactivity with regard to petitioner's fair cross section claim has been raised only in an *amicus* brief. . . . Nevertheless, that question is not foreign to the parties, who have addressed retroactivity with respect to petitioner's *Batson* claim." And *Teague* favorably cited *Mapp* as another instance of the Court reaching a decision "even although such a course of action was urged only by *amicus curiae*." *Id*.

those officers, the Legislature, we believe, has communicated that those individual officers are, for purposes of FOIA, separate and distinct entities from their respective "offices."

Furthermore, because the Legislature apparently believed that the governor and lieutenant governor should not be included within the definition of "public body," it expressly provided that those two officers were to be excluded from the definition. MCL 15.232(h)(*i*) provides that "public body" includes "[a] state officer," and obviously, the governor and lieutenant governor are both state officers. Therefore, if the Legislature had not expressly excluded the governor and the lieutenant governor from the definition of "public body," these two officers would certainly have been included within the definition.

Yet the reason for expressly providing that the definition of "public body" does not include "the executive office of the governor or lieutenant governor" is less obvious or apparent. Those two executive offices do not seem to constitute a "state officer," "employee," "agency," "department," "division," "bureau," "board," "commission," "council," or "authority." MCL 15.232(h)(*i*).[8] Therefore, it must be that "the executive office of the governor or lieutenant governor" is presumptively an "other body" under MCL 15.232(h)(*i*). That is, if the Legislature had not expressly provided that the respective executive *offices* of the governor and lieutenant governor are excluded from the definition of "public body," then they would presumably have been included within the definition because they are necessarily and

[8] *Webster's New World Dictionary* (1974) defines "office," in relevant part, as "a position of authority or trust, esp. in a government, business, institution, etc. [the *office* of president]." None of the specifically listed individuals or entities in MCL 15.232(h)(*i*) satisfies this definition.

logically "other bodies." A contrary interpretation of MCL 15.232(h)(*i*)—that the respective executive offices of the governor and lieutenant are not a "state officer, employee, agency, department, division, bureau, board, commission, council, authority, or *other body* in the executive branch of the state government"—would render the exclusory language pertaining to those offices surplusage because it would simply be unnecessary to exclude from coverage those offices that would not otherwise be included within the definition of "public body." "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). Thus, under MCL 15.232(h)(*i*), an "other body" must include an "office" within the executive branch of state government.

Our understanding of "other body" in MCL 15.232(h)(*i*) as including an "office" is consistent with MCL 15.232(h)(*iv*). Under MCL 15.232(h)(*iv*), "public body" signifies "[*a*]*ny other body* that is created by state or local authority or is primarily funded by or through state or local authority," but "the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body." (Emphasis added.) As with the express exclusion of the executive offices of the governor and lieutenant governor within MCL 15.232(h)(*i*), the express exclusion of "the office of the county clerk . . . when acting in the capacity of clerk to the circuit court" in MCL 15.232(h)(*iv*) indicates that the office of the county clerk would be included within the definition of "public body" absent that exclusion. And because MCL 15.232(h)(*iv*) refers only to "[a]ny other body that is created by state or

local authority or is primarily funded by or through state or local authority," it must be that the office of the county clerk constitutes such an "other body." Put simply, MCL 15.232(h)(*iv*), as with MCL 15.232(h)(*i*), indicates that an "other body" in each provision includes an "office."

With this understanding of MCL 15.232(h) in mind, we then consider the relationship between defendant and its city attorney. Chapter 5 of defendant's City Charter expressly recognizes the following administrative officers:

> The administrative officers of the City of the Village of Clarkston shall be the City Manager, the clerk, the Treasurer, the City Attorney, the Assessor, and the Financial Officer. [City of the Village of Clarkston Charter (the City Charter), § 5.1(a).]

Section 5.6(a) of the City Charter then specifically identifies the duties of the city attorney:

> (1) Advise the Council on all matters of law and changes or developments therein, affecting the City;
>
> (2) Act as legal advisor and be responsible to the Council[;]
>
> (3) Advise the City Manager concerning legal problems affecting the city administration and any officer or department head of the City in matters relating to official duties when so requested in writing, and file with the Clerk a copy of all written opinions;
>
> (4) Prosecute ordinance violations and represent the City in cases before the Courts and other tribunals[.]

And §§ 5.1(d) and (h) of the City Charter provide that the administrative officers identified in the City Charter, including the city attorney, occupy "offices" within the institutional defendant:

> (d) In making appointments of administrative officers, the appointing authority shall consider only the qualifications of the appointee and that person's ability to discharge the duties of *the office* to which he/she is appointed.
>
> * * *
>
> (h) In the event of a vacancy in *an administrative office* the Council shall appoint a replacement within one hundred twenty (120) days or may appoint an acting officer during the period of a vacancy in *the office*. [Emphasis added.]

This is consistent with the common understanding that an "officer" generally occupies an "office." Compare *Webster's New World Dictionary* (1974) (defining "officer," in relevant part, as "anyone elected or appointed to an office or position of authority in a government, business, institution, society, etc.") with *Hallgren v Campbell*, 82 Mich 255, 258-259; 46 NW 381 (1890) ("A person actually obtaining office with the legal *indicia* of title is a legal officer until ousted.") (quotation marks and citations omitted).

Accordingly, we conclude that the City Charter creates the "office of the city attorney."[9] Such office is

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[9] In *People v Freedland*, 308 Mich 449; 14 NW2d 62 (1944), this Court identified five "indispensable" elements for a "public office of a civil nature":

> (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body;

therefore a "public body" because the office constitutes an "other body that is created by . . . local authority" under MCL 15.232(h)(*iv*).[10] Furthermore, it cannot reasonably be disputed that the office, at a minimum,

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(5) it must have some permanency and continuity, and not be only temporary or occasional. [*Id*. at 457-458, quoting *State ex rel Barney v Hawkins*, 79 Mont 506, 528-529; 257 P 411 (1927).]

Although *Freedland* concerned the common-law offense of misconduct in office and is not directly controlling in this case, the office of the city attorney comports with *Freedland*'s standards for a "public office of a civil nature." Briefly stated, the office of the city attorney is (1) created by a municipality; (2) possesses a portion of the sovereign power of government; (3) retains powers and duties defined by the municipality; (4) exercises duties under the general control of the City Council; and (5) constitutes a permanent position.

[10] Concerning the dissent, we respectfully disagree with its conclusion that the office of the city attorney does not constitute a "public body" under MCL 15.232(h)(*iv*) and offer the following in response. First, the dissent states that "[t]he statutory context . . . makes it clear that, as it pertains to local governmental units, an individual does not qualify as an other 'body' under Subdivision (*iv*)." But we do not conclude that the city attorney, individually, is himself a "public body" under MCL 15.232(h)(*iv*). Rather, we conclude that the entity, the "office of the city attorney," constitutes the pertinent "public body" under MCL 15.232(h)(*iv*). Second, the dissent states that " 'body' [as used in MCL 15.232(h)(*i*) and (h)(*iv*)] could reasonably be interpreted to include a government office that is, like the other governmental units on the list, a collective and distinct entity." Yet the dissent also acknowledges that it "could not locate a definition describing an 'office' as a collective and distinct entity." And furthermore, we do not agree that an "office"—or any of the other governmental entities specifically listed in MCL 15.232(h)—is necessarily limited to "collective and distinct" entities. For instance, MCL 15.232(h)(*iii*) provides that a municipal "department" is a "public body." And while it is true that a department is ordinarily a "collective and distinct" entity, it may also be the case that in a smaller municipality, a relatively minor department may consist of a single individual that nevertheless constitutes a "collective" entity. In such a case, we discern no principled reason why that "department" would be any less of a "public body" under MCL 15.232(h)(*iii*) than a "department" consisting of multiple persons. Third, the dissent asserts that "[t]he majority's holding today portends a radical expansion of the definition of 'public body' under FOIA such that it will now encompass all local officers (not just city attorneys)." To the extent the dissent is concerned

"retained" the documents at issue. MCL 15.232(i).[11] Consequently, we conclude that the documents at issue are "public records" because they are comprised of "writing[s] prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time [they were] created."[12] *Id*.

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with the practical implications of our decision, we again disagree that it will effect any radical change in the operation of FOIA. Consider, for example, how FOIA applies at present to the office of the city mayor. MCL 15.232(i) defines a "public record" obtainable under FOIA as "a writing prepared, owned, used, in the possession of, or retained by a public body in the *performance of an official function*, from the time it is created." (Emphasis added.) That is, virtually all records "prepared, owned, used, in the possession of, or retained" by the office of the city mayor "in the performance of an official function" would *also* consist of records fairly characterized as "prepared, owned, used, in the possession of, or retained" by the city itself "in the performance of an official function." And a "city" indisputably constitutes a "public body" under MCL 15.232(h)(*iii*). We therefore struggle to conceive of an example or illustration of a "public record" subject to disclosure under FOIA in which the pertinent "public body" is the "office of the city mayor" but is not also understood to be the city itself. Whether the interpretation of FOIA yielded by this opinion is "broad" or "narrow," or "too broad" or "too narrow," from the perspective of the dissent, it is, in our judgment, fully compatible with the law enacted by the Legislature. In the words of this Court, "FOIA provides Michigan citizens with broad rights to obtain public records, limited only by the coverage of the statute and its exemptions." *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 362; 616 NW2d 677 (2000) (citations omitted). We respectfully believe this opinion to be faithful to the decisive terms of FOIA, and we conclude that the records in question here are "public records" retained by a "public body."

[11] "Retain" is defined, in relevant part, as "to hold or keep in possession." *Webster's New World Dictionary* (1974).

[12] We acknowledge that plaintiff sent the FOIA request here to defendant itself, not to the office of the city attorney, as the pertinent "public body" under MCL 15.232(h) and (i). However, that plaintiff's argument accordingly focused on MCL 15.232(h)(*iii*) rather than MCL 15.232(h)(*iv*) is not determinative because "this Court may review an unpreserved issue if it is one of law and the facts necessary for resolution of the issue have been presented." *McNeil v Charlevoix Co*,

IV. CONCLUSION

Under MCL 15.232(i) of FOIA, a "public record" is "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." We reiterate that such "public records" must be "prepared, owned, used, in the possession of, or retained by a *public body*" and not by a private individual or entity. In the instant case, the office of the city attorney constitutes such a "public body" because it is an "other body that is created by state or local authority" pursuant to MCL 15.232(h)(*iv*). Furthermore, the documents at issue are "writing[s] . . . retained" by that public

484 Mich 69, 81 n 8; 772 NW2d 18 (2009). See also *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002) ("[T]his Court may overlook preservation requirements where failure to consider the issue would result in manifest injustice, if consideration of the issue is necessary to a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented.") (citations omitted). Moreover, "[w]e allow an issue to be raised for the first time on appeal if persuaded that its consideration 'is necessary to a proper determination of a case.' " *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 239 n 5; 615 NW2d 241 (2000), quoting *Prudential Ins Co v Cusick*, 369 Mich 269, 290; 120 NW2d 1 (1963).

We note that FOIA contemplates that a "public body" may exist within a "public body." See, e.g., MCL 15.240(7):

> If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against *the next succeeding public body* that is not an individual and that kept or maintained the public record as part of its public function. [Emphasis added.]

body and "in the performance of an official function" under MCL 15.232(i), and they are therefore "public records" for the purposes of FOIA. The lower courts erred by ruling otherwise. Accordingly, we reverse the Court of Appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

ZAHRA, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with MARKMAN, J.

MCCORMACK, C.J. (*concurring*). I concur with the majority because I agree that the requested records are "public records" subject to disclosure under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. But this Court specifically granted leave to decide "whether the defendant city's charter-appointed attorney was an agent of the city such that his correspondence with third parties, which were never shared with the city or in the city's possession, were public records subject to the FOIA." *Bisio v City of the Village of Clarkston*, 504 Mich 966 (2019). I believe the answer is yes and would decide that way, as this issue was thoroughly litigated in the lower courts and is a matter of jurisprudential significance. In my view, the Legislature did not abrogate the common law of agency when it enacted the FOIA. Therefore, common-law agency principles apply to the FOIA so that "the agent stands in the shoes of the principal." *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). I would hold that because the city attorney created the requested records while representing the City of the Village of Clarkston (the City) in conducting government business, they are subject to disclosure.

The question is not *who* is a public body, but *what* is a public record? Under the FOIA, a public record is "a

writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(i). Thus, if the requested records are writings prepared, owned, used, in the possession of, or retained by the City in the performance of an official function, they are subject to disclosure.[1]

Only one aspect of this definition is seriously in dispute here. The plaintiff submitted her FOIA request to the City, a public body. MCL 15.232(h)(*iii*). The records are "writing[s]" because they are written communications between the city attorney and third parties. MCL 15.232(*l*) ("writing" includes "every other means of recording"). The city attorney created the records "in the performance of an official function," MCL 15.232(i), because they involved his communications on behalf of the City about the application and enforcement of local zoning, environmental, and historical ordinances. The city attorney is an agent of the City. *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Mich Ed Ass'n*, 458 Mich 540, 557; 581 NW2d 707 (1998) (an agency relationship exists when " 'one person acts for or represents another by his authority' ") (citation omitted). Thus, to resolve this case, the Court need only answer one question: do common-law principles of agency apply to the FOIA so that the records created by a public body's agent while representing the public body in government affairs are subject to disclosure?

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[1] Unless public records are exempt under MCL 15.243, they must be disclosed. See MCL 15.232(i)(*i*) and (*ii*); *Herald Co v Bay City*, 463 Mich 111, 119 n 6; 614 NW2d 873 (2000) ("[The FOIA] requires the public body to disclose records unless they are exempt . . . ."). The City has not, even in the alternative, argued in this Court that the records fall within an exemption.

I would hold that they do. The common law applies unless it is affirmatively abrogated by our Constitution, the Legislature, or this Court. Const 1963, art 3, § 7; *People v Woolfolk*, 497 Mich 23, 25; 857 NW2d 524 (2014). We presume that the Legislature is aware of the common law when it acts. *Wold Architects & Engineers v Strat*, 474 Mich 223, 234; 713 NW2d 750 (2006). Although the Legislature can amend or repeal the common law by statute, it "should speak in no uncertain terms" when it does. *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). This Court will not lightly presume that the Legislature has abrogated the common law. *Velez v Tuma*, 492 Mich 1, 11; 821 NW2d 432 (2012).

Whether the Legislature has abrogated the common law is a question of legislative intent. *Wold Architects*, 474 Mich at 233. And there is no evidence that the Legislature intended to amend the common law of agency as it applies to the FOIA; there is no reference in the FOIA's text to suggest that agency principles do not apply, let alone language to make that clear. We presume that the Legislature is aware of the common-law rule that an agent stands in the shoes of the principal so that the acts of the agent (here, the city attorney) are attributed to the principal (here, the City). *In re Capuzzi Estate*, 470 Mich at 402. If the Legislature had intended to shield records prepared or retained by a public body's agent in the performance of an official function, it would have said so. It hasn't; I would presume that common-law agency principles apply.[2]

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[2] Justice VIVIANO believes that this issue has already been resolved by *Breighner v Mich High Sch Athletic Ass'n, Inc*, 471 Mich 217; 683 NW2d 639 (2004). I respectfully disagree. The question in *Breighner* was whether the Michigan High School Athletic Association (MHSAA) was a "public body" under the FOIA. *Id*. at 219 ("Public body" was defined at MCL 15.232(d) when *Breighner* was decided; the definition was moved

Moreover, applying common-law agency principles is the only way that the FOIA works. The plaintiff submitted her FOIA request to the City, an artificial entity that can only act through others. That corporations act through agents is well settled. See *Fox v Spring Lake Iron Co*, 89 Mich 387, 399; 50 NW 872 (1891). If agency principles did not apply, how could citizens obtain public records from a municipal corporation? The FOIA's definition of a "public body" for local governmental units does not include employees. See MCL 15.232(h)(*iii*). Yet a city can *only* act through its agents and employees. Thus, if agency principles

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to MCL 15.232(h) with the enactment of 2018 PA 68. I refer to the current citation when discussing *Breighner* in this opinion). The plaintiffs in that case submitted their FOIA request directly to the MHSAA. *Id*. at 222. The trial court held that the MHSAA was "primarily funded by or through state or local authority" and thus was subject to the FOIA as a public body under MCL 15.232(h)(*iv*). *Id*. at 219. This Court disagreed. *Id*. at 225-231.

Alternatively, the plaintiffs argued, *id*. at 231-232, that the MHSAA was a public body under MCL 15.232(h)(*iii*): "A county, city, township, village, intercounty, intercity, or regional governing body, council, *school district*, special district, or municipal corporation, or a board, department, commission, council, *or agency thereof*." (Emphasis added.) This Court rejected that argument, reasoning that "there is a fundamental difference between the terms 'agent' and 'agency' as the latter term is used in the statute." *Breighner*, 471 Mich at 232. Although this definition includes an "agency," the Court explained, "In this specific context, the word 'agency' clearly refers to a *unit or division of government* and not to the *relationship* between a principal and an agent." *Id*. The Court concluded that the Legislature did not intend that any "agent" of the listed governmental entities qualify as a public body under MCL 15.232(h)(*iii*). *Id*. at 232-233.

Common-law abrogation was not before the *Breighner* Court. And since the plaintiffs submitted their FOIA request directly to the MHSAA, which is not a public body, the *Breighner* Court did not have the opportunity to consider whether an *agent* of a public body could create public records. Here, the plaintiff's FOIA request was submitted to the City—the public body—not to the city attorney. Thus, *Breighner*'s analysis is neither helpful nor controlling.

did not apply to the FOIA, no records from a municipal corporation would be subject to disclosure; it can't prepare, use, or retain records on its own.

Refusing to apply agency principles to the FOIA would frustrate its stated purpose "that all persons . . . 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. The people shall be informed so that they may fully participate in the democratic process." MCL 15.231(2). It would allow local governments to contract out official government work to private attorneys, shield their records from disclosure, and keep the affairs of government secret. One of the City's council members understood this well, as shown by her remarks at a city council meeting after the Court of Appeals' ruling issued:

> What did we win? . . . We get to keep some emails secret that apparently no one in the city is aware of the contents. We get to keep information away from the residents and taxpayers of the city, who pay for the city to function . . . . We can hide things with our attorney? We will forever be known as the city who fought FOIA and won. Not a good reputation. [Custodio, *Council Member Concerned with FOIA-Lawsuit Ruling*, Clarkston News (July 19, 2018), available at <https://clarkstonnews.com/council-member-concerned-foia-lawsuit-ruling/> (accessed July 16, 2020)] [https://perma.cc/R4SH-6MDT].

I would decide this important issue today. The FOIA is "a broadly written statute designed to open the closed files of government." *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 359; 616 NW2d 677 (2000). Consistent with this aim and with our common-law abrogation jurisprudence, I would reverse the Court of Appeals and apply common-law agency

principles to hold that the city attorney's records are "public records" subject to disclosure.

VIVIANO, J. (*dissenting*). This vigorously litigated FOIA action has never been about whether a fictional entity the majority calls "the office of the city attorney" is a "public body" under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. Instead, it has been about whether the City of the Village of Clarkston (the city) must turn over nonprivileged portions of its city attorney's files on the basis of an agency theory. Remarkably, the majority declines even to address the agency theory and instead adopts an amicus argument that was injected into this case at the eleventh hour, without input from the parties or scrutiny from the lower courts. Because I believe that the amicus theory is utterly without merit and will have serious ramifications beyond this case, I respectfully dissent.

I. THE CASE PRESENTED

The question presented by plaintiff is relatively simple: are the nonprivileged portions of the city attorney's files involving his conduct of official city business "public records" subject to FOIA even though he kept them in a separate off-premises file and did not forward copies of the records to the city offices or other city officials? From the start, this case has centered on plaintiff's argument that she is entitled to the records because the city attorney is an agent of the defendant city. Accordingly, she contended the documents are "public records" because they are "in the possession" of the city and because the city attorney, as an agent of the city, "used" them to conduct city business and "retained" them. The trial court held that, although agency principles were applicable, there was no evi-

dence the city used or retained the records in performing an official function and therefore they were not "public records." The Court of Appeals unanimously affirmed on the alternate basis that plaintiff's agency theory was "unsupported by the plain language of the relevant statutes, by Michigan caselaw, and by the foreign caselaw relied upon by plaintiff."[1]

II. THE CASE THE MAJORITY DECIDES

Inexplicably, the majority opinion fails even to mention the agency issue at the heart of this case. Instead,

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[1] Because Chief Justice MCCORMACK has indicated in her concurrence that she would reverse the Court of Appeals on this issue, I will briefly explain why I agree with the Court of Appeals that plaintiff's agency theory is without merit. First, we rejected this theory in *Breighner v Mich High Sch Athletic Ass'n, Inc*, 471 Mich 217; 683 NW2d 639 (2004), in which we held that FOIA does not extend to agents of public bodies. In *Breighner*, the plaintiffs argued that "the [Michigan High School Athletic Association, Inc. (MHSAA)] acts as an 'agent' for its member schools and that it is therefore a public body as defined by [MCL 15.232(h)(*iii*)]." *Id*. at 231 (while the term "public body" was formerly defined in MCL 15.232(d), the definition was moved to MCL 15.232(h) with the enactment of 2018 PA 68, and I have substituted the current citation into quotations in this opinion for ease of reference when appropriate). We rejected the *Breighner* plaintiffs' argument, explaining as follows:

> Although the noun "agency" may be used to describe a business or legal relationship between parties, it is wholly evident from the context of § 232[(h)(*iii*)] that this is not the sense in which that term is used. Section 232[(h)(*iii*)] designates several distinct governmental units as public bodies, and proceeds to include in this definition any "agency" of such a governmental unit. In this specific context, the word "agency" clearly refers to a *unit or division of government* and not to the *relationship* between a principal and an agent. Had the Legislature intended any "agent" of the enumerated governmental entities to qualify under § 232[(h)(*iii*)], it would have used that term rather than "agency." [*Id*. at 232-233 (emphasis in original).]

Indeed, we went so far in a footnote as to declare that "it would defy logic (as well as the plain language of [MCL 15.232(h)(*iii*)]) to conclude that the Legislature intended that any person or entity qualifying as an 'agent' of one of the enumerated governmental bodies would be consid-

the majority opinion reaches for an argument more to its liking, i.e., the notion that "a single *office* may also be considered a 'public body' for purposes of FOIA." The majority traces this argument to the amicus brief filed by the Michigan Press Association (MPA) on behalf of itself and a number of other news organizations.[2] And it is true that the basic outline of this argument was inserted as an alternative theory at the very end of the MPA's amicus brief. The problem is that

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ered a 'public body' for purposes of the FOIA." *Id*. at 233 n 6. *Breighner* applies with full force here and precludes us from finding that an agent of one of the governmental agencies enumerated in MCL 15.232(h)(*iii*) is a "public body." Unlike Chief Justice MCCORMACK, I do not see how we can reach a different conclusion about the meaning of "public body" as that term is used in the very next subsection, which defines "public record." See MCL 15.232(i) (" 'Public record' means a writing prepared, owned, used, in the possession of, or retained by a *public body* in the performance of an official function, from the time it is created.") (emphasis added). It would be passing strange to conclude that agency principles were not imported into the definition of "public body," as *Breighner* in essence held, but that those principles should inform the meaning of that term as used in the very next subsection.

Breighner also rejected the plaintiffs' argument that the MHSAA was a public body under MCL 15.232(h)(*iv*), holding that it was not " 'created' by any governmental authority." *Id*. at 231. Here, I would conclude that plaintiff's agency theory also fails under MCL 15.232(h)(*iv*) but for a different reason. As discussed below, to qualify as an "other body that is created by . . . local authority," whether as an agent of the city or otherwise, the city attorney must be a collective entity. See MCL 15.232(h)(*iv*). See also *Herald Co v Bay City*, 463 Mich 111, 129; 614 NW2d 873 (2000) (noting that "[public body] connotes a collective entity"). No one seriously contends that is the case here.

[2] In addition to the MPA, the MPA's amicus brief was filed on behalf of the Michigan Association of Broadcasters; the Reporters Committee for Freedom of the Press; the Detroit Chapter of the Society of Professional Journalists; The New York Times Company; The Detroit News; The Detroit Free Press; the E.W. Scripps Company; New World Communications of Detroit, Inc., on behalf of its television station WJBK—FOX 2 Detroit; Nexstar Media Group, Inc.; Zillow Group, Inc.; the Better Business Bureau of Eastern Michigan; Meredith Corporation; and the Michigan Coalition for Open Government.

until the MPA filed its brief, and even afterward, no one thought this case was about whether a fictional entity known as "the office of the city attorney" was a "public body" under FOIA. The issue was not addressed in any party's briefing, and it was not discussed at oral argument.[3]

Although we value input from amici and sometimes adopt assertions they make, deciding a case by adopting an argument that neither party has made or responded to and none of the lower courts has addressed is quite a departure from the principle of party presentation.[4] But that does not stop the majority, or even slow it down. Instead, finding the parties' framing inconvenient, the majority swallows the MPA's theory whole—even though, as discussed below, it has serious interpretive gaps and will have serious consequences far beyond this case.

A. INTERPRETIVE ANALYSIS

FOIA defines "public record" in pertinent part to mean "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(i). The act defines a "public body" as "any of the following":

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[3] Nothing in the record or procedural history supports the majority's assertion that "plaintiff has consistently argued throughout this case that the documents at issue constitute 'public records,' because, among other reasons, the city attorney holds an 'office' within defendant . . . ."

[4] See *United States v Sineneng-Smith*, 590 US ___, ___; 140 S Ct 1575, 1579; 206 L Ed 2d 866 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw v. United States*, 554 U.S. 237 [; 128 S Ct 2559; 171 L Ed 2d 399] (2008), 'in both civil and criminal cases, in the first instance and on appeal . . . , 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.' *Id*., at 243.").

(*i*) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

(*ii*) An agency, board, commission, or council in the legislative branch of the state government.

(*iii*) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

(*iv*) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body. [MCL 15.232(h).]

All parties concede, and in its unanimous opinion the Court of Appeals held, that the city attorney is not himself a public body.[5] This widespread agreement is

[5] Defendant has argued throughout this case that the city attorney is not himself a "public body" under FOIA, and plaintiff has repeatedly and emphatically conceded the point and indeed even argued it herself for strategic advantage. See *Bisio v The City of The Village of Clarkston*, unpublished per curiam opinion of the Court of Appeals, issued July 3, 2018 (Docket No. 335422), p 6 ("Plaintiff argues that the *Breighner* Court's holding is irrelevant to the case at bar because she has never claimed that the city attorney was a public body."). Plaintiff also asserted at oral argument: "[W]e are not claiming that the city attorney is a public body. Obviously, he's not. Because as you point out, the definition doesn't include officers and employees of municipalities." In light of the plain language of the statute and the parties' repeated concessions, the Court of Appeals' position is hardly remarkable. See *Bisio*, unpub op at 5 ("The definition of 'public body' provided by MCL 15.232[(h)(*iii*)] does not include officers or employees acting on behalf of cities, townships, and villages. By contrast, MCL 15.232[(h)(*i*)], which provides the definition of 'public body' relevant to the executive branch of state government, does include officers and employees acting on

not surprising because it accords with the ordinary meaning of "body" as used in the statute. See *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n (On Remand)*, 317 Mich App 1, 13; 894 NW2d 758 (2016) (interpreting "body" in this context "as '[a]n artificial person created by a legal authority. See [corporation],' and '[a]n aggregate of individuals or groups.' *Black's Law Dictionary* (10th ed)."). See also *Herald Co*, 463 Mich at 129 (interpreting "public body" under the Open Meetings Act, MCL 15.261 *et seq*., and noting that it "connotes a collective entity").[6] The statutory context also makes it clear that, as it pertains to local governmental units, an individual does not qualify as an other "body" under Subdivision (*iv*).[7]

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behalf of the public body. Had the Legislature so intended, it could have included officers or employees, or agents, in the definition of public body that pertains to cities, townships, and villages. That it did not indicates the Legislature's intent to limit 'public body' in § 232[(h)(*iii*)] to the governing bodies of the entities listed.").

[6] See also *Herald Co*, 463 Mich at 130 n 10 ("*The American Heritage Dictionary of the English Language* (New College ed), p 147, defines 'body' as '[a] group of individuals regarded as an entity' and '[a] number of persons, concepts, or things regarded collectively; a group.' *Webster's New Collegiate Dictionary* (7th ed), p 94, similarly defines the term as 'a group of persons or things' and 'a group of individuals organized for some purpose . . . (a legislative [body]).' "). While "public body" is a defined term under the act, "body" is not. Thus, it is appropriate to look to the dictionary for assistance in determining its meaning. See *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). Since the definitions in both lay and legal dictionaries are the same, it is proper to rely on both types of dictionaries. See *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 621 n 62; 886 NW2d 135 (2016).

[7] This is true whether the subdivisions of MCL 15.232(h) are read together or separately. First, reading them together, the word "other" as used in the MCL 15.232(h)(*iv*) statutory phrase "[a]ny other body" is used to refer to a "thing that is different or distinct from one already mentioned." Lexico, *Oxford English and Spanish Dictionary* <https://www.lexico.com/en/definition/other> (accessed July 14, 2020) [https://perma.cc/49ZU-DXEP]. Under this reading, any fair examination of the language of the statute must begin with the recognition that

But, in a sleight of hand, the MPA's argument switches the focus from the city attorney himself being an "officer" to the city attorney occupying an "office."

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the Legislature included individuals like "officer[s]" and "employee[s]" in MCL 15.232(h)(*i*), which deals with the state government, but the Legislature did not include these terms in MCL 15.232(h)(*iii*), which concerns local governmental units. When the Legislature chooses to include a term in one place but not another in the same statute, courts should not read the term into the part where it was omitted. *Nickola v MIC Gen Ins Co*, 500 Mich 115, 125; 894 NW2d 552 (2017). Finding that local officers constitute public bodies under Subdivision (*iv*) would, in essence, undo the Legislature's exclusion of those officers from Subdivision (*iii*). Because "officer" was expressly listed in MCL 15.232(h)(*i*), it could not be added to MCL 15.232(h)(*iv*) by use of the catchall phrase "[a]ny other body" with regard to local governmental units.

There is also a good argument that MCL 15.232(h)(*i*) should *not* be read in conjunction with the other subdivisions of MCL 15.232(h). MCL 15.232(h)(*i*), which relates to the executive branch of the state government, is the only subdivision that includes individuals ("state officer[s]" and "[state] employee[s]") in the definition of "public body." But it has its own catchall phrase. MCL 15.232(h)(*i*) ("A state officer, employee, agency, department, division, bureau, board, commission, council, authority, *or other body in the executive branch of the state government* . . . .") (emphasis added). The next two subdivisions, MCL 15.232(h)(*ii*) and (h)(*iii*), relating to the legislative branch of state government and local governmental units, respectively, do not include any individuals. See, e.g., *Breighner*, 471 Mich at 232 (noting that "[Subdivision (*iii*)] designates several distinct governmental units as public bodies . . . ."). Thus, an argument may be made that the catchall phrase in the following subdivision, Subdivision (*iv*), only applies to the two subdivisions which immediately precede it, and which do not have their own catchall provisions. Applying the doctrine of *ejusdem generis*, then, would give us another reason to conclude that an individual working in the legislative branch of state government or in a local governmental unit cannot be deemed a "public body" under FOIA. See *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 242; 615 NW2d 241 (2000) (quotation marks and citation omitted) ("[Ejusdem generis] is a rule whereby in a statute in which general words follow a designation of particular subjects, the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated.") (alteration in original).

Relying on MCL 15.235(h)(*iv*), a provision it concedes "has received no attention in this case," the MPA contends that the contested documents must be turned over because "*the office* of the city attorney *is* a public body . . . ." In particular, the MPA asserts that "the office of the city attorney" fits within the catchall phrase "[a]ny other body that is created by . . . local authority." MCL 15.232(h)(*iv*). Thus, according to the MPA, "[a]ny entity created by local authority is a public body that must abide by FOIA's disclosure requirements."

This argument has some intuitive appeal, so far as it goes. But it sows the seeds of its own destruction. The MPA appears to recognize that a "body" must be an entity. Thus, its assertion that the act expressly contemplates that individuals can be "public bodies" is irrelevant since (1) the parties agree the city attorney is not himself a "public body" and (2) the question here is whether "the office of the city attorney" is a "public body" under MCL 15.232(h)(*iv*) because it is an *entity* created by local authority.

The majority opinion's contextual analysis does not add to the equation. The exemptions in Subdivisions (*i*) and (*iv*) at most show that since a "public body" includes other entities that one might think of as similar to a government office (such as an "agency, department, division [or] bureau" at the state level, MCL 15.232(h)(*i*), and a "department . . . or agency" at the local level, MCL 15.232(h)(*iii*)), the Legislature thought it necessary to expressly exclude certain offices from its catchall phrases (i.e., "the executive office of the governor or lieutenant governor," MCL 15.232(h)(*i*), and "the office of the county clerk . . . when acting in the capacity of clerk to the circuit court," MCL 15.232(h)(*iv*)). For this reason, I agree that "body" could reasonably be interpreted to include a government office that is, like the other governmental units on the list, a collective and distinct entity.

B. APPLICATION

So if a department or other entity known as the "office of the city attorney" was created by local authority in the city, it might constitute a "public body." The question then becomes: was such an office ever created by the city? The MPA makes the conclusory assertion that Section 5.1(a) of defendant's charter creates the office of city attorney. See City of the Village of Clarkston Charter (City Charter), § 5.1(a). But that is a blatant misreading of the charter. As noted above, to qualify as a "body," an office must be a collective entity. Section 5.1(a) of the City Charter establishes the city attorney as one of the administrative officers of the city. It also gives the city council the power to establish additional administrative officers or departments or to combine them and prescribe their duties. The city attorney in this case is a private attorney who contracts with the city to serve as its city attorney. No one contends that either the City Charter or the city council created a law department or corporation counsel's office headed by the city attorney.

The majority attempts to supplement the MPA's argument with additional citations to the charter. Thus, the majority notes that, not surprisingly, another provision of the charter sets forth the duties of the city attorney. See City Charter, § 5.6. But nothing in that provision creates an entity within the city (such as a department) to be run by the city attorney. But alas, the majority finally identifies two provisions that use the word "office" in relation to the administrative officers of the city. The first, relating to appointments of administrative officers, says that "the appointing authority shall consider only the qualifications of the appointee and that person's ability to discharge the duties of the *office* to which he/she is appointed." City

Charter, § 5.1(d) (emphasis added). The second, related to vacancies, provides that "[i]n the event of a vacancy in *an administrative office* the Council shall appoint a replacement within one hundred twenty (120) days or may appoint an acting officer during the period of a vacancy in the *office*." City Charter, § 5.1(h) (emphasis added).

The majority spikes the football a little too soon and, in the process, has massively expanded the scope of FOIA. It is true in a sense that, as the majority asserts, "an 'officer' generally occupies an 'office.' " But as used in the City Charter, an "office" is simply a position of public authority occupied by an officer. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "office" in pertinent part as "a special duty, charge, or position conferred by an exercise of governmental authority and for a public purpose[;] a position of authority to exercise a public function and to receive whatever emoluments may belong to it"). Such a position cannot qualify as a "body" because it is not a collective entity. To the extent the charter describes an office, it is filled by a solitary officer—the city attorney; it is an office only in the sense that the position is occupied by an officer. It is unlike, say, the Executive Office of the Governor, which includes various divisions and other offices within it, all staffed with employees in addition to any "officer." See, for example, *House Speaker v Governor*, 443 Mich 560, 589 n 35; 506 NW2d 190 (1993); see also MCL 10.151 ("The Office of Regulatory Reform is created within the Executive Office of the Governor.").[8] The City Charter gives the

[8] See also MCL 50.67(1) ("The county clerk shall keep his or her office at the seat of justice for the county[.]"). I could not locate a definition describing an "office" as a collective and distinct entity. The closest definition I found is "a place where a particular kind of business is

city attorney no such trappings. Thus, it simply cannot be disputed that while the charter established the position of city attorney as an administrative officer of the city having certain public duties, it did not create a collective entity or department to assist him in performing them.

Under the majority's reasoning, any legal authority creating an officer position *ipso facto* creates an office subject to FOIA. Of course, this flies in the face of the parties' concession and the Court of Appeals' holding that the city attorney is not himself a public body. And it flies in the face of our interpretive principles. Why, one might ask, would the Legislature include officers and employees in the definition of "public body" pertaining to state governmental entities but not in the definition pertaining to local governmental entities if it intended them to be included in both? Ordinarily, we would give meaning to this legislative choice. Finally, and perhaps most importantly, the majority's reasoning distorts the meaning of the key terms, "body" and "office"—the majority never explains why the type of office created by the City Charter should be considered a collective entity such that it would qualify as an "other body" under FOIA.

The majority's holding today portends a radical expansion of the definition of "public body" under FOIA such that it will now encompass all local officers (not just city attorneys).[9] As the majority makes clear by

transacted or a service is supplied . . . [such as] a place in which the functions of a public officer are performed." *Merriam-Webster's Collegiate Dictionary* (11th ed). This description would seemingly apply to the Executive Office of the Governor and the office of the county clerk.

[9] The new categories of local officers subject to FOIA as public bodies would appear to include, at a minimum, county officials (such as county executives, prosecutors, clerks, treasurers, and county commission members); local government officials (such as mayors, city council

citing *People v Freedland*, 308 Mich 449; 14 NW2d 62 (1944), all public officers occupy offices created by some legal authority. See *id*. at 457-458 (noting as one of the "indispensable" elements of a "public office of a civil nature" that "[i]t must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature") (quotation marks and citation omitted). It is virtually unheard of for a court to adopt an amicus's interpretation having such a widespread impact without allowing an opportunity for input from the parties or the many thousands of local officers who will be directly affected by our decision.[10] The majority's man-

members, supervisors, trustees, clerks, treasurers, city attorneys, city assessors, city managers, and police and fire chiefs); and thousands of police officers, deputy sheriffs, assistant prosecutors, and assistant attorneys general. See *People v Coutu*, 459 Mich 348, 357-358; 589 NW2d 458 (1999) (holding that deputy sheriffs are public officials for purposes of the common-law offense of misconduct in office); *Tzatzken v Detroit*, 226 Mich 603, 608; 198 NW 214 (1924) (holding that police officers are public officers for purposes of tort immunity). It will also likely include *any* person who is elected or appointed to "[a] department, board, agency, institution, commission, authority, division, council, college, university, school district, intermediate school district, special district, or other public entity of this state or a city, village, township, or county in this state." MCL 15.181(e)(*iii*) (defining "public officer" for purposes of the Incompatible Public Offices Act, MCL 15.181 *et seq*.). Chief Justice MCCORMACK would expand the reach of FOIA even further to encompass records maintained by agents of public bodies, including private individuals and companies who contract to provide goods or services to one of the listed governmental units.

[10] There are many groups who I am sure would like to provide input on this issue, including the Michigan Municipal League and the Michigan Townships Association, who filed a joint amicus brief in this case in our Court but have not had an opportunity to address this point since the MPA's amicus brief was filed on the same day. But other groups representing local officers may also appreciate the opportunity to be heard, such as the Fraternal Order of Police, the Police Officers Association of Michigan, the Prosecuting Attorneys Association of Michigan, and the Michigan Association of Counties.

gling of the meaning of "body" and "office" will, I am afraid, have many serious consequences beyond this case.

III. CONCLUSION

It is impossible to take the theory the Court has now landed on seriously, given that it was not raised by the parties or addressed by the lower courts and is incompatible with the plain language of the statute. It depends on a conclusion that a fictional entity known as "the office of the city attorney" was created by the City Charter, even though it clearly was not. And I believe the majority's detour will have serious consequences far beyond this case. Even if it seems to some like good public policy for FOIA to encompass individual actors at the local level like private attorneys who contract to serve as city attorneys, I would leave it to the Legislature to include such "local officers" in the statute by amending it.

We do much better when we let the parties and the lower courts sharpen the issues for us to decide. We should do that here. I would affirm the Court of Appeals decision because it reached the right result for the right reasons on the issue presented. I respectfully dissent.

PROGRESS MICHIGAN v ATTORNEY GENERAL

Docket Nos. 158150 and 158151. Argued January 8, 2020 (Calendar No. 1). Decided July 27, 2020.

Progress Michigan filed a complaint in the Court of Claims against then Attorney General Bill Schuette in his official capacity, alleging that defendant violated the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., and failed to preserve state records under the Management and Budget Act, MCL 18.1101 *et seq*. Plaintiff sought certain e-mail messages between Attorney General Schuette and his staff that were sent using personal e-mail accounts. Defendant denied the request on October 19, 2016, and on November 26, 2016, defendant denied plaintiff's subsequent departmental appeal of that decision. Seeking to compel disclosure, plaintiff filed its complaint in the Court of Claims on April 11, 2017. Defendant moved for summary disposition, arguing that dismissal was appropriate because plaintiff failed to comply with the signature and verification requirement of MCL 600.6431 of the Court of Claims Act, MCL 600.6401 *et seq*. On May 26, 2017, plaintiff filed an amended complaint that contained allegations identical to those in the original complaint but was also signed by plaintiff's executive director and sworn to before the Ingham County Clerk. Defendant again moved for summary disposition, this time arguing that the amended complaint was untimely because it was filed outside FOIA's 180-day period of limitations. The Court, CYNTHIA D. STEPHENS, J., dismissed plaintiff's Management and Budget Act claim but denied the summary-disposition motion with respect to defendant's FOIA claim, holding that plaintiff had complied with the MCL 600.6431 signature and verification requirement and that the complaint was timely filed within that statute's one-year limitations period. The Court of Claims concluded that the amended complaint complied with FOIA's statute of limitations because the amendment related back to the filing of the original complaint, which had been timely filed. Defendant appealed (Court of Appeals Docket No. 340921), arguing that the Court of Claims erred by concluding that plaintiff could amend its complaint to comply with MCL 600.6431. Defendant asserted that the order was appealable by right because the order constituted a denial of

governmental immunity; specifically, defendant asserted that compliance with the MCL 600.6431 verification and signature requirement was a prerequisite to suit against the state. Defendant also filed an application for leave to appeal (Court of Appeals Docket No. 340956), arguing that plaintiff had failed to comply with FOIA's statute of limitations. The Court of Appeals granted leave to appeal and consolidated the appeals. The Court of Appeals, METER, P.J., and GADOLA and TUKEL, JJ., reversed the Court of Claims and remanded the case for entry of summary disposition in favor of defendant. 324 Mich App 659 (2018). The Court of Appeals considered plaintiff's compliance with MCL 600.6431 as an issue of immunity, reasoning that the verification and signature requirement was a condition precedent for avoiding governmental immunity; on that basis, it concluded that it had jurisdiction over the appeal because it was an appeal of a final order denying governmental immunity. It reasoned that although the original complaint was timely, it was time-barred because it was not signed and verified as required by MCL 600.6431. The Court of Appeals analogized plaintiff's first complaint to the medical malpractice complaint in *Scarsella v Pollak*, 461 Mich 547 (2000), in which the plaintiff failed to include an affidavit of merit with the complaint as required by MCL 600.2912d, rendering the complaint insufficient to commence the malpractice action and, therefore, insufficient to toll the applicable statute of limitations. Because plaintiff's complaint in this case was not verified, the Court of Appeals reasoned that the claim lacked legal validity from its inception and could not be amended to cure the defect. The Court of Appeals further concluded that the amended complaint was untimely because it was filed outside FOIA's 180-day statute of limitations. The Supreme Court granted plaintiff's application for leave to appeal. 503 Mich 982 (2019).

In an opinion by Justice CAVANAGH, joined by Justices MARKMAN, ZAHRA, BERNSTEIN, and CLEMENT, the Supreme Court *held*:

Regardless of whether the MCL 600.6431(2)(d) verification and signature requirement applied, plaintiff was required to comply with other provisions of the Court of Claims Act, including the MCL 600.6434 verification requirement. Although plaintiff did not appear to fulfill that requirement in its amended complaint, defendant waived review of the issue by conceding that the amended complaint was, in fact, verified; any lack of compliance was therefore not a basis for dismissing the complaint. The filing and tolling provisions in MCL 600.1901 and MCL 600.5856(a) of the Revised Judicature Act (RJA), MCL 600.1010 *et seq*., apply to

FOIA actions brought in the Court of Claims because neither FOIA nor the Court of Claims Act contains language governing the commencement of an action or the tolling of a limitations period. MCL 600.6434 does not override the RJA rules that an action is commenced when a complaint is filed, does not override the act's rule that a limitations period is tolled when a complaint is filed, and does not condition tolling on satisfaction of the verification requirement. The original complaint was filed within FOIA's limitations period, and the lack of verification did not render it a nullity. The Court of Appeals' reliance on *Scarsella* was misplaced because it did not apply in the context of this case. Under MCR 2.118(A)(1), plaintiff was entitled to amend its complaint, without seeking leave from the Court of Claims, within 14 days of defendant filing its motion to dismiss. Plaintiff did so, and under MCR 2.118, the amended pleading superseded the former pleading. There was no need to analyze whether the amended complaint related back under MCR 2.118(D), because the amendment only corrected the technical verification requirement; it did not add a new claim. The Court of Appeals erred when it reversed the Court of Claims and remanded the case for entry of summary disposition in favor of defendant.

1. The state is immune from all suits except to the extent it consents to be sued. In that regard, MCL 15.240 of FOIA authorizes individuals to bring a civil action against a public body to challenge a final determination denying all or a portion of a request for documents. Because MCL 15.232(h)(*i*) defines the term "public body" to include a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, the office of the Attorney General is subject to a FOIA request. When a public body denies all or a portion of an individual's request, MCL 15.240 requires an appeal of that decision to be filed in the Court of Claims, if the public body is a state public body, within 180 days of the final determination. Within the Court of Claims Act, MCL 600.6431 provides that a claim may not be maintained against the state unless within one year after the claim has accrued the individual files in the Court of Claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms, or agencies. Under MCL 600.6431(2)(d), the claim or notice must include a signature and verification by the claimant before an officer authorized to administer oaths. Regardless of whether the MCL 600.6431(2)(d) signature and verification requirement applies to the Attorney General given that the Attorney General is not a "state," MCL 600.6434(2) requires, among other things, that the

complaint be verified. In this case, because defendant was a "public body," plaintiff properly asserted a claim under FOIA when defendant denied its claim and did so within 180 days of the denial as required by MCL 15.240. Whether the Court of Appeals was correct in analyzing plaintiff's compliance with the MCL 600.6431 signature and verification requirement as an issue of governmental immunity, instead of as an issue of compliance with the rules of the Court of Claims, did not have to be decided because either way plaintiff had to comply with the Court of Claims Act, which included the MCL 600.6434(2) verification requirement. It is undisputed that the original complaint was not verified as required by MCL 600.6434(2). While plaintiff's amended complaint also did not appear to be verified as required by MCL 600.6434(2), defendant waived any argument that the complaint was not properly verified by conceding in multiple briefs that the second complaint was verified.

2. Under MCL 600.6422 and MCL 600.6434(1), practice and procedure in the Court of Claims is governed by the statutes and court rules prescribing practice in the circuit courts of Michigan. The RJA also governs practice and procedure in the Court of Claims because the Court of Claims Act is contained within the RJA. In that regard, MCL 600.1901 provides that an action is commenced by the filing of a complaint in a court, and MCL 600.5856(a) states that the statutory period of limitations is tolled when a complaint is filed. Because neither FOIA nor the Court of Claims Act contains language governing the commencement of an action or the tolling of a limitations period, the filing and tolling provisions in MCL 600.1901 and MCL 600.5856(a) apply to FOIA actions brought in the Court of Claims. Under MCR 2.118, a plaintiff may amend its complaint by right within 14 days of the defendant filing a motion to dismiss, and unless otherwise indicated, an amended pleading supersedes the former pleading. In this case, plaintiff commenced its FOIA action when it timely filed the first complaint on April 11, 2017, tolling FOIA's 180-day limitations period under MCL 15.240. Because plaintiff filed its amended complaint within 14 days of defendant filing its motion to dismiss, the timely complaint superseded the original complaint.

3. By its own terms, *Scarsella*'s holding—that the plaintiff's failure to file the required affidavit of merit with a medical malpractice complaint rendered the complaint ineffective in that it did not toll the statute of limitations—was limited to the affidavit-of-merit requirement set forth in MCL 600.2912d(1). Accordingly, *Scarsella* was not applicable to the facts of this case.

The language in the affidavit-of-merit and verification statutes was not identical, and the Court of Claims Act and FOIA do not contain language suggesting that failure to comply with the verification requirements set forth in MCL 600.6431 and MCL 600.6434 would render a complaint null and void. In particular, MCL 600.6434 does not override the MCL 600.1901 rules regarding commencing an action, does not override the MCL 600.5856 rules regarding tolling the statute of limitations, and does not condition tolling on compliance with the verification requirements; had the Legislature wanted the verification requirements to affect when an action is commenced or when the statute of limitations is tolled, it could have said so. Moreover, *Scarsella* did not apply in the context of this case because in *Scarsella* the Court expressly declined to extend its nullity analysis to documents that are inadequate or defective, like in this case, as opposed to the affidavit of merit that was completely omitted by the plaintiff in *Scarsella*. Permitting a plaintiff to amend its original complaint to correct the lack of verification does not subvert the MCL 600.6434 verification requirement because the complaint would still need to be verified, and the complaint could be dismissed if the plaintiff failed to do so, just not on statute-of-limitations grounds.

Reversed and remanded.

Chief Justice MCCORMACK, joined by Justice VIVIANO, concurring, agreed with the majority that plaintiff's original unsworn and unverified complaint tolled the statute of limitations for its FOIA claim but wrote separately to explain why she would have overruled *Scarsella*. Even though *Scarsella* did not involve the Court of Claims Act or FOIA, the Court of Appeals analogized the affidavit of merit required to be filed with the medical malpractice complaint in that case to the statutorily required verification requirements in this case, concluding that the failure to have the complaint verified resulted in plaintiff's original complaint being legally invalid from its inception and, thus, that it did not commence the action or toll the statute of limitations. The Court of Appeals' analogy makes sense, but the majority rejects the reasoning, concluding that plaintiff's failure to sign or verify the complaint was more like when a medical malpractice plaintiff files an affidavit but the affidavit is inadequate or defective in some way; and because such inadequacies or deficiencies do not prevent the statute of limitations from being tolled in malpractice cases, it should not do so in this FOIA action. The majority is correct that the Court of Claims Act does not override or contradict the RJA's statutory rules for when an action is commenced or

when the limitations period is tolled and that tolling the statute of limitations in this case does not render meaningless the Court of Claims Act's verification requirements. The *Scarsella* Court's decision was questionable in that the same reasoning applies to medical malpractice actions because there is no statute that conditions tolling on the plaintiff's filing an affidavit of merit. The majority should have considered whether *Scarsella* was correctly decided even though the parties did not request such action or brief the issue. The standard for reconsidering the issue addressed in *Scarsella* is too high because it is unlikely that a case addressing the issue will be appealed given that *Scarsella* clearly states that when a plaintiff wholly omits to file an affidavit of merit with the complaint, the filing is ineffective and does not toll the period of limitations. This case demonstrates that while the Court is skeptical of *Scarsella*'s reasoning, *Scarsella*'s influence cannot be cabined to medical malpractice actions. Chief Justice MCCORMACK agreed that *Scarsella* was distinguishable in this case, but rather than resolve on a case-by-case-basis future litigants' attempts to extend *Scarsella* to other actions involving "mandatory" conditions of maintaining suit, she would hold that in accordance with MCL 600.5856(a), unless clearly stated otherwise, a statute of limitations or repose is tolled at the time the complaint is filed.

Justice MARKMAN, concurring, agreed with the majority opinion but wrote separately to express his disagreement with Chief Justice MCCORMACK's assertion that the Court should overrule *Scarsella*. In *Scarsella*, the plaintiff failed to file an affidavit of merit with his medical malpractice complaint, contrary to the requirements of MCL 600.2912d(1), which provides that the plaintiff in such an action *shall* file an affidavit of merit *with* the complaint. This Court concluded that use of the word "shall" indicates that an affidavit accompanying the complaint is mandatory and imperative. Accordingly, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit. In *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68 (2015), this Court expanded on the reasoning in *Scarsella* and held that a medical malpractice action can only be commenced by filing a notice of intent and then filing an affidavit of merit with the complaint after the notice period has expired. *Scarsella* and *Tyra* were correctly decided and should be left undisturbed, particularly in the context of this case because this case was not a medical malpractice action, plaintiff could be given relief without addressing *Scarsella*, and neither party requested that *Scarsella* be reconsidered. In rejecting the Court of Appeals' reasoning related to *Scarsella*, the majority correctly

concludes in accordance with *Saffian v Simmons*, 477 Mich 8 (2007), that the complaint in this case tolled the statute of limitations because the failure to verify the complaint was more like a defective affidavit of merit than an omitted affidavit. Nonetheless, the *Scarsella* rule is straightforward and consistent with the MCL 600.2912d(1) affidavit-of-merit requirement, and overruling *Scarsella* would not displace the reasonableness of the logic underlying it. The holding in *Scarsella* set forth a rule of procedure that is reasonable and manageable, does not present an insurmountable obstacle in carrying into effect the requirement of filing an affidavit of merit, and conforms with the plain language of the statute.

FREEDOM OF INFORMATION ACT — ACTIONS FILED IN THE COURT OF CLAIMS — FAILURE TO VERIFY THE COMPLAINT.

MCL 600.1901 of the Revised Judicature Act (RJA) provides that an action is commenced by the filing of a complaint in a court; MCL 600.5856(a) of the RJA provides that the statutory period of limitations is tolled when a complaint is filed; the filing and tolling provisions in MCL 600.1901 and MCL 600.5856(a) apply to Freedom of Information Act actions brought in the Court of Claims; MCL 600.6434(2) of the Court of Claims Act, which requires that a plaintiff verify a complaint filed in the Court of Claims, does not override the RJA rules that an action is commenced when a complaint is filed, does not override the act's rule that a limitations period is tolled when a complaint is filed, and does not condition tolling on compliance with the verification requirement (MCL 600.101 *et seq*.; MCL 15.231 *et seq*.; MCL 600.6401 *et seq*.).

Goodman Acker, PC (by *Mark Brewer*) for Progress Michigan.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kyla L. Barranco*, *Christina M. Grossi*, and *Jessica A. McGivney*, Assistant Attorneys General, for the people.

Amicus Curiae:

Mark Granzotto, PC (by *Mark Granzotto*) for the Michigan Association of Justice.

CAVANAGH, J. Plaintiff, Progress Michigan, filed a request under Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*., with defendant, then Attorney General William Schuette, seeking the disclosure of certain e-mail messages sent or received by Schuette or certain employees of his department.[1] The request was denied, and plaintiff brought suit in the Court of Claims, challenging that denial. Defendant moved for summary disposition, but the Court of Claims denied the motion with regard to the FOIA claim. The Court of Appeals reversed, reasoning that this Court's decision in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000), rendered plaintiff's initial complaint a nullity, such that it could not be amended, and that the statutory period of limitations elapsed before the second complaint was filed. *Progress Mich v Attorney General*, 324 Mich App 659, 673-674; 922 NW2d 654 (2018). *Scarsella* does not apply in this context, and plaintiff complied with the statutory requirements necessary to sustain its claim under the FOIA. Accordingly, we reverse the judgment of the Court of Appeals and remand the case to the Court of Claims for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff filed its FOIA request on September 27, 2016, seeking the disclosure of all e-mail messages sent or received by 21 employees of defendant's department[2] using personal e-mail accounts in the perfor-

[1] Attorney General Dana Nessel was subsequently elected and has taken over the defense of this lawsuit. For ease of reference in this opinion, however, we refer to Attorney General Schuette as the defendant.

[2] The individuals were John Bandstra, Kathryn Barron, Andrea Bitely, John Bursch, Alan Cropsey, Lori Gay, Holly Gustafson, Gerald (Rusty) Hills, Carol Isaacs, Esther Jentzen, Aaron Lindstrom, Sharon

mance of any official function since November 1, 2010. Defendant denied the request on October 19, 2016, stating that only a single e-mail message met plaintiff's description and that the e-mail message was not subject to disclosure because it was exempt from disclosure under the FOIA as attorney work product. Plaintiff filed an internal appeal on November 26, 2016; defendant denied the appeal on December 12, 2016.

Plaintiff filed its complaint[3] in the Court of Claims on April 11, 2017, alleging that defendant's denial violated the FOIA and that defendant had failed to preserve state records under the Management and Budget Act (MBA), MCL 18.1101 *et seq*. On May 16, 2017, in lieu of filing an answer, defendant moved for summary disposition under MCR 2.116(C)(4), (7), and (8). Defendant argued, in part, that plaintiff's complaint was subject to dismissal because it was not signed and verified as required by MCL 600.6431(1) of the Court of Claims Act (COCA), MCL 600.6401 *et seq*. Plaintiff filed a nearly identical amended complaint on May 26, 2017. The allegations were the same, but the amended complaint was verified—that is, it was signed by plaintiff's executive director and sworn to before the Ingham County Clerk. Defendant once again moved for summary disposition under MCR 2.116(C)(4), (7), and (8), this time arguing that the amended complaint was untimely because it was filed outside the FOIA's 180-day period of limitations (i.e., more than 180 days after October 19, 2016).[4] See MCL 15.240.

Lollio, Peter Manning, Beth Nurenberg, Matthew Schneider, William (Bill) Schuette, John Sellek, Dan Sonneveldt, Dennis Startner, Barbara Teszlewicz, and Joy Yearout.

[3] Plaintiff sued defendant "in his official capacity as Attorney General and head of the Department of Attorney General."

[4] Defendant did not argue that the amended complaint was not properly verified.

The Court of Claims granted defendant's motion with respect to plaintiff's claim under the MBA but denied defendant's motion for summary disposition of the FOIA claim, holding that plaintiff had complied with MCL 600.6431(1) and the applicable statute of limitations. The Court of Claims, citing the language of MCL 600.6431 and our decision in *McCahan v Brennan*, 492 Mich 730; 822 NW2d 747 (2012), concluded that to be compliant, the notice or claim had to be filed within the specified period (1 year), and it rejected defendant's position that a plaintiff is limited to only one opportunity to meet that requirement. On that basis, the Court of Claims concluded that plaintiff's amended complaint was timely filed under MCL 600.6431. The Court of Claims also rejected defendant's argument that plaintiff's amended complaint was untimely because it was filed outside the FOIA's 180-day limitations period. Relying on MCL 600.5856(a), the Court of Claims concluded that the statutory period of limitations was tolled at the time the original complaint was filed and that the amendment related back to the date of the original complaint because the claim asserted in the amended complaint arose out of the same conduct, transaction, or occurrence set forth in the original pleading.

Defendant appealed in the Court of Appeals.[5] The Court of Appeals first rejected plaintiff's argument that the Court lacked jurisdiction in Docket No. 340921 because the Court of Claims' denial of summary dispo-

[5] Defendant appealed by right the denial of his motion for summary disposition under MCR 2.116(C)(7) based on governmental immunity (Docket No. 340921). Defendant also filed an application for leave to appeal from the denial of his motion for summary disposition under MCR 2.116(C)(7) based on the statute of limitations (Docket No. 340956). The Court of Appeals granted defendant's application and consolidated the two appeals.

sition was not a "final judgment" or "final order" under MCR 7.202(6). *Progress Mich*, 324 Mich App at 665-666. Plaintiff argued that the Court of Claims did not deny defendant governmental immunity because there is no governmental immunity applicable to plaintiff's claim under the FOIA. The Court of Appeals determined that because defendant asserted that compliance with MCL 600.6431(1) was a condition precedent to avoiding governmental immunity, see *Fairley v Dep't of Corrections*, 497 Mich 290, 297; 871 NW2d 129 (2015), the denial of defendant's motion amounted to " 'an order denying governmental immunity to a governmental . . . official,' " making it a "final order under MCR 7.202(6)(a)(v)." *Progress Mich*, 324 Mich App at 665-666 (citation omitted). The Court went on to conclude that, regardless, it had jurisdiction over the appeal because it had granted leave to appeal in Docket No. 340956. *Id*. at 666.

The Court of Appeals then concluded that although the original complaint was timely, the bar-to-claim language of MCL 600.6431 was triggered because it was not signed and verified. *Id*. at 670-671. The Court analogized the unverified complaint in this case to the medical malpractice complaint filed in *Scarsella*, 461 Mich at 549. In that case, the plaintiff did not include with the complaint the affidavit of merit (AOM) required under MCL 600.2912d; because of the plaintiff's failure to include the statutorily required AOM, this Court had held that the complaint was " 'insufficient to commence the plaintiff's malpractice action' " and insufficient to toll the limitations period. *Progress Mich*, 324 Mich App at 671, quoting *Scarsella*, 461 Mich at 550. The Court of Appeals reasoned that because the complaint in this case was not verified, the claim could not be maintained because it "lacked legal validity from its inception" and was a "nullity." *Progress Mich*,

324 Mich App at 673. Because "there was nothing pending that could be amended," the amended complaint did not cure the defect of the original complaint, and any attempt by plaintiff to amend the complaint under MCR 2.118 was ineffectual. *Id*. (quotation marks omitted). Because the amended complaint was filed outside the FOIA's 180-day statute of limitations, neither could it commence the action on its own. *Id*. at 674 n 3. The Court reversed and remanded to the Court of Claims for entry of summary disposition in favor of defendant. *Id*. at 674.

We granted leave and directed the parties to address: "(1) whether there is a sovereign or governmental immunity defense to the failure to disclose public records pursuant to the [FOIA]; (2) if so, whether that immunity is waived by the FOIA; (3) whether the notice and verification requirements of the [COCA], see MCL 600.6431(1), are applicable to [an] FOIA appeal; (4) if so, whether the Court of Appeals erred when it held that the plaintiff's failure to follow the verification requirement in its original complaint, which was filed within one year after the FOIA claim accrued, MCL 600.6431(1), rendered the complaint 'invalid from its inception' and incapable of amendment; and (5) whether the Court of Appeals erred when it held that the verified amended complaint, also filed within the one-year period, could not 'relate back' to the date of the original complaint for purposes of compliance with the 180-day limitations period of the FOIA." *Progress Mich v Attorney General*, 503 Mich 982, 982-983 (2019).

II. STANDARD OF REVIEW

Plaintiff's challenge to the jurisdiction of the Court of Appeals requires us to interpret the COCA, which

presents a statutory question this Court reviews de novo. *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 767; 664 NW2d 185 (2003). The availability of governmental immunity presents a question of law that is likewise reviewed de novo. *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 179; 931 NW2d 539 (2019).

III. ANALYSIS

In our order granting plaintiff's application for leave to appeal, we asked the parties to address (1) whether there is a sovereign or governmental immunity defense to the failure to disclose public records under the FOIA and (2) if so, whether that immunity is waived by the FOIA. *Progress Mich*, 503 Mich at 982-983. Plaintiff argues that there is no sovereign or governmental immunity defense to its claim under the FOIA because this Court has previously recognized a common-law mandamus action to compel disclosure of public documents against the state that was not barred by immunity; moreover, the subsequently enacted FOIA explicitly waives any immunity. Defendant agrees that under the FOIA, he is subject to suit but argues that he is entitled to a sovereign-immunity defense in the FOIA suit because plaintiff's originally filed unverified complaint did not comply with MCL 600.6431. The Court of Appeals, citing *Fairley*, 497 Mich at 297, considered the issue of plaintiff's compliance with MCL 600.6431 as an issue of immunity, reasoning that the verification requirement was a condition precedent for avoiding governmental liability. *Progress Mich*, 324 Mich App at 665-666. The Court concluded that the Court of Claims' "denial of summary disposition constituted a denial of governmental immunity to a governmental party, and the order thus constituted a final order," granting the Court of Appeals jurisdiction over the appeal by right. *Id*. at 666.

As this Court recognized in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 598; 363 NW2d 641 (1984), the state is immune from suit unless, and only to the extent that, it consents to be sued:

> From statehood forward, Michigan jurisprudence recognized that the sovereign (the state) was immune from *all* suits, including suits for tortious injuries which it had caused. The rationale for sovereign immunity was never grounded in a belief that the state could do no wrong. Rather, sovereign immunity existed in Michigan because the state, as creator of the courts, was not subject to them or their jurisdiction. As the Supreme Court stated in *Michigan State Bank v Hastings*, 1 Doug 225, 236 (Mich, 1844):
>
> > The principle is well settled that, while a state may sue, it cannot be sued in its own courts, unless, indeed, it consents to submit itself to their jurisdiction. * * * [A]n act of the legislature, conferring jurisdiction upon the courts in the particular case, is the usual mode by which the state consents to submit its rights to the judgment of the judiciary.
>
> Thus, the original Michigan rule held that the state was immune from all suits except to the extent that it consented to be sued in its courts.

The Legislature can, and has, abrogated the state's sovereign immunity by enacting legislation consenting to suit. Relevant to this case, the Legislature has consented to suit against public bodies and waived its sovereign immunity under the FOIA.[6] Specifically, the

[6] While statutory waivers of immunity would come later, there have always been exceptions to the background rule of absolute sovereign immunity for the state recognized at common law. Common-law writs of mandamus and habeas corpus existed before there was any legislative waiver of immunity from suit. The state necessarily was subject to suit for those writs—i.e., it was not immune from suit—because, otherwise, these writs would be an empty promise of a remedy. Specifically, in *Nowack v Auditor General*, 243 Mich 200, 203-204; 219 NW 749 (1928), this Court

act authorizes individuals to initiate a civil action against a public body to challenge a final determination that denied all or a portion of a request for documents. MCL 15.240. The FOIA defines "public body" to include the following: "A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government . . . ." MCL 15.232(h)(*i*). Accordingly, because there is no question that defendant is considered a "public body," plaintiff could assert a claim under the FOIA for defendant's denial of its request for documents.

MCL 15.240 also specifies how such an FOIA suit should be filed. The statute requires that a plaintiff must file the suit in the Court of Claims within 180 days of the final determination denying the plaintiff's request:

> (1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:
>
> (a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

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recognized a common-law right to access public records with no indication that the state was immune from such an action. This is likely because any immunity defense theory for a mandamus action would defeat the point of the writ of mandamus; if the state could assert immunity from the writ, the writ would have no function.

The FOIA statute, first enacted in 1976, effective April 13, 1977—see 1976 PA 442—specifically codified into statute a mandamus-like action whereby plaintiffs could seek to compel the government to perform the legal duty to disclose public documents. The extent to which the common-law right to compel production of public documents exists outside the FOIA, if at all, has not been raised by the parties, and it is not necessary for us to decide that question in this case. Plaintiff's claim is not a mandamus action seeking to compel defendant to produce the disputed documents. Plaintiff's claim is an FOIA claim that must be resolved under that act.

> (b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request. [*Id*.]

Accordingly, because a decision of a state public body was at issue, plaintiff was required to commence its civil action in the Court of Claims within 180 days of October 19, 2016, the date defendant first denied plaintiff's FOIA request.[7] Plaintiff did exactly that: in compliance with MCL 15.240, plaintiff filed its action in the Court of Claims within the 180-day limitations period. Despite this, defendant argued that he was entitled to governmental immunity because plaintiff's original complaint was not verified and that, therefore, plaintiff did not comply with MCL 600.6431 of the COCA. Citing *Fairley*, 479 Mich at 297, the Court of Appeals agreed, concluding that compliance with the COCA was a condition precedent to avoiding defendant's immunity. *Progress Mich*, 324 Mich App at 665-666. Whether compliance with the COCA is properly considered a question of immunity or a question of compliance with the rules of the forum is a question of no moment because plaintiff was required to comply with the COCA either way.[8] We disagree with the Court of Appeals, however, that plaintiff failed to comply with the COCA.

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[7] Plaintiff has not challenged defendant's position that the 180-day period of limitations under MCL 15.240 began to run when defendant first denied plaintiff's FOIA request on October 19, 2016, rather than when defendant denied plaintiff's appeal of that denial on December 12, 2016. Accordingly, and because we hold that plaintiff's original complaint tolled the statutory period of limitations, we do not address whether defendant is correct on this point.

[8] We acknowledge that in *Fairley*, 479 Mich at 297, we stated that "while MCL 600.6431 does not 'confer governmental immunity,' it establishes conditions precedent for avoiding the governmental immu-

First, we address the statutory authority for the verification requirement. Defendant has offered the concession that under *Pike v Northern Mich Univ*, 327 Mich App 683, 695-697; 935 NW2d 86 (2019), MCL 600.6431 would not apply because defendant is not "the state," although defendant maintains *Pike* was wrongly decided. MCL 600.6431 provides:

> (1) Except as otherwise provided in this section, a claim may not be maintained against this state unless the claimant, within 1 year after the claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against this state or any of its departments, commissions, boards, institutions, arms, or agencies.
>
> (2) A claim or notice under subsection (1) must contain all of the following:
>
> (a) A statement of the time when and the place where the claim arose.
>
> (b) A detailed statement of the nature of the claim and of the items of damage alleged or claimed to have been sustained.
>
> (c) A designation of any department, commission, board, institution, arm, or agency of the state involved in connection with the claim.
>
> (d) A signature and verification by the claimant before an officer authorized to administer oaths.

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nity conferred by the [the governmental tort liability act (GTLA), MCL 691.1401 *et seq*.], which expressly incorporates MCL 600.6431." Further, we rejected the Court of Appeals' interpretation of MCL 600.6431 as merely establishing procedures for suing the state under the GTLA. *Id*. at 297 n 11. *Fairley* is not directly applicable here because it involved a claim under the GTLA rather than under the FOIA and the Court's analysis of the interplay between the GTLA and the COCA was specific to those statutes. More importantly, we need not decide whether compliance with the COCA is a question of immunity or a question of compliance with the rules of the forum because the answer is the same—plaintiff must comply with the COCA to maintain its claim against defendant.

> (3) A claimant shall furnish copies of a claim or notice filed under subsection (1) to the clerk at the time of filing for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms, or agencies of this state designated in the claim or notice.
>
> (4) For a claim against this state for property damage or personal injuries, the claimant shall file the claim or notice under subsection (1) with the clerk of the court of claims within 6 months after the event that gives rise to the claim.
>
> (5) This section does not apply to a claim for compensation under the wrongful imprisonment compensation act, 2016 PA 343, MCL 691.1751 to 691.1757.[9]

Even if MCL 600.6431 does not apply because defendant is not a "state," there is no question plaintiff was required to comply with MCL 600.6434, which provides:

> (1) Except as provided in this section, the pleadings shall conform to the rules for pleadings in the circuit courts.
>
> (2) *The complaint shall be verified.* The pleadings of the state need not be verified.
>
> (3) The complaint shall be served upon any department, commission, board, institution, arm, or agency of the state involved in the litigation, in the same manner as a complaint filed in the circuit court.
>
> (4) With each paper, including the original complaint filed by the claimant, 1 copy of each shall be furnished to the clerk who shall immediately transmit the copy to the attorney general. [Emphasis added.]

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[9] MCL 600.6431 was recently amended by 2020 PA 42, effective March 3, 2020. However, the statute applies retroactively to March 29, 2017. 2020 PA 42, enacting section 1. Because plaintiff filed its complaint in the Court of Claims on April 11, 2017, all references in the analysis section of this opinion to MCL 600.6431 are to the current version of the statute.

There is no dispute that the originally filed complaint was not verified as required under MCL 600.6434(2). As for the amended complaint, it appears from the face of the pleading that it was not, in fact, verified.[10] However, defendant stated affirmatively that the amended complaint was properly verified multiple times throughout the course of this litigation. Specifically, defendant asserted the second complaint was verified in his second motion for summary disposition in the Court of Claims, in his brief on appeal in the Court of Appeals, and in his brief on appeal in this Court.[11] Further, when specifically invited at oral argument in this Court to argue that the amended

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[10] MCR 1.109(D)(3) specifies the verification requirement:

> Verification. Except when otherwise specifically provided by rule or statute, a document need not be verified or accompanied by an affidavit. If a document is required or permitted to be verified, it may be verified by
>
> (a) oath or affirmation of the party or of someone having knowledge of the facts stated; or
>
> (b) except as to an affidavit, including the following signed and dated declaration:
>
> "I declare under the penalties of perjury that this _____ has been examined by me and that its contents are true to the best of my information, knowledge, and belief." Any requirement of law that a document filed with the probate court must be sworn may be also met by this declaration.

The amended complaint contains no oath or affirmation by plaintiff or by someone having knowledge of the facts stated and does not include a signed and dated declaration consistent with MCR 1.109(D)(3)(b). The amended complaint merely includes the signature of plaintiff's executive director, subscribed and sworn to before the Ingham County Clerk.

[11] See Defendant's Second Motion for Summary Disposition in the Court of Claims (June 13, 2017) at 2 ("In response, on May 26, 2016, Progress Michigan filed its First Amended Complaint, which differed only in that it was signed and verified."); Defendant's Brief on Appeal in the Court of Appeals (January 25, 2018) at 17 n 8 ("The only difference between the amended and original complaints was Progress Michigan's addition of its verified signature as required by MCL 600.6431(1));

complaint was not verified, defendant declined. Defendant did not address verification under MCL 600.6434 separately from verification under MCL 600.6431, and while the statutes function slightly differently, there is no difference between their verification requirements. Accordingly, defendant has waived any argument that the amended complaint was not properly verified. *Sweebe v Sweebe*, 474 Mich 151, 156-157; 712 NW2d 708 (2006) (A "waiver is the intentional relinquishment of a known right.") (quotation marks, citation, and alteration omitted).

Having waived any challenge to the amended complaint's verification, defendant's sole argument in support of dismissal of the amended complaint is that it was filed outside the 180-day limitations period specified in MCL 15.240. The Court of Appeals agreed, reasoning that because the original complaint was not verified, it was a nullity. *Progress Mich*, 324 Mich App at 673. Despite the fact that the complaint had been accepted for filing by the Court of Claims, had been served on defendant, and had been the subject of defendant's first responsive pleading, the Court of Appeals concluded that it was as if the complaint never even existed and could not have been amended to comply with the verification requirement. We disagree.

To determine whether the amended complaint was timely filed, we first need to analyze the effect of the unverified original complaint. To do this, we look to the procedures that govern practice in the Court of Claims. Under MCL 600.6422, practice and procedure in the Court of Claims is governed by the statutes and court rules applicable to proceedings in the circuit court, unless otherwise specifically stated in the COCA:

Defendant's Brief on Appeal in this Court (June 26, 2019) at 24 ("In an attempt to cure this deficiency, it filed a verified amended complaint on May 26, 2017 . . . .").

> (1) Practice and procedure in the court of claims shall be in accordance with the statutes and court rules prescribing the practice in the circuit courts of this state, except as otherwise provided in this section.
>
> (2) The supreme court may adopt special rules for the court of claims.
>
> (3) All fees in the court of claims shall be at the rate established by statute or court rule for actions in the circuit courts of this state and shall be paid to the clerk of the court of claims.

Similarly, MCL 600.6434(1) states, "Except as provided in this section, the pleadings shall conform to the rules for pleadings in the circuit courts."

The Revised Judicature Act (RJA), MCL 600.101 *et seq*., governs practice and procedure in the Court of Claims because the COCA is contained within the RJA. Relevant to this case, two provisions of the RJA prescribe the practice and procedure in the circuit court and, therefore, the Court of Claims: MCL 600.1901 and MCL 600.5856. MCL 600.1901 states that an action is commenced upon the filing of a complaint in a court.[12] MCL 600.5856(a) states that the statutory period of limitations is tolled upon the filing of a complaint. Nothing in the COCA or the FOIA prescribes different practices or procedures governing the commencement of an action or the tolling of a limitations period. Accordingly, these statutes apply, and plaintiff's FOIA action was commenced when it filed the complaint on April 11, 2017; the filing of the original complaint tolled the 180-day limitations period under MCL 15.240, leaving six days remaining before the limitations period passed.

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[12] See also MCR 2.101(B) ("A civil action is commenced by filing a complaint with a court.").

As already discussed, because the original complaint was not verified, it did not comply with MCL 600.6434(2) and was subject to dismissal. But plaintiff proceeded to amend the complaint under the Michigan Court Rules to correct the lack of verification. Under MCR 2.118(A)(1), plaintiff was entitled to amend its complaint, without seeking leave from the Court of Claims, within 14 days of defendant filing its motion to dismiss.[13] See also MCL 600.2301.[14] Plaintiff did so: defendant's motion to dismiss the complaint was filed on May 16, 2017, and the amended complaint was filed on May 26, 2017. Under MCR 2.118(A)(4), "[u]nless otherwise indicated, an amended pleading supersedes the former pleading." Accordingly, the amended complaint, timely filed under MCR 2.118(A)(1), superseded the original complaint.

The Court of Appeals held that because it was not verified, plaintiff's original complaint did not commence the action in the Court of Claims and that it therefore did not toll the statutory period of limitations. In the Court of Appeals' own words, the original complaint was a "nullity" that could not be amended. *Progress Mich*, 324 Mich App at 673. In reaching this

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[13] MCR 2.118(A)(1) states:

> A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading.

[14] MCL 600.2301 provides:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

conclusion, the Court of Appeals extended this Court's decision in *Scarsella*, 461 Mich 547, to apply in the context of this case—that is, the Court of Appeals analogized the *Scarsella* plaintiff's failure to file a statutorily required AOM with his medical malpractice complaint, with plaintiff's failure in this case to file a verified complaint originally. *Progress Mich*, 324 Mich at 673.

We first note that by its own terms, *Scarsella* does not apply here. In *Scarsella*, the Court examined the MCL 600.2912d(1) requirement that a medical malpractice plaintiff "shall file with the complaint an [AOM] signed by a health professional . . . ." Limiting our holding to the AOM requirement in that statute, we held that the plaintiff's failure to file the affidavit rendered the complaint "ineffective," in that it would "not work a tolling of the applicable period of limitation." *Scarsella*, 461 Mich at 553. We note the obvious—that the complaint at issue here does not allege a claim of medical malpractice and, hence, does not fall within *Scarsella*'s express holding.[15] Without explaining why

[15] Moreover, the complaint in *Scarsella* omitted the requisite AOM, whereas here defendant argued the original complaint was insufficient or incomplete because it lacked the requisite verification. *Scarsella* explicitly stated:

> Today, we address only the situation in which a medical malpractice plaintiff wholly omits to file the affidavit required by MCL 600.2912d(1); MSA 27A.2912(4)(1). In such an instance, the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitation. *This holding does not extend to a situation in which a court subsequently determines that a timely filed affidavit is inadequate or defective*. [*Scarsella*, 461 Mich at 553 (emphasis added).]

In this case, the complaint was not "wholly omit[ted]" but, rather, was "inadequate or defective." *Scarsella* explicitly declined to extend its "nullity" analysis to the context in which the document (there the affidavit, here the complaint itself) is present, but is "inadequate or

the verification requirement should be considered substantially similar to the MCL 600.2912d AOM requirement, the Court of Appeals merely concluded that the verification requirement (of MCL 600.6431) "is analogous to the requirements for initiating a medical malpractice claim." *Progress Mich*, 324 Mich App at 671. We disagree.[16]

First, as even the Court of Appeals acknowledged, the language of the medical malpractice and verification statutes are not identical. *Id*. at 672 n 2. Further, nothing in MCL 600.6431 or MCL 600.6434 suggests that the failure to comply with the verification requirement renders a complaint "null and void." Nor does any other provision of the COCA or the FOIA. Finally, as already stated, MCL 600.6422(1) dictates that the court rules governing civil actions in the circuit court govern actions in the Court of Claims, and no court rule renders a complaint filed without the requisite verification a nullity.

Construing MCL 600.6434 as requiring that the complaint be verified, as we must under *McCahan*, does not mean that an unverified complaint does not commence a civil action under MCL 600.1901 or toll the limitations period under MCL 600.5856. Nothing in MCL 600.6434 (or any other provision of the COCA) suggests otherwise. MCL 600.6434 says absolutely nothing that would contradict or override the general rules pertaining to commencing an action under

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defective." That is the situation here. By its own terms, *Scarsella* does not apply. See also *Saffian v Simmons*, 477 Mich 8, 13-14; 727 NW2d 132 (2007) ("*Scarsella* did not address the problem of a defective affidavit of merit.").

[16] Although amicus curiae, Michigan Association for Justice, argues that *Scarsella* was incorrectly decided, we need not reach the issue because plaintiff has not asked us to do so and the case is distinguishable by its own terms.

MCL 600.1901 or tolling the limitations period under MCL 600.5856. Nor does MCL 600.6434 explicitly condition tolling on the verification requirement. All MCL 600.6434 requires is that the complaint be verified. It is not inconsistent to require a plaintiff to comply with the verification requirement in MCL 600.6434 while at the same time permitting the action to be commenced under MCL 600.1901 and the limitations period tolled under MCL 600.5856(a).

Finally, we reject defendant's argument that permitting plaintiff to amend its complaint to correct the lack of verification would allow plaintiff to subvert the verification requirement of MCL 600.6434. Recognizing that an action is commenced under MCL 600.1901 and that the statutory period of limitations is tolled under MCL 600.5856 upon the filing of a complaint does not render the verification requirements of MCL 600.6434 meaningless. Plaintiffs still have to verify the complaint, and their complaint might be dismissed if they fail to do so, just not on statute-of-limitations grounds.[17] Likewise, nothing in the language of MCL 15.240 suggests that the verification requirement of MCL 600.6434 (or MCL 600.6431) has any bearing on the question of when an action is commenced or whether the statutory period of limitations is tolled. To the contrary, the rules applicable in the Court of

[17] In denying the application for leave to appeal in *Castro v Goulet*, 501 Mich 884, 886 (2017), Justice VIVIANO offered a similar analysis concerning the MCL 600.2912d(1) AOM requirement and the statute of limitations in MCL 600.5856(a). *Castro*, 501 Mich 884, 886 (2017) (VIVIANO, J., concurring) ("No one has yet offered a convincing argument why it would be inconsistent to mandate the AOM filing in § 2912d(1) while at the same time permitting[§ 5856(a)] to toll the running of the statutory limitations period. Tolling in these circumstances would not appear to vitiate the requirements of § 2912d(1): plaintiffs would still have to file the AOM and their claims might be dismissed when they failed to do so, just not on statute of limitations grounds.").

Claims state that an action is commenced and the statutory limitations period is tolled upon the filing of a complaint. Had the Legislature intended the verification requirement to affect the commencement of the action or the tolling of the statutory period of limitations under either the FOIA or the COCA, it could have, and presumably would have, so specified.[18]

IV. CONCLUSION

Because the Court of Appeals erred by granting defendant summary disposition, we reverse the judgment of the Court of Appeals and remand the case to the Court of Claims for further proceedings.

MARKMAN, ZAHRA, BERNSTEIN, and CLEMENT, JJ., concurred with CAVANAGH, J.

MCCORMACK, C.J. (*concurring*). I agree with the Court that the unsworn and unverified original complaint tolled the statute of limitations on the plaintiff's Freedom of Information Act (FOIA)[1] claim. The Court

[18] There is no need to analyze whether the amended complaint related back under MCR 2.118(D). As discussed, the original complaint—which set forth the entire FOIA claim and satisfied the limitations period in MCL 15.240(1)(b)—was not a "nullity." The amendment only corrected the technical verification requirement; it did not add a new claim. See 1 Mich Court Rules Practice, *Relation Back of Amendments–In General* (7th ed), § 2118.11, pp 884-885 ("The chief importance of the relation-back rule is to determine whether or not the statute of limitations has been satisfied. In broad terms, if the original complaint was timely, it satisfied the statute of limitations even if it was defective and even if the amendment that cured the defect was not made until after the running of the statute. On the other hand, an amendment that raises a new claim (*i.e.*, one that does not arise out of the same transaction or occurrence) does not relate back, and if it is raised for the first time after the statute of limitations has run, it may be attacked on that ground.").

[1] MCL 15.231 *et seq*.

of Appeals erred by holding otherwise, and the Court is right to reverse its judgment. I write separately to explain why today I would also overrule our decision in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000).

As the Court explains, *Scarsella* did not involve the Court of Claims Act[2] or the FOIA; the question that *Scarsella* presented is how a trial court should proceed if a plaintiff in a medical malpractice action files a complaint without also filing the "affidavit of merit" required by MCL 600.2912d.[3] Despite that dissimilarity, the Court of Appeals followed *Scarsella*'s roadmap to conclude that the plaintiff's original complaint "lacked legal validity from its inception" because it was neither signed nor verified. *Progress Mich v Attorney General*, 324 Mich App 659, 673; 922 NW2d 654 (2018).

But it is hard to fault the Court of Appeals; the analogy makes sense. In *Scarsella*, 461 Mich at 553, this Court stated that when "a medical malpractice plaintiff wholly omits to file" the affidavit of merit, "the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitation." That result was required, the Court held, because MCL 600.2912d(1) uses mandatory language—"the plaintiff . . . *shall* file with the complaint an affidavit of merit . . . ." (Emphasis added.) See *Scarsella*, 461 Mich at 549 ("Use of the word 'shall' indicates that an affidavit accompanying the complaint is mandatory

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[2] MCL 600.6401 *et seq*.

[3] MCL 600.2912d(1) provides that "the plaintiff in an action alleging medical malpractice . . . shall file with the complaint an affidavit of merit signed by a health professional . . . ." The affidavit must include, among other things, a statement identifying the applicable standard of practice or care and a description of how the defendant breached that standard. MCL 600.2912d(1)(a) through (d).

and imperative. . . . We therefore conclude that, for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit."). And while dismissal of the affidavit-lacking complaint is without prejudice, the dismissal is fatal if (absent tolling) a subsequent action is time-barred. *Id*. at 549-550. That was the result in *Scarsella*, and so, too, the Court of Appeals concluded here.

Requiring a plaintiff to sign their complaint and verify the facts it alleges is different than requiring a plaintiff to provide a presuit affidavit from an expert who will opine favorably on the plaintiff's claim. But those differences didn't cause the panel to pause. Citing *Scarsella* favorably, it recognized that both cases involve "mandatory prerequisites to filing suit and thus present the same issue." *Progress Mich*, 324 Mich App at 672 n 2. As a result, the original complaint was a "nullity," a legal zero that neither commenced the plaintiff's FOIA action nor tolled the limitations period. *Id*. at 673.

The Court today rejects this logic. It finds a distinction when the Court of Appeals did not, explaining that the defects in the original complaint identified by the defendant—that it was neither signed nor verified—are more like when a plaintiff *does* file an affidavit of merit, but that affidavit is inadequate or defective in some way. And analogizing also to our medical malpractice caselaw, these deficiencies would not prevent tolling of the statute of limitations there, so it should not here either. Compare *Kirkaldy v Rim*, 478 Mich 581, 586; 734 NW2d 201 (2007) (a deficient affidavit of merit suffices to toll the limitations period "until the validity of the affidavit is successfully challenged in 'subsequent judicial proceedings,' " at which point the limitations period continues to run).

This reasoning should not be interpreted as an endorsement of *Scarsella*. Indeed, the Court explains today that the Court of Claims Act "says absolutely nothing that would contradict or override" the statutory rules for when an action is commenced or when the limitations period is tolled. See MCL 600.1901; MCL 600.5856.[4] And tolling the statute of limitations in a case such as this one would not render meaningless the Court of Claims Act's signature and verification requirements—a defective complaint might still be subject to dismissal, but the running of the limitations period would be tolled until that time.

All true. And of course, these same points apply to medical malpractice actions because there is no statutory provision that conditions tolling on the plaintiff's filing of an affidavit of merit. Others have beat me to this point. See *Kirkaldy*, 478 Mich at 587 (M. CAVANAGH, J., concurring) ("Clearly, the Legislature did not instruct that the period of limitations for a medical malpractice action would be tolled only when a complaint and an affidavit of merit are filed."); see also *Castro v Goulet*, 501 Mich 884, 886-887 (2017) (VIVIANO, J., concurring) ("Absent any explicit textual indication that filing the [affidavit of merit] is a condition to tolling, *Scarsella*'s contrary conclusion is questionable because we must be cautious not to read into the statute what is not within the Legislature's intent as derived from the language of the statute.") (cleaned up).

Compared to the statutes involved here, the textual absence in the affidavit-of-merit statute, MCL 600.2912d, is a *stronger* indication that tolling simply

[4] Under those rules, "[a] civil action is commenced by filing a complaint with the court," MCL 600.1901, and statutes of limitations are tolled "[a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules," MCL 600.5856(a).

requires the filing of a complaint timely served. That is because in enacting Public Act 78 of 1993—the public act that created the affidavit-of-merit requirement—the Legislature added another procedural prerequisite for would-be medical malpractice plaintiffs, requiring them to provide a defendant with notice of intent to sue "not less than 182 days before the action is commenced." MCL 600.2912b(1). And in it, the Legislature explicitly addressed the interplay between this new notice requirement and our tolling rules. As amended by 1993 PA 78, our tolling statute, MCL 600.5856, provided: "The statutes of limitations or repose are tolled . . . [i]f, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b." MCL 600.5856(d), as amended by 1993 PA 78 (paragraph structure omitted). That is, the Legislature explained in words how the new notice provision worked with the tolling statute.

That explicit provision makes the Legislature's *silence* on whether an affidavit of merit is needed to effectuate tolling under MCL 600.5856(a), well, *loud*. As Justice VIVIANO put it: "[T]he Legislature knows how to tweak the limitations period in the medical malpractice context, but does not appear to have done so for [affidavits of merit]." *Castro*, 501 Mich at 887 (VIVIANO, J., concurring).

But the Court today declines to consider whether *Scarsella* was correctly decided. I appreciate the Court's desire to avoid disrupting precedent when we have not been asked to do so by the parties. But I believe that our standard for reconsidering *Scarsella* might be too high. Ideally, a case would present in

which the question is neatly asked: a medical malpractice plaintiff whose claim is dismissed as untimely, with that dismissal resulting from the failure to file an affidavit of merit contemporaneously with the complaint (and with no excusable reason for failing to do so, see MCL 600.2912d(2) and (3)). But that's unlikely because *Scarsella*'s rule is clear: when a plaintiff "wholly omits" to file the affidavit of merit "the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitation." *Scarsella*, 461 Mich at 553. This language leaves no room for interpretation or debate; under *Scarsella*, no attorney can omit filing the affidavit and expect a different result. And because even a hastily prepared affidavit of merit puts the plaintiff in a much better litigation position than none at all, see *Kirkaldy*, 478 Mich at 586 (opinion of the Court), that there is a potentially meritorious argument for overruling *Scarsella* is not a risk that any prudent attorney would knowingly take.

Perhaps because of this, our post-*Scarsella* opinions have not confronted *Scarsella* head-on but have, instead, tried to make sense of its (I assume) unintended consequences when a flawed affidavit is timely filed but later challenged by the defendant. See, e.g., *Saffian v Simmons*, 477 Mich 8, 13-14; 727 NW2d 132 (2007) (an affidavit of merit bears a presumption of validity and a "technically deficient" affidavit is not a valid reason for setting aside the defendant's default for failing to file an answer); *Kirkaldy*, 478 Mich at 586 (opinion of the Court) (an affidavit that did not fully comply with the statutory requirements would still operate to toll the statute of limitations until successfully challenged); *Ligons v Crittenton Hosp*, 490 Mich 61, 76, 89-90; 803 NW2d 271 (2011) (whether a defective affidavit of merit

tolls the saving period provided for by the wrongful-death saving statute, MCL 600.5852).

The result has been a category of lawsuits that amicus curiae, Michigan Association for Justice, aptly describes as "spectral": cases assigned a docket number and litigated in the courts, but somehow never begun because the cases were a "nullity." And this oddity is not limited to cases that are controlled by our holding in *Scarsella*; we have also extended it to the presuit notice required by MCL 600.2912b. In *Burton v Reed City Hosp Corp*, 471 Mich 745, 752-754; 691 NW2d 424 (2005), this Court held that a "prematurely filed complaint"—one that is filed less than 182 days after the plaintiff gives presuit notice—does not commence a medical malpractice action. Like when a plaintiff omits the affidavit of merit when filing a complaint, a prematurely filed complaint is ineffective to toll the limitations period because "[e]ach statute [MCL 600.2912b and MCL 600.2912d] sets forth a prerequisite condition to the commencement of a medical malpractice lawsuit." *Burton*, 471 Mich at 754. And these "spectral cases" are not resolved on their underlying merits but, instead, on whether the plaintiff managed to navigate the complex set of tolling rules we have created.[5]

I agree with the Court that *Scarsella can* be distinguished here. But I respectfully disagree that we should not take the final step this case implies and overrule it. As this case shows, not only is the Court leery of *Scarsella*'s reasoning, we also cannot expect its

[5] I agree with Justice MARKMAN that the affidavit-of-merit requirement was likely designed by the Legislature to make it more difficult for medical malpractice plaintiffs to bring suit. But statutory interpretation begins with the law's plain language, not with the policy that may have motivated it. And *Scarsella*'s holding is inconsistent with the plain language of our tolling statute.

influence to stay cabined to medical malpractice actions and MCL 600.2912d. How *Scarsella*'s reasoning can be extended is limited only by a litigant's imagination, no matter how trivial a "mandatory" condition for maintaining suit might be. Rather than resolve these future questions case by case, I would hold today that unless clearly stated otherwise, a statute of limitations or repose is tolled "[a]t the time the complaint is filed," as MCL 600.5856(a) says.

VIVIANO, J., concurred with MCCORMACK, C.J.

MARKMAN, J. (*concurring*). I fully concur with the majority opinion and write separately only to express my disagreement with Chief Justice MCCORMACK's assertion that this Court should overrule *Scarsella v Pollack*, 461 Mich 547; 607 NW2d 711 (2000).

In *Scarsella*, the plaintiff failed to file an affidavit of merit with his medical malpractice complaint, contrary to the requirements of MCL 600.2912d(1), which provides that the plaintiff in such an action "*shall* file with the complaint an affidavit of merit." *Scarsella*, 461 Mich at 548 (emphasis added). This Court concluded that "[u]se of the word 'shall' indicates that an affidavit accompanying the complaint is mandatory and imperative" and thus "for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit." *Id*. at 549 (quotation marks and citation omitted). Not an extraordinary interpretation of the law in my judgment.

While *Scarsella* itself was predicated on the mandatory "shall" language set forth in MCL 600.2912d(1), we elaborated on its reasoning in *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 94; 869 NW2d

213 (2015), in which we rejected the plaintiff's argument that *Scarsella* should be overruled, explaining as follows:

> More specific statutory provisions control over more general statutory provisions, and thus the specific requirements of [MCL 600.2912b(1)] regarding "commenc[ing] an action alleging medical malpractice" prevail over the general requirements of MCL 600.1901 regarding the commencing of civil actions. Although a civil action is generally commenced by filing a complaint, a medical malpractice action can only be commenced by filing a timely [notice of intent] and then filing a complaint and an affidavit of merit after the applicable notice period has expired, but before the period of limitations has expired. [Quotation marks, citation, and brackets omitted; first and second alterations in original.][1]

See also *Castro v Goulet*, 501 Mich 884, 891 n 1 (2017) (MARKMAN, J., dissenting) (quoting same). Without restating the entirety of the analyses in *Scarsella* and *Tyra*,[2] I believe these cases were decided correctly and,

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[1] *Tyra* specifically concerned MCL 600.2912b(1) (written notice-of-intent requirement), while *Scarsella* specifically concerned MCL 600.2912d(1) (affidavit-of-merit requirement). However, the statutes are substantively identical with regard to their mandatory character, with the former providing that "a person *shall not* commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice," and the latter providing that "the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney *shall* file with the complaint an affidavit of merit . . . ." (Emphasis added.)

[2] In addition, I note that MCL 600.2912d(1) provides that the plaintiff or the plaintiff's attorney "shall file *with* the complaint an affidavit of merit . . . ." (Emphasis added.) In my view, the word "with" further communicates that the affidavit of merit must be filed simultaneously with and alongside the complaint. An affidavit of merit that is filed separately from the complaint at a later point in time is not filed "with" the complaint and, thus, does not comply with MCL 600.2912d(1) for that reason as well.

unlike the Chief Justice, would leave them undisturbed. In particular, I would leave these cases undisturbed in the context of resolving the present case in which the dispute in no way pertains to medical malpractice; in which, as shown by the majority opinion, relief can be afforded to plaintiff absent any need to address *Scarsella*; and in which neither party has sought reconsideration of *Scarsella*.

The Court of Appeals, however, in reaching a result contrary to that of this Court, viewed it as helpful to analogize the instant dispute with *Scarsella*. See *Progress Mich v Attorney General*, 324 Mich App 659, 672; 922 NW2d 654 (2018) ("Like the plaintiff in *Scarsella*, plaintiff here argues that it should have been allowed to amend the complaint such that the complaint then would comply with the statutory requirements. However, we reject this argument . . . .") (citation omitted). The statute at issue in the Court of Appeals, MCL 600.6431(1),[3] provided that "[n]o claim may be maintained against the state unless the claimant . . . files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim . . . , which claim or notice *shall* be signed and verified by the claimant . . . ." (Emphasis added.)[4] The word "shall" is "mandatory and imperative,"

[3] As enacted by 1961 PA 236.

[4] MCL 600.6431 was amended by 2020 PA 42, which is applicable retroactively to March 29, 2017, the date on which the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*., became effective. The amended version of MCL 600.6431 retains the act's original signature and verification requirement in current Subsection (2)(d), see MCL 600.6431(1), as enacted by 1961 PA 236, and it appears that the central purpose of the amendment was to provide that the requirements of MCL 600.6431 do not apply to claims for compensation under the WICA. See MCL 600.6431(5) ("This section does not apply to a claim for compensation under the wrongful imprisonment compensation act, 2016 PA 343, MCL 691.1751 to 691.1757.").

Scarsella, 461 Mich at 549, and if the failure to satisfy the "mandatory and imperative" affidavit-of-merit requirement of MCL 600.2912d(1) rendered the complaint in *Scarsella* a " 'nullity,' " it is not incomprehensible why the Court of Appeals would conclude that a failure to satisfy the "mandatory and imperative" verification requirement of MCL 600.6431(1) might analogously render the complaint in the present case a "nullity." See *Progress Mich*, 324 Mich App at 672-673. Nonetheless, I ultimately agree with and join the conclusion of the majority opinion that the complaint here was sufficient to toll the statute of limitations because the failure to verify the complaint more closely resembled a *defective* affidavit of merit than an *absent* affidavit of merit. See *Saffian v Simmons*, 477 Mich 8, 13-14; 727 NW2d 132 (2007) ("*Scarsella* did not address the problem of a defective affidavit of merit.").

But the essential reasoning of *Scarsella*—that the failure to satisfy mandatory language governing statutory preconditions for the maintenance of an action is fatal to the action—is hardly novel to that decision. Consider, for one recent example, this Court's decision on June 4, 2020, to deny the Legislature's application to bypass the Court of Appeals in *House of Representatives v Governor*, 505 Mich 1142 (2020). The critical dispute in that case concerned the significance of MCR 7.305(B)(4), which sets forth the following requirements for the grant of a bypass application:

> (B) Grounds. The application *must* show that
>
> * * *
>
> (4) in an appeal before a decision of the Court of Appeals,
>
> (a) delay in final adjudication is likely to cause substantial harm, or

> (b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branches of state government is invalid[.] [Emphasis added.]

In his dissenting statement, Justice VIVIANO wrote, "It is indisputable that our Court has jurisdiction over this case, if we choose to assert it." *House of Representatives*, 505 Mich 1154 (VIVIANO, J., dissenting). However, a plurality of the Court disagreed, concluding that because the Legislature had failed to satisfy the "mandatory" requirements set forth in MCR 7.305(B)(4), we lacked jurisdiction over the case:

> Justice VIVIANO asserts that "[i]t is indisputable that our Court has jurisdiction over this case," but with a plurality of this Court concluding otherwise, it is plainly disputable. An application "must show" the items included in the list. MCR 7.305(B). Echoing that language, commentary on our rules also characterizes it as mandatory. See Gerville-Réache, *Expediting Review*, § 7.23, p 199 in Michigan Appellate Handbook (Shannon & Gerville-Réache eds, 3d ed, January 2018 update) (remarking that a bypass application "must show" the grounds listed in MCR 7.305(B)(4)). Moreover, the original form of the rule provided only that bypass applications show that "delay in final adjudication is likely to result in substantial harm"; the additional option in MCR 7.305(B)(4)(b) that a bypass application can also show that it is an appeal from a ruling that various forms of law or government action are invalid was added in 2002. See 466 Mich lxxxvi, lxxxix (2002). Since such a judicial declaration would already have fallen within the grounds listed in MCR 7.305(B)(1) through (3), the fact that MCR 7.305(B)(4)(b) was added to MCR 7.305(B)(4) indicates that we understood it to be mandatory for bypass applications; otherwise, it would be redundant of what is already stated in MCR 7.305(B)(1) through (3). Our past practice also indicates it is mandatory, as we have denied bypass applications on the basis that the grounds in the rule were not satisfied. [*House of Representatives*, 505 Mich at 1144 n 3 (CLEMENT, J., concurring).]

Although the plurality did not cite *Scarsella* or *Tyra*, it might well have done so because its reasoning is similar. Once more, in *Scarsella*, 461 Mich at 549, this Court concluded that the failure to satisfy a mandatory rule governing a complaint in a medical malpractice action rendered the complaint a " 'nullity,' " while the plurality in *House of Representatives*, 505 Mich 1142 (CLEMENT, J., concurring), concluded that the failure to satisfy a mandatory rule governing a bypass application deprived the Court of jurisdiction.[5] Thus, in both cases, a mandatory rule was treated as tantamount to a threshold requirement for maintaining an action, with the failure to satisfy the requirement voiding the action.

It is not my point in any way to critique the plurality's statement in *House of Representatives* but, rather, to underscore the reasonableness of what it asserts concerning the consequences of mandatory language that is preconditional to maintaining a lawsuit.[6] Simply put, overruling *Scarsella*, whether done today or tomorrow, would not displace its reasoning

[5] I acknowledge that the plurality's reasoning was not adopted by the Court itself given that we did not dismiss the application for lack of jurisdiction but, instead, denied the application because "we are not persuaded that the questions presented should be reviewed by this Court before consideration by the Court of Appeals," *id*., 943 NW2d 365 (order of the Court), and later asserted jurisdiction on June 30, 2020, by directing the Court of Appeals to decide the case by a specific date, *House of Representatives v Governor*, 505 Mich 1166 (2020).

[6] To be clear, I express no opinion as to whether the plurality was correct in interpreting MCR 7.305(B)(4) as establishing the limits of our jurisdiction over a case filed through a bypass application. Moreover, I note that I did not join the plurality statement and instead joined Justice ZAHRA's dissent on the ground that "the [preconditional] requirements of MCR 7.305(B)(4) [were] satisfied." *House of Representatives*, 505 Mich at 1151 n 3 (ZAHRA, J., dissenting). As a result, whether MCR 7.305(B)(4) establishes the limits of our jurisdiction in that context was a question that I did not need to reach in *House of Representatives* because I would have concluded that the court rule was satisfied in any event.

from our law. It is the reasoning of logic, and such reasoning would continue within our jurisprudence, notwithstanding the overruling of *Scarsella*, even if the realm of medical malpractice law was singularly deprived of its logical force.

Furthermore, *Scarsella* and its progeny have beneficially contributed to the overall clarity of Michigan's comprehensive medical malpractice reforms of the 1990s, giving practical meaning to these reforms in a disciplined and responsible manner. For instance, under *Scarsella*, a plaintiff filing a medical malpractice complaint must simultaneously file an affidavit of merit asserting that the allegations of malpractice have medical and litigative merit, and the failure to do so will result in the ineffectuality of the action.[7] This constitutes a clear and straightforward rule that is altogether consistent with the obligation of the "plaintiff in an action alleging medical malpractice [who] . . . shall file with the complaint an affidavit of merit signed by a health professional . . . ." MCL 600.2912d(1).

And as the Chief Justice notes, it is "unlikely" that a medical malpractice case will, as a result, be presented to this Court in which the plaintiff has *failed* to comply with *Scarsella* precisely because "under *Scarsella*, no attorney can omit filing the affidavit and expect" effectively to toll the statute of limitations. Unlike the Chief Justice, however, I find this unlikeliness to be a virtue of *Scarsella* and not a vice. In other words, when *Scarsella* precludes a medical malpractice action from proceeding on the merits only on the rare occasion in

[7] The only exception to the rule is set forth in MCL 600.2912d(2): "Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1)."

which there has been a complete failure on the plaintiff's part to file an affidavit of merit along with the complaint, it seems to me that *Scarsella* is sufficiently straightforward in setting forth the preconditions for a medical malpractice lawsuit and cannot be said to have established an unreasonable, much less an insurmountable, obstacle in carrying into effect one of the most significant of the Legislature's medical malpractice reforms—the requirement of the filing of an affidavit of merit by a "health professional."

Accordingly, I believe that *Scarsella* sets forth an eminently reasonable and manageable rule of procedure and, most importantly, was decided in accordance with the language of the law.[8] And indeed, this has been equally true, in my judgment, of most of this Court's decisions in support of the Legislature's medical malpractice reforms of the 1990s. Predictability and fairness in medical malpractice litigation is far more likely to result when this Court gives faithful and disciplined meaning to the laws and reforms of the Legislature (as in *Scarsella*), and thereby maintains an accord between our state's statutory law and its case-law, than when a disregard of these obligations fosters uncertainty as to which of these laws control.

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[8] Of course, I concur with the Chief Justice in her affirmation that "statutory interpretation begins with the law's plain language," although I would further affirm that such interpretation not only "begins with," but usually "ends with" the law's plain language. For reasons already generally explained, I believe that *Scarsella* is fully consistent with this principle. That it was necessary to draw an utterly logical inference as to the impact of a failure to comply with a mandatory statutory obligation does not constitute any departure from the underlying principle.

PEOPLE v WOOD

Docket No. 159063. Argued March 4, 2020 (Calendar No. 6). Decided July 28, 2020.

Keith E. Wood was convicted following a jury trial in the 77th District Court of jury tampering, MCL 750.120a(1), for having distributed a pamphlet promoting the concept of jury nullification outside the courthouse at which the pretrial hearing of a man named Andrew Yoder was scheduled to begin. The pamphlet asserted that jurors could vote their conscience, that jurors could not be forced to obey a juror oath, and that a juror had the right to hang a jury if he or she did not agree with other jurors. Defendant handed the pamphlet to two women who told him that they had been summoned to the court for jury selection. The case against Yoder never went to trial because Yoder entered into a plea agreement. After being charged in district court with obstruction of justice, MCL 750.505, and jury tampering, defendant moved to dismiss both charges, arguing with regard to the jury-tampering charge that the term "juror" in MCL 750.120a(1) did not include people who were summoned for jury duty but never selected or sworn. The district court, Kimberly L. Booher, J., dismissed the obstruction charge but denied the motion with regard to the jury-tampering charge, of which defendant was ultimately convicted. Defendant appealed his conviction in the Mecosta Circuit Court, arguing that the government had violated his First Amendment right of free speech, that MCL 750.120a(1) was unconstitutionally vague, and that he had not received a fair trial. The circuit court, Eric R. Janes, J., affirmed defendant's conviction. After granting defendant's application for leave to appeal, the Court of Appeals, MURRAY, C.J., and CAMERON, J. (MURPHY, J., dissenting), also affirmed his conviction, holding in a published opinion that the term "juror" includes a person summoned for jury duty and that MCL 750.120a was not unconstitutional as applied to defendant, nor was it unconstitutionally vague or overbroad. 326 Mich App 561 (2018). The Supreme Court granted defendant's application for leave to appeal. 504 Mich 975 (2019).

In an opinion by Justice CLEMENT, joined by Chief Justice MCCORMACK and Justices ZAHRA, BERNSTEIN, and CAVANAGH, the Supreme Court *held*:

Individuals who are merely summoned for jury duty and have not yet participated in a case are not jurors for purposes of MCL 750.120a(1). Therefore, defendant did not attempt to influence the decision of any "juror" as that term is used in MCL 750.120a(1).

1. MCL 750.120a(1) makes it a misdemeanor for a person to willfully attempt to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case. The statute does not define "juror," but dictionaries generally define it either narrowly, as "one member of a jury," or broadly, to include those summoned for jury duty. Taking "juror" in the context of the provision at issue, which prohibits an individual from influencing a juror's decision "in any case," the most reasonable interpretation is that when individuals are merely summoned for jury duty, they are not jurors because they have yet to participate in a case. The earliest point at which individuals summoned for jury duty may be considered as participating in any particular case is venire selection because, before that, a summoned individual might never be assigned to a venire and thus might never be attached to any case at all. This narrower interpretation of "juror" is supported by reading MCL 750.120a in harmony with MCL 750.120, which prohibits bribing any person summoned as a juror, because the context suggests that the word has a broader meaning in MCL 750.120 than it does in MCL 750.120a(1). The Legislature chose not to include the language "any person summoned as a juror" when it enacted MCL 750.120a and chose not to include the language "in any case" in MCL 750.120, which suggests that MCL 750.120a applies to a broader group of people. Further, the etymology of "juror" shows that swearing an oath is central to the definition of "juror," but when individuals are summoned for jury duty, they have yet to be sworn in for any official proceedings. Although the voir dire oath on its own may not transform an individual into a juror, it is some indication that a person is participating in a case as required under MCL 750.120a(1). Finally, while Chapter 13 of the Revised Judicature Act (RJA), MCL 600.1300 *et seq*., uses "juror" to include those summoned for jury duty, it also uses the term in both broader and narrower senses throughout the act, and it is not clear that Chapter 13 of the RJA should be read *in pari materia* with MCL 750.120a because these statutes have a scope and aim that are distinct and unconnected.

2. Defendant talked to individuals who had been summoned for jury duty but had yet to participate in any court proceedings that would make them a part of any case. When defendant approached the individuals to whom he handed pamphlets, they

had neither entered the courthouse nor sat as part of a venire nor sworn an oath. Further, none of the individuals summoned for jury duty on the day of the Yoder trial ultimately participated in a case for purposes of MCL 750.120a(1) because they were dismissed before any proceedings began. Defendant, therefore, did not attempt to influence the decision of any "juror" as that term is used in MCL 750.120a(1).

3. The constitutional arguments defendant raised were not reached because the case was decided on statutory grounds.

Reversed and remanded for further proceedings.

Justice VIVIANO, joined by Justice MARKMAN, dissenting, would have held that the ordinary meaning of "juror" in this context includes not only empaneled jurors but also summoned jurors, because almost all the dictionaries from the period in which MCL 750.120a was enacted included summoned jurors in the definition of "juror." He explained that the meaning of "juror" broadened over the beginning of the 20th century as the procedures for summoning jurors changed and that the broadened meaning of "juror" was well established in 1955, the year MCL 750.120a was enacted. He noted that the majority did not take stock of the dictionaries discussed and that the definitions the majority cited were not inconsistent but instead were closely related subsenses that were better read together as a single definition. He explained that the phrase "in any case" in MCL 750.120a demonstrated that the breadth of the statute reaches cases that have not yet proceeded to trial. Moreover, he stated that the majority's reliance on MCL 750.120 overlooked the historical development of the word "juror" and the fact that that section also applies to individuals summoned for "any case" by its use of the phrase "any suit, cause, or proceeding." Further, he stated that allowing improper influence before jurors are chosen and sworn but disallowing it afterward would merely regulate the timing of improper influence, which would not further the statute's purpose, collected from the text, of preventing individuals from asserting improper influence over judicial proceedings. Under this interpretation, defendant's actions fell within the statutory proscription of jury tampering by seeking to influence a summoned juror. Justice VIVIANO further stated that this interpretation would avoid any First Amendment concerns because it would render the statute sufficiently definite, would not sweep in a substantial amount of protected speech, and was narrowly tailored in its application to defendant's conduct. Accordingly, he would not have reversed the Court of Appeals' judgment.

CRIMINAL LAW — STATUTES — JURY TAMPERING — WORDS AND PHRASES — "JUROR."

Individuals who are merely summoned for jury duty and have not yet participated in a case are not jurors for purposes of MCL 750.120a(1).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Brian E. Thiede*, Prosecuting Attorney, for the people.

Kallman Legal Group, PLLC (by *David A. Kallman* and *Stephen P. Kallman*) for defendant.

Amici Curiae:

Daniel S. Korobkin and *Gautam S. Hans* for the American Civil Liberties Union of Michigan.

Revision Legal, PLLC (by *Eric Misterovich* and *John Di Giacomo*) for the Fully Informed Jury Association.

Revision Legal, PLLC (by *Eric Misterovich*) for the Cato Institute.

CLEMENT, J. A criminal statute, MCL 750.120a(1), prohibits any individual from willfully attempting to "influence the decision of a juror in any case by argument or persuasion . . . ." In this case, we consider the meaning of "juror" under this statute. Defendant was charged with jury tampering after handing pamphlets outside a courthouse to individuals arriving for their first day of jury duty. We hold that the individuals here who were merely summoned for jury duty and had not participated in a case were not jurors under MCL 750.120a(1).

I. FACTS AND PROCEDURAL HISTORY

What does the case of Andrew Yoder, an Amish man indicted for violating environmental regulations, have

to do with jury nullification? Very little. But the two converge in defendant's case. At some point, defendant, Keith E. Wood, became interested in jury nullification, the concept that a jury can vote to acquit even if it finds that the accused violated the law beyond a reasonable doubt.[1] Yoder's case also "piqued [defendant's] interest" after he learned of the case through an "email blast" sent to several people. Defendant claims—and it is not disputed—that he neither personally knew Yoder nor had any contact with him. Nevertheless, defendant attended the pretrial hearing in the Yoder case on November 4, 2015, at which the court scheduled Yoder's trial for November 24th.

On the morning set for Yoder's trial, defendant showed up and began handing out pamphlets outside the courthouse's front entrance to anyone who would take one. The pamphlets—entitled "Your Jury Rights: True or False?"—promoted jury nullification.[2] Defendant had found the pamphlets at the website of the Fully Informed Jury Association (FIJA).[3] They men-

[1] Jury nullification has "solid historical credentials," the most famous case in American history being that of John Peter Zenger, who was charged, during the colonial period, by the British with criminal sedition. 6 LaFave et al, Criminal Procedure (4th ed), § 22.1(g), p 29. He was ultimately acquitted by the jury even though he had violated the law. *Id*. at 30. Under jury nullification, "a jury in a criminal case has the power to acquit even when its findings as to the facts, if literally applied to the law as stated by the judge, would have resulted in a conviction." *Id*. at 29.

[2] For example, the pamphlets explained that "[y]ou may, and should, vote your conscience" and advised that "[y]ou have the right to 'hang' the jury with your vote if you cannot agree with other jurors!"

[3] According to its website, FIJA's mission is to "empower[] jurors to uphold individual rights and liberty by instilling in them a rich understanding of their protective role, including jurors' right to refuse to enforce unjust law." FIJA, *What We Do* <https://fija.org/what-we-do/overview.html> (accessed June 18, 2020) [https://perma.cc/6NGM-9WYG].

tioned nothing specifically about the Yoder case. When asked why he handed out pamphlets that morning, defendant answered that he "believed that there were going to be a lot of people around the courthouse and it was going to give [him] a really good opportunity to educate" them. According to defendant, he had no interest in the outcome of the Yoder case. Defendant also testified that he did not know that the Yoder case was going to be the only case scheduled for November 24th. After spending some time handing out pamphlets to a number of people, defendant was arrested. And the Yoder case, before any proceedings began, was ultimately resolved through a plea bargain, and the summoned individuals were sent home.

Defendant was charged with one count of jury tampering,[4] MCL 750.120a(1), and one count of obstruction of justice, MCL 750.505. Before trial, defendant moved to dismiss both charges, but the district court dismissed only the obstruction charge. As to the jury-tampering charge, defendant argued that he had not attempted to influence a "juror" as that term is used in MCL 750.120a(1), and he raised several constitutional arguments, including a First Amendment free-speech challenge.

When the district court denied his motion to dismiss the jury-tampering charge, defendant sought leave for an interlocutory appeal, but the circuit court denied his application, as did the Court of Appeals "for failure to persuade the Court of the need for immediate appellate review." *People v Wood*, unpublished order of the Court of Appeals, entered December 2, 2016 (Docket No. 334410). This Court also denied leave. *People v Wood*, 500 Mich 963 (2017).

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[4] While the prosecution prefers to use "Juror—attempting to influence" as the name for the charge, we will follow the lead of the lower courts in referring to defendant's charge, periodically, as "jury tampering."

A jury trial was then held on the jury-tampering charge. Although defendant had handed pamphlets to a number of people outside the courthouse, his jury-tampering charge was based on his interactions on the morning of Yoder's trial with Jennifer Johnson and Theresa DeVries, both of whom had been summoned for jury duty. As for Johnson, she testified that when she arrived for the first time at the courthouse, she approached defendant at the front entrance of the courthouse because she saw others walking up to defendant and thought she was supposed to check in with him. She could not remember whether she had told defendant that she was checking in for jury duty or whether defendant had asked if she was there for jury duty; either way, it was clear to defendant that she was there for jury duty. Defendant then handed her a pamphlet and pointed to the door. As for DeVries, she testified that when she showed up for the first time, as she walked up to the courthouse, defendant approached her and asked, " 'Are you here for jury selection?' " She answered, "Yes." Defendant then handed her a pamphlet and said, " 'Do you know what your rights are for being . . . on jury duty?' " She said, "Oh," grabbed the pamphlet, and walked into the courthouse.

After the prosecution rested, defendant moved again to dismiss the charge, but the district court denied the motion. Over defendant's objection, the district court instructed the jury as to the elements of jury tampering, stating in relevant part, "The word 'juror' includes a person who has been summoned to appear in court to decide the facts in a specific trial." The jury convicted defendant of jury tampering. Defendant then appealed in the circuit court, which affirmed his convictions.

In the Court of Appeals, defendant raised three arguments. First, defendant argued that he had not

tampered with a "juror in any case" because the ordinary meaning of "juror" is someone who serves on a jury and no jury had been sworn. He also argued that the statute is at least ambiguous in this regard and, as a result, the rule of lenity should apply. Second, defendant argued that if the Court of Appeals were to accept the prosecution's interpretation of "juror," then the statute would violate his First Amendment right to free speech. Third, defendant argued that the statute was void for vagueness under due-process principles. The Court of Appeals affirmed his conviction in a split, published decision. In doing so, the majority held that "juror" under MCL 750.120a(1) included those summoned for jury duty, "even if never selected [or] sworn to serve on a jury." *People v Wood*, 326 Mich App 561, 571; 928 NW2d 267 (2018). The majority also denied defendant's constitutional claims. The dissent, however, would have held that there is no juror for purposes of MCL 750.120a(1) "at the point in time that [a person] has merely been summoned for jury duty and arrives at the courthouse." *Id*. at 592 (MURPHY, J., dissenting).

Defendant sought leave to appeal in this Court, raising the same issues as below, and we granted leave to appeal and heard oral argument. *People v Wood*, 504 Mich 975 (2019). We disagree with the Court of Appeals and reverse its decision.

II. ANALYSIS

The issue in this case is the proper interpretation of the term "juror." We review this question of statutory interpretation de novo. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008). MCL 750.120a(1) provides:[5]

[5] Other provisions prohibit different means of improperly affecting the judgment of the jury. See MCL 750.120 (bribery); MCL 750.120a(2) (intimidation); MCL 750.120a(4) (retaliation).

> A person who willfully attempts to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.

According to defendant, "juror" in MCL 750.120a(1) includes only the individuals who are selected and sworn to serve on a jury. The prosecution, by contrast, argues that "juror" includes all the individuals summoned for jury duty. Although we do not decide, on the basis of the facts here, whether "juror" should be interpreted as narrowly as defendant proposes, we nevertheless disagree with the prosecution's broad interpretation.[6]

"We begin by construing the language of the statute itself." *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004). Our goal is to determine the "plain and ordinary" meaning of "juror" as used in this statute. *People v Monaco*, 474 Mich 48, 55; 710 NW2d 46 (2006). The text of MCL 750.120a(1) prohibits a person from influencing the decision of a juror, but the statute fails to provide a definition of "juror." We start, therefore, by consulting dictionary definitions "to determine the plain and ordinary meaning" of "juror." *People v Rea*, 500 Mich 422, 428; 902 NW2d 362 (2017).

Dictionaries generally provide two definitions of the word "juror." On the one hand, as defendant argues, some dictionaries define "juror" narrowly as "one member of a jury." *Black's Law Dictionary* (Deluxe 4th ed); see also, e.g., *Webster's Third New International Dic-*

[6] There are several possible lines of demarcation that could be drawn to determine when a summoned individual becomes a "juror," such as when that person joins a venire or joins a jury. But we need not decide where that line is to resolve this case.

tionary (1961) ("[O]ne of a number of men sworn to deliver a verdict as a body[.]").[7] On the other hand, as the prosecution argues, these same dictionaries also define "juror" more broadly to include those summoned for jury duty. See *Black's Law Dictionary* ("The term is not inflexible, and besides a person who has been accepted and sworn to try a cause 'juror' may also mean a person selected for jury service."); *Webster's Third New International Dictionary* ("[A] person designated and summoned to serve on a jury."). Thus, contrary to the dissent's position, these dictionaries support both parties' interpretations.

To determine which of the dictionary definitions is the most reasonable, we then interpret "juror" in its context—not in isolation. *Breighner v Mich High Sch Athletic Ass'n, Inc*, 471 Mich 217, 232; 683 NW2d 639 (2004). MCL 750.120a(1) prohibits an individual from influencing a juror's decision "in any case." In that context, we agree with the Court of Appeals dissent that when individuals are merely summoned for jury duty, they are not jurors because they have yet to participate in a case. For example, a summoned individual may become a juror in a case when they join a venire, "the group of potential jurors in the courtroom from which a defendant's petit jury [is] selected." *People v Bryant*, 491 Mich 575, 583 n 4; 822 NW2d 124 (2012) (drawing a distinction in a case involving the Sixth Amendment's "fair cross section" requirement, which prohibits the exclusion of certain segments of the population from the jury, between the venire and the jury pool, "the group of people summoned to appear

[7] "Dictionaries tend to lag behind linguistic realities[.]" Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 419. As a result, "it is generally quite permissible to consult" a dictionary published within a reasonable time after the statute being construed was enacted. *Id*.

for jury duty on a particular day"). When the venire is selected, summoned individuals are assigned to a specific case and are then subject to voir dire. In other words, venire selection is the earliest point at which individuals summoned for jury duty may be considered as participating in any particular case because, before that, a summoned individual may never be assigned to a venire and thus might never be attached to any case at all. To demonstrate this point, imagine a situation in which there are multiple trials scheduled at a courthouse for a single day. In that situation, those summoned for jury duty could participate in any one of those scheduled cases; it is not until venire selection that anyone could possibly be considered assigned to a case—let alone be considered a juror under MCL 750.120a(1). The dissent argues that "case" suggests a broader set of proceedings than just the trial, and thus "juror" encompasses the summoned individuals here. But even if that is true, the language still suggests that summoned individuals have to participate in some sort of proceedings before becoming jurors. Here, Johnson and DeVries had only been summoned for jury duty at the time defendant interacted with them; they had not become part of a venire.

MCL 750.120, the neighboring bribery statute, also supports our narrower interpretation of "juror" because its context suggests that the word has a broader meaning there than it does in MCL 750.120a(1). MCL 750.120 provides:

> Any person summoned as a juror or chosen or appointed as an appraiser, receiver, trustee, administrator, executor, commissioner, auditor, arbitrator or referee who shall corruptly take anything to give his verdict, award, or report, or who shall corruptly receive any gift or gratuity whatever, from a party to any suit, cause, or proceeding, for the trial or decision of which such juror shall have been

> summoned, or for the hearing or determination of which such appraiser, receiver, trustee, administrator, executor, commissioner, auditor, arbitrator, or referee shall have been chosen or appointed, shall be guilty of a felony.

We read MCL 750.120 and MCL 750.120a harmoniously because "we examine . . . statute[s] as a whole, reading individual words and phrases in the context of the entire legislative scheme." *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014). We also generally presume that when the language of two statutes is different, "the drafters acted intentionally and purposely in their inclusion or exclusion." *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). Here, the Legislature was aware of the language in MCL 750.120, which was enacted in 1931,[8] and deliberately chose not to include the same language in MCL 750.120a(1), which was enacted in 1955.[9]

MCL 750.120 presents two differences from MCL 750.120a(1). First, it refers to "[a]ny person summoned as a juror." By including that language in MCL 750.120, the Legislature suggested a broader range of people who may not be bribed, as it conditions the group of individuals who may be charged under MCL 750.120 with the act of being summoned. Its failure to include that same language in MCL 750.120a(1) evinces an intent to narrow the class of persons subject to criminal liability under the statute. The prosecution's interpretation would also render "any person summoned" surplusage because if the word "juror" is broad enough to include those who have merely been summoned for jury duty, it would be unnecessary to clarify what was already inherent in the meaning of "juror." *People v Pinkney*, 501 Mich 259, 282; 912 NW2d 535 (2018)

[8] 1931 PA 328.

[9] 1955 PA 88.

(" '[W]e must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory.' ") (citation omitted).

The dissent argues that the difference is a "vestige of the earlier, and narrower, meaning of 'juror' "; according to the dissent, MCL 750.120 uses "any person summoned" because "juror" in 1846, when the first version of the statute was enacted, only meant one who serves on a jury.[10] The Court of Appeals majority also found MCL 750.120 unhelpful because it believed that the Legislature "used the phrase '[a]ny person summoned' to describe the act of being called for jury duty, just as it used a descriptive phrase for the rest of the positions listed in the statute, i.e., '[a]ny person . . . chosen or appointed as[.]' " *Wood*, 326 Mich App at 573. In other words, the choice of language was merely stylistic. But without additional textual evidence, we find both arguments insufficient to rebut this Court's presumption that the Legislature intended the difference in word choice between the two statutes, and we find both arguments insufficient to overcome the rule against surplusage.[11]

Second, MCL 750.120 does not include the "in any case" modifier that is present in MCL 750.120a(1). So even if we did believe that "[a]ny person summoned as" was merely stylistic, that would not explain the choice

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[10] See 1846 RS, ch 156, § 10.

[11] Although the dissent agrees that the statutes should be read harmoniously together, the dissent also gives less weight to the difference in language because it believes that MCL 750.120a(1) is capable of only one interpretation. We disagree. As noted earlier, the language of MCL 750.120a(1) supports the narrower definition of "juror." And, at the very least, the language is ambiguous enough that MCL 750.120 provides helpful information—especially in light of this Court's presumption that differences between related statutes are intentional.

to include "in any case" in MCL 750.120a(1) but not in MCL 750.120. As we noted earlier, that phrase, in light of the context, limits the meaning of "juror" to individuals who have participated in a case. By contrast, the absence of "in any case" from the bribery statute suggests, again, a potentially broader group of people to whom that statute applies.

The dissent, like the Court of Appeals majority and the prosecution, also asserts that the "purpose" of MCL 750.120a(1) means that the term "juror" must include everyone summoned for jury duty. Looking at the language in MCL 750.120a and the surrounding statutory framework, the dissent argues that "the concrete purpose of the statute, collected from the statutory language, is to prevent individuals from asserting improper influences over judicial proceedings." We do not disagree. See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 56 (finding the purpose to be an appropriate consideration in statutory interpretation when it is "derived from the text, not extrinsic sources"). This purpose, however, does not help us choose between the possible meanings of "juror" because both the prosecution's and defendant's proposed definitions accomplish the goal of protecting the integrity of the jury. The prosecution's definition may indeed accomplish that goal in a broader way by expanding the scope of the term "juror." But our job is not to choose which definition the Legislature *should* have adopted to accomplish its goal in the best possible way; our goal is to interpret the text that is provided to us. See *id*. at 57 ("Purpose sheds light only on deciding which of various *textually permissible meanings* should be adopted. No text pursues its purpose at all costs."). It is within the realm of possibility—and not an absurd result as the dissent suggests—that the Legislature wanted a narrower

definition of "juror" in MCL 750.120a(1). Consider that the Legislature could have chosen a narrower definition of "juror" because of possible First Amendment concerns—such as those raised by defendant here—and relied on other traditional methods of eliminating jurors who may have been improperly influenced, like voir dire, for-cause removal, and peremptory strikes. Using those familiar methods of eliminating biased jurors would not, as the prosecution argues, "negate any ability of the law to achieve its goal." We need not, however, dwell for long on what the Legislature meant to do. Our point is that the "purpose" of MCL 750.120a(1) does not help us choose between the possible meanings. If we were, instead, to adopt the broader definition of "juror," solely because we felt that it would better accomplish the purpose of the statute, we would be basing our decision on intuitions. And "[l]ike most intuitions, it finds [the Legislature] to have intended what the intuitor thinks [the Legislator] *ought* to intend," not what it actually did. *Deal v United States*, 508 US 129, 136; 113 S Ct 1993; 124 L Ed 2d 44 (1993), superseded by statute as stated in *United States v Davis*, 588 US ___ n 1; 139 S Ct 2319 n 1 (2019).[12]

The oath offers another signal that an individual is participating in "any case." The etymology of "juror" shows the centrality of the oath. "Juror" can be traced from the Latin word for "jury," *jūrāre*, meaning "to swear." See *Oxford English Dictionary* (2d ed); see also *People v Cain*, 498 Mich 108, 134; 869 NW2d 829 (2015) (VIVIANO, J., dissenting) (underscoring that "the

[12] If the Legislature disagrees with our interpretation, it is free, at any time in the future, to clarify the meaning of "juror," as other states have done. See, e.g., SD Codified Laws 22-12A-12 (making it illegal to influence "a juror, or any person summoned or drawn as a juror").

etymological roots of the word 'jury' " "can be traced back to the French words '*juré*' and '*jurée*' and the Latin word '*jurare*,' which mean 'sworn,' 'oath,' and 'to swear,' respectively"). But at the time that individuals in the community are summoned for jury duty, they have yet to be sworn in for any official proceedings. Summoned individuals can get sworn at two points during judicial proceedings. First, if they are assigned to a venire, they are given the voir dire oath. MCR 6.412(B) ("Before beginning the jury selection process, the court should give the prospective jurors appropriate preliminary instructions and must have them sworn."). Second, the smaller group of the venire selected to serve on the jury receive their final oath for the trial. MCL 768.14 ("You shall well and truly try, and true deliverance make, between the people of this state and the prisoner at bar, whom you shall have in charge, according to the evidence and the laws of this state; so help you God."). Although the voir dire oath on its own may not transform an individual into a juror, it is some indication that a person is participating in a case as required under MCL 750.120a(1). *Cain*, 498 Mich at 135 n 28 (VIVIANO, J., dissenting), citing *Merriam-Webster's Collegiate Dictionary* (2014) ("Indeed, oaths are so integral to the concept of a jury that, in common parlance, one who refuses to take a required oath is deemed a 'nonjuror.' ").

Finally, the prosecution argues that Chapter 13 of the Revised Judicature Act (RJA), MCL 600.1300 *et seq*., uses "juror" to include those summoned for jury duty and that the RJA should be read harmoniously with MCL 750.120a(1). The Court of Appeals majority also suggested as much when it noted that MCL 600.1334 and MCL 600.1344 use "juror" to "apply to those persons summoned for jury duty but not necessarily selected and sworn." *Wood*, 326 Mich App at 574 n 4. Chapter 13 of the RJA establishes the procedures

for selecting individuals for jury service. But, like the jury-tampering statute, the RJA fails to provide a definition of "juror." See MCL 600.1300. Recognizing that, the prosecution argues that "juror" is used throughout this chapter of the RJA to refer to individuals summoned for jury duty. A review of the RJA, however, shows that while it uses "juror" in the sense the prosecution argues for, it also uses it in both broader and narrower senses. For example, MCL 600.1349 states that "[n]o juror may be subject to an action, civil or criminal, on account of any verdict . . . ." This provision appears to refer to a juror as a member of a jury because only jury members can render verdicts; it makes those jurors immune from lawsuits for their decision. Then, there are other places in Chapter 13 where the RJA seems to refer to everyone on the jury list as a juror—even when they have yet to be summoned—which would be an even broader definition of "juror" than the one for which the prosecution advocates. See, e.g., MCL 600.1321(2) ("If there are not sufficient names on the segregated list for any district court district, the board shall . . . obtain as many additional jurors as needed for that district."). Because of this variance in usage, the RJA, like the purpose of MCL 750.120a(1), does not help us decide the meaning of "juror." Instead, it presents its own complexities in making this determination. It is also not clear that Chapter 13 of the RJA should be read *in pari materia* with MCL 750.120a(1) because they both have a "scope and aim [that] are distinct and unconnected." *People v Mazur*, 497 Mich 302, 313; 872 NW2d 201 (2015). Although they both deal with jurors, the purpose of MCL 750.120a(1) is to prevent jury tampering, while the purpose of Chapter 13 of the RJA is to set forth procedures for ultimately selecting a jury.

In sum, under MCL 750.120a(1), an individual summoned for jury duty is not a juror when he or she merely

shows up at the courthouse for jury duty. Defendant here talked to individuals who had been summoned for jury duty but had yet to participate in any court proceedings that would make them a part of any case. When defendant approached Johnson and DeVries, they had neither entered the courthouse nor sat as part of a venire nor sworn an oath. And all the individuals summoned for jury duty on the day of the Yoder trial, ultimately, did not participate in any case because they were dismissed before any proceedings began. Defendant, therefore, had not discussed jury nullification with any "jurors" as that term is used in MCL 750.120a(1). Because the individuals summoned for jury duty here had not participated in any meaningful sense in the proceedings of a case, we need not decide whether the term "juror" in MCL 750.120a(1) is limited to those who serve on a jury. We also need not reach defendant's constitutional arguments because we have decided this case on statutory grounds. *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 734; 664 NW2d 728 (2003) ("[I]t is an undisputed principle of judicial review that questions of constitutionality should not be decided if the case may be disposed of on other grounds.").

III. CONCLUSION

We hold that the individuals here who were merely summoned for jury duty and had not yet participated in a case were not jurors under MCL 750.120a(1). Therefore, we reverse the Court of Appeals' decision and remand to the district court for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

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

VIVIANO, J. (*dissenting*). This case presents a relatively straightforward question: what would the word "juror" as used in the jury-tampering statute have meant to an ordinary user of the English language when the statute was enacted? The majority holds that defendant Keith Wood cannot be guilty of jury tampering under MCL 750.120a(1) because he did not influence a "juror," which it defines narrowly to exclude individuals who have been summoned for jury duty. But the majority misreads the statute. The ordinary meaning of "juror" in this context includes summoned jurors. This conclusion follows from a close and comprehensive examination of the dictionaries from the relevant period, almost all of which included summoned jurors in the definition of "juror." It follows, too, from a proper reading of the statutory context and purpose as discerned from the text. Under this interpretation, defendant's actions fell within the statutory proscription of jury tampering by seeking to influence a summoned juror. I would also conclude that this interpretation is sufficiently definite to avoid any First Amendment concerns. For these reasons, I dissent.

I. JURY-TAMPERING STATUTE

"In every case requiring statutory interpretation, we seek to discern the ordinary meaning of the language in the context of the statute as a whole."[1] "The words of a statute . . . should be interpreted on the basis of their ordinary meaning and the overall context in which they are used."[2] "To determine the ordinary meaning of undefined words in the statute, a court may consult a dictionary."[3]

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[1] *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 339; 952 NW2d 384 (2020).

[2] *People v Flick*, 487 Mich 1, 10-11; 790 NW2d 295 (2010).

[3] *People v Tennyson*, 487 Mich 730, 738; 790 NW2d 354 (2010).

The statute at issue in this case, MCL 750.120a(1), provides:

> A person who willfully attempts to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.

This case turns on the meaning of the term "juror." It is not defined in the Michigan Penal Code, MCL 750.1 *et seq*.; therefore, we first turn to a dictionary to ascertain the ordinary meaning of that term.[4] Because the jury-tampering statute was enacted in 1955, the meaning of "juror" turns upon dictionaries from that period.[5] The best practice, when employing dictionaries, is to use multiple versions from the relevant period so that outliers can be identified and rejected in favor of those offering a "more advanced semantic analysis . . . ."[6]

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[4] *Tennyson*, 487 Mich at 738.

[5] See *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 563 n 58; 886 NW2d 113 (2016) ("In ascertaining the meaning of a term, a court may determine the meaning at the time the statute was enacted by consulting dictionaries from that time."). Because "[d]ictionaries tend to lag behind linguistic realities," it is also appropriate here to consult dictionaries from after 1955 to understand how language was used at that time. Scalia & Garner, *A Note on the Use of Dictionaries*, 16 Green Bag 2d 419, 423 (2013). See also Aprill, *The Law of The Word: Dictionary Shopping in the Supreme Court*, 30 Ariz St L J 275, 287 (1998) ("Because of the inevitable time delay between collection of citations and publication of a dictionary, dictionaries must lag behind current use of the language. A dictionary with a 1996 publication date will not describe completely how language is being used in 1996.").

[6] *A Note on the Use of Dictionaries*, 16 Green Bag at 422 & nn 14 and 15, citing *MCI Telecom Corp v American Tel & Tel Co*, 512 US 218, 225-228; 114 S Ct 2223; 129 L Ed 2d 182 (1994) (weighing various definitions of the term "modify" to determine the meaning of the term in 47 USC 203), and quoting Sinclair, *Guide to Statutory Interpretation*

Here, a brief overview of the historical development of the word "juror" provides a useful starting point, as it displays how the word broadened during the 20th century. Beginning in 1846, when a number of Michigan's bribery and corruption statutes were first enacted,[7] and running through the early 20th century, "juror" was narrowly defined in every dictionary I could locate as, or as something equivalent to, "one who serves on a jury."[8] In the 1930s—possibly coinciding with increases in the number of jurors being summoned; reforms to the manner of selecting, summoning, and compensating them; and the advent of professional court administration over these new processes[9]

(2000), p 137 (" '[I]f you use a dictionary, use more than one and check editions from the date of enactment as well as current.' "). See also Harrell, *Dictionary Research for Lawyers*, 48 Colo Lawyer 8, 9 (May 2019) ("Researchers should consult multiple secondary sources, when available, to overcome potential inaccuracies, shortcomings, and biases of individual sources.").

[7] See, e.g., 1846 RS, ch 156, § 10 (predecessor of current MCL 750.120, which used the phrase "any person summoned as a juror").

[8] *Webster's Elementary School Dictionary* (1914) ("A member of a jury."); *A Primary School Dictionary of the English Language* (1880) ("One who serves on a jury."); *An American Dictionary of the English Language* (1861) ("One that serves on a jury; one sworn to deliver the truth on the evidence given him concerning any matter in question or on trial."); *An American Dictionary of the English Language* (1857) ("One that serves on a jury."); *An American Dictionary of the English Language* (1853) ("One who serves on a jury."); *A Dictionary of the English Language* (1851) ("One who serves on a jury."); *A Dictionary of the English Language* (1846) ("One who serves on a jury.").

[9] See generally King, *Juror Delinquency in Criminal Trials in America, 1796–1996*, 94 Mich L Rev 2673, 2691 (1996). As of 2007, state courts estimated that nearly 32 million jury summonses were mailed annually—corresponding to about 15% of the nation's adult population—in order to secure enough jurors to hear cases. See National Center for State Courts Center for Jury Studies, *The State-of-the-States Survey of Jury Improvement Efforts—Executive Summary*, p 2, available at <http://www.ncsc-jurystudies.org/__data/assets/pdf_file/0018/5319/sos_exec_sum.pdf> (accessed July 14, 2020) [https://perma.cc/9DHA-4BPM]. This represents a significant expansion of the jury

—dictionaries began reflecting a broader meaning of "juror," encompassing summoned jurors.[10]

By 1955, this broadened meaning was well established. All but one of the dictionaries that I found from around that year define "juror" to include individuals summoned to be on jury duty. *Webster's New International Dictionary*, published in 1953, defines "juror," in the legal context, as "a member of a jury, or one designated and summoned to serve on a jury."[11] The

summons over its use around the time the predecessor to MCL 750.120 was enacted. At that time, only about 5 to 6% of the population in Illinois, for example, were ever summoned, and often courtroom bystanders were used throughout the Midwest when the summoned individuals failed to appear. See McDermott, *The Jury in Lincoln's America* (Athens: Ohio University Press, 2012), pp 31, 33, 51. In addition, the scope of the potential jury pools expanded over the course of the 20th century, introducing new groups into jury service. See Friedman, *American Law in the 20th Century* (New Haven: Yale University Press, 2002), pp 264-266. All of these changes reflect the realities of the administration of the jury system as it stood at the time MCL 750.120a(1) was enacted. See, e.g., *Ballentine's Law Dictionary* (3d ed) (defining "juror" as "[a] person on the jury list or roll—any person in a county, city, district, or other venue listed for jury service for a definite period, such as a year, or for an indefinite period. A person whose name has been drawn from the jury list or roll and placed in the jury wheel or box. In common usage, a venireman—a person whose name has been drawn from the wheel for a venire or special venire and who has been summoned by a writ of venire and is thereby upon the jury panel for a term of court, or part of a term, or a panel from which jurors are to be selected for a particular case. Most narrowly defined, a member of a jury which has been sworn to try a case") (citation omitted). These changes might help explain the expansion in the meaning of "juror."

[10] See *Webster's Student Dictionary* (1938) (defining "juror" to mean "[i]n legal procedure, a member of a jury or a person summoned to serve on a jury."); *Webster's Collegiate Dictionary* (1936) (defining "juror" to mean "[a] member of a jury, or one summoned to serve on a jury").

[11] *Webster's New International Dictionary of the English Language* (1953). See also *Webster's New World Dictionary of the American Language* (1966) ("[A] member of a jury or jury panel[.]"); *New Century Dictionary of the English Language* (1953) (defining "juror" as "[o]ne of a body of persons sworn to deliver a verdict in a case submitted to them;

Court of Appeals below employed a similar definition from a contemporaneous dictionary that had a usage note stating, " ' "*Juror*" is uniformly used by the jurists most familiar with the subject as including persons designated or ordered to be summoned as *jurors*.' "[12] *Webster's New Practical Dictionary*, from 1957, defines it as, in a legal procedure, "a member of a jury or a person summoned to serve on a jury."[13] Some, like *Webster's Seventh New Collegiate Dictionary*, from 1963, use both understandings—i.e., members of the jury and summoned jurors—as coordinate subsenses (which I discuss more below) in the same definition entry: "**1. a** : a member of a jury **b** : a person summoned to serve on a jury[.]"[14] Legal dictionaries from this time,

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a member of any jury; also, one of the panel from which a jury is selected"). At the time, a jury "panel" was broadly defined to mean "**1 a** (1) : a schedule containing names of persons summoned as jurors (2) : the group of persons so summoned (3) : JURY 1."); *Webster's Seventh New Collegiate Dictionary* (1963). See also *American College Dictionary* (1953) ("10. *Law*. a. the list of persons summoned for service as jurors. b. the body of persons composing a jury."); *Webster's New World Dictionary of the American Language* (1966) ("7. in *law*, *a*) originally, a piece of parchment on which were recorded the list of persons summoned for jury duty. *b*) later, the list itself. *c*) the jurors as a whole.").

[12] *People v Wood*, 326 Mich App 561, 572; 928 NW2d 267 (2018), quoting *Webster's New Int'l Dictionary* (1955).

[13] *Webster's New Practical Dictionary* (1957).

[14] *Webster's Seventh New Collegiate Dictionary* (1963). See generally Explanatory Note 11.2, p 12a ("Boldface lowercase letters separate coordinate subsenses of a numbered sense or sometimes of an unnumbered sense."). Other dictionaries from that period follow the same template. See *Webster's Third New International Dictionary* (1966) (defining "juror" as "**1 a** : one of a number of men sworn to deliver a verdict as a body : a member of a jury **b** : a person designated and summoned to serve on a jury"); *American Heritage Dictionary of the English Language* (1969) (defining "juror" as "**1. a.** A person serving as a member of a body sworn to hear and hand down a verdict on a case. **b.** A person called or designated for jury duty"). I did locate one dictionary that lists these understandings as distinct senses of the word. See

such as *Black's Law Dictionary*, define "juror" as "[o]ne member of a jury," but with a usage note explaining that "[t]he term is not inflexible, and besides a person who has been accepted and sworn to try a cause 'juror' may also mean a person selected for jury service."[15] Another legal dictionary included this broader definition encompassing summoned jurors.[16]

All these dictionaries support my interpretation, including those that list empaneled and summoned jurors as coordinate subsenses. In the present context, the definitions with the related subsenses indicate that both are included as a single definition of "juror," not as distinct alternatives. A "sense" is a "basic unit[] of [dictionary] entry organization[,] the most distinct component parts of the dictionary article."[17] A subsense, in turn, is a "a specific sense of a word or phrase that is derived from, included in, or closely related to a broader sense and that may be grouped with the broader sense in a dictionary[.]"[18] Generally, when

American College Dictionary (1953) ("**1.** one of a body of persons sworn to deliver a verdict in a case submitted to them; a member of any jury. **2.** one of the panel from which a jury is selected."). Even this dictionary may be read as supporting my interpretation. See note 26 of this opinion.

[15] *Black's Law Dictionary* (Rev 4th ed). We need not determine whether the term "juror" is a legal term of art because, as discussed in the text, the definitions in both lay and legal dictionaries are the same. Therefore, it is proper to rely on both types of dictionaries. See *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 621 n 62; 886 NW2d 135 (2016).

[16] See *Ballentine's Law Dictionary* (3d ed).

[17] Lew, *Identifying, Ordering and Defining Senses*, in Jackson, ed, *The Bloomsbury Companion to Lexicography* (London: Bloomsbury Publishing Plc, 2013), § 4.9, p 1.

[18] *Merriam-Webster Online Dictionary* <http://merriam-webster.com/dictionary/subsense> (accessed July 15, 2020) [https://perma.cc/V2FW-J2RC]. See also *Lexico Online Dictionary* <http://lexico.com/definition/subsense> (accessed July 15, 2020) [https://perma.cc/PA3M-MUNV] (defining a subsense as "[a] subsidiary sense of a word defined in a dictionary").

confronting different, distinct *senses* of a word, we "must use the context in which a given word appears to determine its aptest, most likely sense."[19] But when confronting coordinate *subsenses*, those related understandings may be read together if appropriate.[20] For example, "the word *knife* could signify a range of objects, from a piece of cutlery to a medical instrument to a weapon," but "*knife* in its general ordinary sense, meaning 'a sharp instrument for cutting,' can be used to signify all of these sub-senses together at the same time."[21] A prohibition of knives on airplanes would therefore encompass any type of knife.[22] Under this reasoning, courts have recognized that a definition of a single term can include multiple subsenses.[23] In fact, numerous courts, including the United States Su-

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[19] Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 418. See also *In re Erwin Estate*, 503 Mich 1, 33; 921 NW2d 308 (2018) (VIVIANO, J., dissenting) ("[W]hen a word has more than one definition, the context determines the sense in which the Legislature used the word.").

[20] See Lew, *Identifying* at § 4.9, p 8 ("[S]ubsenses should be allowed to be nested under the main sense.").

[21] Camper, *Arguing Over Texts: The Rhetoric of Interpretation* (New York: Oxford University Press, 2018), ch 3, p 46.

[22] *Id*.

[23] See *State v Guzman*, 366 Or 18, 25; 455 P3d 485 (2019) ("The listed subsenses [of 'counterpart'] have the same core of meaning—a high degree of similarity."); *State v Fries*, 344 Or 541, 546 n 5; 185 P3d 453 (2008) (describing how two out of the four pertinent subsenses of "possession" may apply in context); *Wetherell v Douglas Co*, 342 Or 666, 679; 160 P3d 614 (2007) (describing how two subsenses of "profit" may apply as they both refer to some consideration of expenses and revenue).

These principles do not necessarily apply when analyzing the relationship between two distinct *senses* of a word. Cf. *Reading Law*, p 418. However, because of the close relationship between summoned and empaneled jurors—which is apparent whether both are included in the same definition or as coordinate subsenses—these understandings of the word "juror" are best read together even in the one contemporaneous dictionary I found listing them as distinct senses. See note 16 of this opinion.

preme Court, have concluded that the term "juror" in similar contexts includes both summoned and empaneled jurors.[24]

I found only one lay dictionary from this period that defines "juror" simply as a "member of a jury."[25] This dictionary is less probative, however, and not simply because it stands alone. In light of the historical development of the term "juror," this dictionary appears to reflect the word's older meaning.[26] And, in general, little "can validly be inferred from the fact that a particular meaning is not recorded for a particular word," as sometimes the omission can be due to practical concerns like space constraints during publishing.[27] Given that this outlier provides a less sophisticated semantic analysis, I decline to rely on it.

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[24] See *United States v Russell*, 255 US 138, 143-144; 41 S Ct 260; 65 L Ed 553 (1921) (jury tampering); *United States v Aguilar*, 21 F3d 1475, 1482 (1994) (obstruction of justice), rev'd in part on other grounds 515 US 593 (1995); *United States v Jackson*, 607 F2d 1219, 1222 (CA 8, 1979) (improperly influencing jury); *State v Solomon*, 120 A3d 661, 665; 2015 ME 96 (2015) (jury tampering); *State v Bowers*, 270 SC 124, 130; 241 SE2d 409 (1978) (same); *State v Tucker*, 170 So 3d 394 (La Ct App, 2015) (same); *Nobles v State*, 769 So 2d 1063, 1065-1066 (Fla Ct App, 2000) (same).

[25] *The Holt Intermediate Dictionary of American English* (1966).

[26] See *A Note on the Use of Dictionaries*, 16 Green Bag at 422 ("Occasionally most dictionaries will define a word inadequately—without accounting for its semantic nuances as they may shift from context to context—and a given dictionary will improve on the others. When that is so, the more advanced semantic analysis will be preferable."). It is noteworthy, too, that the majority likewise refrains from using these dictionaries.

[27] Cunningham et al, *Plain Meaning and Hard Cases*, 103 Yale L J 1561, 1615 (1994). See also *Law of the Word*, 30 Ariz St L J at 297 ("[N]o dictionary has a monopoly on the truth. Dictionaries include common meanings of words. They do not, however, include all meanings. They may well exclude meanings that are quite ordinary although less common. Furthermore, dictionary definitions may fail to include a

In sum, almost all contemporaneous lay and legal dictionaries provide that both prospective and empaneled jurors are included in the definition of the term "juror." The majority does not take stock of the dictionaries discussed above or the consensus that emerges that "juror" had a broad meaning when MCL 750.120a was enacted. After a superficial reading of only two dictionaries—one lay and one legal—the majority summarily dispenses with the dictionary as a tool to assist us in determining the ordinary meaning of "juror." What is more, the majority fails to appreciate that the definitions it cites as inconsistent alternatives are instead closely related subsenses of the word "juror," which are better read together as a single definition.[28]

My interpretation also draws support from the broader statutory context, which illustrates why both understandings of "juror" apply in this case.[29] Recall that MCL 750.120a(1) criminalizes "willful[] attempts to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case[.]" The principal phrase giving context to "juror" is "in any

particular definition of a word either because the meaning was not among those included in the citation file or because the meaning was sacrificed to constraints of abstraction and of space.").

[28] See *ante* at 122-123, citing *Webster's Third New International Dictionary* (1961).

[29] See *Feyz v Mercy Mem Hosp*, 475 Mich 663, 685 n 62; 719 NW2d 1 (2006) ("[B]ecause a word can have many different meanings depending on the context in which it is used, and because dictionaries frequently contain multiple definitions of a given word, . . . it is important to determine the most pertinent definition of a word in light of its context."); *Reading Law*, p 70 ("Most common English words have a number of dictionary definitions, some of them quite abstruse and rarely intended. One should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise.").

case." This phrase provides context because it indicates that the defendant need not have any particular connection with the case—e.g., as a party or participant—that he or she seeks to influence: the target can be a "juror" in "any case." Because "case" means a suit or action involving an "aggregate of facts,"[30] there must be an actual, particular case.

The use of "case" demonstrates the statute's breadth, as it reaches cases that have not yet proceeded to trial. This is shown by the simple fact that while a "case" may result in a "trial," the two terms have distinct meanings. The "trial"—i.e., the "judicial examination . . . of the issues between the parties"—is only part of the larger case.[31] The statute demonstrates the difference between these two terms by using both in MCL 750.120a(1), excepting from the criminal prohibition arguments or persuasion made "in open court in the trial of the case." The statute thus recognizes that a trial occurs as part of a case, but it does *not* limit a "juror" to someone serving in a specific trial or in any trial whatsoever. A case will, of course, begin before the jury is empaneled and the trial begun. As long as a particular case exists, prospective jurors who have not yet been involved in a trial, but only summoned with the possibility of hearing the case, fit within the statute.[32]

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

[31] *Id*.

[32] This difference between "trial" and "case" demonstrates why an oath is not required to make a person a "juror." My position in *People v Cain*, 498 Mich 108, 134, 139; 869 NW2d 829 (2015) (VIVIANO, J., dissenting), was that "[t]he essence of the jury is, and always has been, the swearing of the oath"; thus, "a jury is not a jury until it is sworn." The majority cites my dissent in *Cain* as support for its position that an oath is required to become a juror. I firmly disagree. The question in *Cain* was whether "the failure to properly swear *the jury*" required a new trial. *Id*. at 114 (opinion

Contrary to the majority's assertion, the statute does not limit its application to "sworn" jurors only. It could have done so by, for example, using language similar to that in MCL 750.120a(3), which provides that "Subsections (1) and (2) do not prohibit any *deliberating juror* from attempting to influence other *members of the same jury* by any proper means."[33] No such language appears in the related subsection at issue here, MCL 750.120a(1), indicating that no such limitations should be read into this subsection.

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of the Court) (emphasis added). But "jury" and "juror" are different concepts. The relevant definitions of "jury" contain an essential requirement that the jury be "sworn." *Webster's Seventh New Collegiate Dictionary* (1963) (defining "jury" as "a body of men *sworn* to give a verdict on some matter submitted to them; *esp*: a body of men legally selected and *sworn* to inquire into any matter of fact and to give their verdict according to the evidence"); *Black's Law Dictionary* (Rev 4th ed) ("A certain number of men, selected according to law, and *sworn* (*jurati*) to inquire of certain matters of fact, and declare the truth upon evidence to be laid before them.") (emphasis added); see also *Cain*, 498 Mich at 134 n 32 (VIVIANO, J., dissenting), quoting 1 Pollock & Maitland, *The History of English Law* (2d ed) (Cambridge: Oxford University Press, 1968), bk I, ch VI, p 138 (" 'The essence of the jury . . . seems to be this: a body of neighbors is summoned by some public officer *to give upon oath* a true answer to some question.' "). By contrast, the dictionary definitions discussed above demonstrate that prospective jurors are still jurors even though they have only been summoned to appear and not sworn. In any event, I recognize that the *Cain* majority concluded, contrary to my dissent, that "the error of failing to properly swear the jury did not undermine the proceedings with respect to the broader pursuits and values that the oath seeks to advance." *Cain*, 498 Mich at 122 (opinion of the Court). Further, though "juror" and "jury" come from the same historical root, "juror" is used more broadly. See notes 9 through 18 of this opinion and accompanying text (explaining how "juror" more commonly refers to individuals summoned for jury duty, even before the jury is formed and sworn); cf. *Oxford English Dictionary* (2d ed) ("The word [juror] has the same historical development as is seen in JURY, but has now a wider range of application than *juryman* and *jury-woman*, being freely used historically of members of the ancient inquests out of which the jury system arose, as well as of members of a jury chosen to adjudicate between competitors, and award prizes, to whom 'juryman' is seldom applied.").

[33] Emphasis added.

The thrust of the majority's argument focuses on MCL 750.120, which it claims is context demonstrating that "juror" does not apply to both prospective and empaneled jurors.[34] That statutory section makes it a felony for "[a]ny person summoned as a juror . . . [to] corruptly receive any gift or gratuity whatever, from any party to any suit, cause, or proceeding, for the trial or decision of which such juror shall have been summoned . . . ."[35] The majority reads "summoned as a juror" to indicate that additional language is necessary for "juror" to include summoned jurors. According to the majority, if "juror" already included summoned jurors, then there would be no need to include the phrase "[a]ny person summoned as a juror." Thus, the majority interprets "summoned" as language that

[34] I agree with the majority that the two statutes should be read harmoniously or *in pari materia*, but I decline to give MCL 750.120 the great weight that the majority gives it. MCL 750.120 was enacted by 1931 PA 328, but a previous version of the jury-tampering statute using the "any person summoned as a juror" language was first enacted in 1846. See 1846 RS, ch 156, § 10. MCL 750.120a was enacted more than 100 years later by 1955 PA 88. While "statutes are to be interpreted in the light of, and with reference to, others *in pari materia*," that principle carries "additional weight when applied to acts passed at one and the same session." *City of Lansing v Bd of State Auditors*, 111 Mich 327, 333; 69 NW 723 (1896). See also 82 CJS, Statutes, § 480, p 628 ("The rule that statutes in pari materia should be construed together and harmonized, if possible, applies with peculiar force to statutes passed at the same session of the legislature, especially where they are passed or approved on the same day.") (boldface omitted). But if a statute, especially a later statute, is "clear on its face and when standing alone is fairly susceptible of but one construction," it should be applied as written. 73 Am Jur 2d, Statutes, § 97, p 336. In sum, while I agree with the majority that MCL 750.120a should certainly be read harmoniously or *in pari materia* with the other sections of Chapter XVII of the Michigan Penal Code, it is proper to give more weight to the language of MCL 750.120a itself rather than to MCL 750.120 generally, as the majority does. As previously discussed, that plain language of MCL 750.120a already supports a conclusion that "juror" includes both prospective and empaneled jurors.

[35] MCL 750.120.

broadens the scope of the statute beyond what the word "juror" would cover.[36] Further, according to the majority, MCL 750.120 does not include the "in any case" language, which also indicates a "potentially broader group of people to whom that statute applies."[37]

The majority overlooks the historical development of the word "juror" and the corresponding statutory history of MCL 750.120. The predecessor to that statute was enacted in 1846.[38] At that time, as noted above, the ordinary meaning of "juror" was narrower, including only those who sat on the jury.[39] This historical understanding of the meaning of "juror" as expanding to include a person summoned to serve as a juror is also supported by the manner in which the definition is set forth (i.e., with historically ordered subsenses) in numerous dictionaries.[40] This analysis might explain why the Legislature used the formulation "[a]ny person summoned as a juror" in MCL 750.120—i.e., to ensure that prospective jurors (not just seated jurors) were covered by the statute. The phrase is thus a vestige of the earlier, and narrower, meaning of "juror."[41]

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[36] See *ante* at 125-126.

[37] *Ante* at 127.

[38] 1846 RS, ch 156, § 10.

[39] See note 10 of this opinion and accompanying text.

[40] See e.g., *Merriam-Webster's Collegiate Dictionary* (2003) (defining "juror" in relevant part as "**1 a** : a member of a jury **b** : a person summoned to serve on a jury"). As stated in the Explanatory Notes, "[t]he order of senses within an entry is historical," and "[w]hen a numbered sense is further subdivided into lettered subsenses, the inclusion of particular subsenses within a sense is based upon their semantic relationship to one another, but their order is likewise historical subsense 1a is earlier than 1b, 1b is earlier than 1c, and so forth." *Id*. at p 20a.

[41] There is no need in this case to decide whether "juror" in MCL 750.120 has retained its original meaning throughout its various reen-

The majority also attempts to make hay about the lack of the phrase "any case" in MCL 750.120, but the majority never acknowledges a substantially similar phrase later in the statute. A portion of the statute prohibits a "person summoned as a juror" from "receiv-[ing] any gift or gratuity whatever, from a party to any suit, cause, or proceeding, for the trial or decision of which such juror shall have been summoned." A "case," as explained above, means a suit or action. So MCL 750.120 does, in fact, contain words meaning the same thing as "any case." In this respect, then, it covers the same ground as MCL 750.120a(1): both apply to individuals summoned for any case.[42] Thus, the majority's reliance on MCL 750.120 is unavailing.[43]

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actments, the most recent of which came when the definition was in the process of expansion. See 1931 PA 328; see generally MCL 8.3u (providing that reenacted portions of statutes "shall be construed as a continuation of such laws and not as new enactments"). Instead, it is sufficient here to explain how the linguistic context in which this statute arose might have shaped the language used in ways that did not reflect ordinary usage more than a century later when MCL 750.120a was passed. It is also worth noting that, on occasion, vestigial language from early versions of a statute remains on the books without much legislative consideration of how or whether it continues to fit. Cf. *People v Pinkney*, 501 Mich 259, 280; 912 NW2d 535 (2018) (explaining how a provision was kept in the penal law despite inconsistent changes elsewhere).

[42] The majority also analyzes whether the Revised Judicature Act (RJA), MCL 600.101 *et seq*., provides further context for the definition of "juror" in MCL 750.120a(1). I agree with the majority that the RJA provides no assistance to us in our resolution of this case. The RJA should not be read *in pari materia* with MCL 750.120a because the two statutes only incidentally refer to the same subject material (jurors) with a "scope and aim [that] are distinct and unconnected." *People v Mazur*, 497 Mich 302, 313; 872 NW2d 201 (2015). The RJA creates much of the procedural framework applicable in the courts, whereas MCL 750.120a enacts a substantive criminal offense, albeit one that deals with court actions. Any overlap is incidental.

[43] Despite largely premising its interpretation on context in general and MCL 750.120 in particular, the majority fails to consider the anomaly it creates in the broader statutory framework. Under the majority's interpretation, it would appear that since MCL 750.119(1)—

A proper contextual analysis in this case includes consideration of statutory purpose "in its concrete manifestations as deduced from close reading of the text."[44] The objective of MCL 750.120a, clearly apparent from its text, is to prevent an individual from influencing decisions of jurors. Both Subsections (1) and (2) proscribe this conduct. Subsection (1) pertains specifically to "willful[] attempts" to influence the decision of those jurors "by argument or persuasion," whereas Subsection (2) focuses on influence "by intimidation." The surrounding provisions reflect the same thrust, proscribing actions that improperly impair the impartiality of another's official conduct.[45]

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which also was originally enacted in 1846 RS, ch 156, § 9—prohibits corrupting a "juror" by gifts or gratuities, its original meaning would not apply to prospective jurors; yet MCL 750.120 would criminalize a prospective juror's acceptance of such gifts. This would mean that an individual could corrupt a prospective juror without fear of criminal penalty under MCL 750.119(1), but the corrupted prospective juror would be criminally liable under MCL 750.120 for taking such a gift. This asymmetry does not appear to make much sense. Of course, if "juror" in MCL 750.120 bears its original meaning—as I posited it might—the same anomaly appears. Unlike the majority's interpretation, however, my interpretation of MCL 750.120a(1) is grounded on the plain meaning of the words used in that statute and does not center upon MCL 750.120.

[44] *Reading Law*, p 20; see also *id*. ("The evident purpose of what a text seeks to achieve is an essential element of context that gives meaning to words."); *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884, 928 (2019) (VIVIANO, J., dissenting) (" '[T]he purpose of a law must be collected chiefly from its words, not from extrinsic circumstances.' Similarly, in his seminal treatise, Justice COOLEY recognized that intent 'is to be found in the instrument itself rather than extrinsic sources.' ") (quotation marks and citations omitted); Cooley, Constitutional Limitations (1st ed), p 55 ("It is to be presumed that language has been employed with sufficient precision to convey [the intent], and unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it.").

[45] For example, MCL 750.117 prevents individuals from bribing public officers, and MCL 750.118 prohibits public officers from accepting those

Therefore, the concrete purpose of the statute, collected from the statutory language, is to prevent individuals from asserting improper influences over judicial proceedings.

This statutory framework also supports the conclusion that the definition of "juror" includes both empaneled and summoned jurors. If the surrounding statutes in general, and MCL 750.120a in particular, seek to ensure the impartiality of jurors, it would be exceedingly strange to prohibit individuals from influencing empaneled jurors but to allow them to influence summoned jurors who might eventually render decisions. Summoned jurors, should they be chosen and sworn as members of a jury, will naturally become empaneled jurors. Allowing improper influence before those jurors are chosen and sworn but disallowing it afterward would merely regulate the timing of the improper influence. In fact, for these very reasons, the Supreme Court of Maine has gone so far as to suggest that the interpretation the majority reaches here constitutes an "absurd result."[46] In opting for this result by selecting the narrower definition of "juror," the majority has opened a chasm in the statutory framework because now, as long as the corruption occurs before the jury is empaneled, the corrupter cannot be liable under MCL 750.120a(1).

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bribes. MCL 750.119 prohibits one from bribing jurors, among other individuals, and MCL 750.120 prevents a juror from accepting a bribe that influences the juror's verdict. MCL 750.122 prohibits a person from giving something of value to discourage or influence a witness's testimony in judicial proceedings. All of those proscribed actions are wrongful attempts to assert an improper influence over another's official decision.

[46] *Solomon*, 120 A3d at 665 ("It is inconceivable that the Legislature intended to prohibit attempts to improperly influence jurors who have been selected to serve, while allowing free rein to anyone who wants to improperly influence potential jurors who are awaiting possible selection in response to a traverse jury summons. The definition of 'juror' suggested by [the defendant] would lead to an absurd result and we decline to adopt such an interpretation.").

In sum, the majority concludes that the term "juror" in MCL 750.120a(1) includes only empaneled jurors, but I believe that the ordinary meaning of "juror" in context includes both empaneled and summoned jurors. In this case, then, the trial judge properly instructed the jury as to the meaning of "juror." Consequently, I would affirm the conviction if the statute, as properly interpreted, is constitutional, which I turn to next.

II. FIRST AMENDMENT

Because I conclude that MCL 750.120a applies to both empaneled and prospective jurors, I must also grapple with defendant's First Amendment challenge. Fortunately, this Court is not the first to address a jury-tampering statute that applies to both empaneled and prospective jurors; other jurisdictions have concluded that those statutes are constitutional. I do so as well.

The First Amendment of the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech[.]"[47] Political speech, such as "handing out leaflets in the advocacy of a politically controversial viewpoint[,] . . . is the essence of First Amendment expression; [n]o form of speech is entitled to greater constitutional protection."[48] The First Amendment generally prevents the government from "proscribing speech, or even expressive conduct, because of disapproval of the

[47] US Const, Am I. That provision is applicable to the states through the Fourteenth Amendment. *In re Chmura*, 461 Mich 517, 529; 608 NW2d 31 (2000).

[48] *McCullen v Coakley*, 573 US 464, 488-489; 134 S Ct 2518; 189 L Ed 2d 502 (2014) (quotation marks and citation omitted; second alteration in original).

ideas expressed."[49] Any content-based speech restriction must satisfy strict scrutiny; i.e., "it must be narrowly tailored to promote a compelling Government interest."[50] The government may constitutionally regulate the content of protected speech only "if it chooses the least restrictive means to further the articulated interest."[51]

Defendant raises facial and as-applied challenges to the statute. In the former, he claims that the statute is unconstitutionally overbroad, which constitutes a facial challenge.[52] "Before ruling that a law is unconstitutionally overbroad, this Court must determine whether the law 'reaches a substantial amount of constitutionally protected conduct.' "[53] Because the overbreadth doctrine is "strong medicine," it should be used "sparingly and only as a last resort," and especially not "when a limiting construction has been or could be placed on the challenged statute."[54] In addressing an overbreadth challenge, a court must first construe the challenged statute because "it is impossible to determine whether a statute reaches too far without first

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[49] *RAV v City of St Paul*, 505 US 377, 382; 112 S Ct 2538; 120 L Ed 2d 25 305 (1992) (citations omitted).

[50] *United States v Playboy Entertainment Group, Inc*, 529 US 803, 813; 120 S Ct 1878; 146 L Ed 2d 865 (2000).

[51] *Sable Communications of Cal, Inc v FCC*, 492 US 115, 126; 109 S Ct 2829; 106 L Ed 2d 93 (1989). See also *Playboy Entertainment Group, Inc*, 529 US at 813 ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.").

[52] *People v Rapp*, 492 Mich 67, 72-73; 821 NW2d 452 (2012).

[53] *Id*. at 73, quoting *Village of Hoffman Estates v The Flipside, Hoffman Estates, Inc*, 455 US 489, 494; 102 S Ct 1186; 71 L Ed 2d 362 (1982). Criminal statutes in particular must be scrutinized with care, as "those that prohibit a substantial amount of constitutionally protected conduct may be facially overbroad even if they have a legitimate application." *Rapp*, 492 Mich at 73.

[54] *Broadrick v Oklahoma*, 413 US 601, 613; 93 S Ct 2908; 37 L Ed 2d 830 (1973).

knowing what the statute covers."[55] Second, after giving the statute a proper construction, a court must determine whether it "criminalizes a substantial amount of protected expressive activity."[56]

The United States Court of Appeals for the Ninth Circuit has addressed a case that is very similar to this one. In *Turney v Pugh*, 400 F3d 1197 (CA 9, 2005), the defendant passed out fliers, which invited people to call the Fully Informed Jury Association (FIJA), outside the county courthouse.[57] He approached three prospective jurors, some of whom were wearing badges identifying them as such, and told them to contact the FIJA. The defendant was convicted of jury tampering under Alaska Stat § 11.56.590(a), which provides that a person is guilty of jury tampering if he or she " 'communicates with a juror' " with an intent to " '(1) influence the juror's vote, opinion, decision, or other action as a juror; or (2) otherwise affect the outcome of the official proceeding.' "[58] The Alaska Supreme Court construed the statute as prohibiting "communications intended to affect how the jury decides a specific case" in situations where the speaker has an "intent to influence the outcome" and knows that he or she is communicating with a juror.[59] Under that construction, the court held that the statute was not unconstitutionally overbroad.[60]

On the defendant's collateral challenge to his conviction, the Ninth Circuit agreed.[61] In determining

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[55] *United States v Williams*, 553 US 285, 293; 128 S Ct 1830; 170 L Ed 2d 650 (2008).

[56] *Id*. at 297.

[57] *Turney*, 400 F3d at 1198.

[58] *Id*. at 1199, quoting Alas Stat § 11.56.590(a).

[59] *Turney v State*, 936 P2d 533, 540-541 (Alas, 1997).

[60] *Id*. at 541.

[61] *Turney*, 400 F3d at 1198.

whether the statute prohibited a substantial amount of protected speech, the court noted that the First Amendment, while protective of speech concerning judicial proceedings, did not "shield the narrow but significant category of communications to jurors made outside of the auspices of the official proceeding and aimed at improperly influencing the outcome of a particular case."[62] The statute also did not sweep in a substantial amount of protected speech, such as innocent advice to jurors, political demonstrations outside a courthouse, or the mass publication of political ideas.[63] Innocent advice was not implicated by the statute because such advice is not given with the intent to "influence the outcome of a particular case."[64] Political demonstrations were not implicated because the statute was narrowly targeted at conduct infringing

[62] *Id*. at 1203. In reaching that conclusion, the court examined two cases in which the United States Supreme Court distinguished protected publications regarding judicial proceedings and speech intended to improperly influence jurors. See *Bridges v California*, 314 US 252, 271; 62 S Ct 190; 86 L Ed 192 (1941) ("The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved [i.e., newspaper editorials] actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases."), and *Wood v Georgia*, 370 US 375, 389; 82 S Ct 1364; 8 L Ed 2d 569 (1962) ("[I]t is important to emphasize that this case does not represent a situation where an individual is on trial; there was no 'judicial proceeding pending' in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding. . . . Moreover, we need not pause here to consider the variant factors that would be present in a case involving a petit jury.").

[63] *Turney*, 400 F3d at 1203-1204.

[64] *Id*. (emphasis omitted).

the substantial state interest in the judicial process.[65] Finally, the statute did not implicate the mass dissemination of political ideas, such as newspaper or television advertisements, because "the speaker would have to *know* that she or he was communicating with a juror in order to be guilty of jury tampering."[66] Other courts have concluded that similar constructions given to jury-tampering statutes like the one analyzed in *Turney* are valid.[67]

Following those decisions here, I believe that MCL 750.120a(1) is not overbroad. The first step in our analysis is to construe the statute.[68] The statute has two relevant components. First, it regulates *willful* attempts to influence the decision of a juror in any case. We have held that willful acts are done without "carelessness or accident" but instead "knowingly and stubbornly and for the alleged unlawful pur-

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[65] *Id*. at 1204, discussing *Cox v Louisiana*, 379 US 559; 85 S Ct 476; 13 L Ed 2d 487 (1965). *Cox* rejected a facial challenge against an antipicketing statute that applied to attempts to influence judges, jurors, or others involved in the judicial process. *Cox*, 379 US at 560. The Court noted, "A State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence." *Id*. at 562.

[66] *Turney*, 400 F3d at 1205.

[67] See *State v Springer-Ertl*, 610 NW2d 768, 777; 2000 SD 56 (2000) ("A reasonable interpretation of our statute confines its scope to conduct designed to influence specifically jurors and persons summoned or drawn as jurors. Consequently, the statute would not include situations where a person intends to inform the public or express a public opinion, regardless of whether jurors—drawn, summoned, or sworn—may be among the public. . . . With these constraints on the scope of [the South Dakota statute], the statute meets the constitutional requirements of notice and specificity without infringing on First Amendment rights."); *People v Iannicelli*, 449 P3d 387, 395; 2019 CO 80 (2019) (holding that, for the reasons set forth in *Turney*, criminal liability under the Colorado jury-tampering statute should be limited "to attempts to influence a person's vote, opinion, decision, or other action in a specifically identifiable case").

[68] *Williams*, 553 US at 293.

pose . . . ."[69] Applying these definitions, "willfully" in MCL 750.120a(1) requires that the defendant *know* that he or she is communicating with a juror and then act *intentionally* to influence the juror's decision in a case. Second, the statute also requires that the defendant act to influence a juror's decision *in any case*. As previously described, this reference to "case" means that there must be an *actual* case that the defendant is attempting to influence.

This construction renders MCL 750.120a(1) similar to the statute in *Turney*. There, the Ninth Circuit expressly approved of a statute that criminalized "knowingly communicating with a juror" intending to influence the outcome "of a specific case."[70] Our statute contains materially similar limiting requirements. Consequently, the Ninth Circuit's conclusion in *Turney* is relevant to this case. The statute is not overbroad because it is aimed to regulate "the narrow but significant category of communications to jurors made outside of the auspices of the official proceeding and aimed at improperly influencing the outcome of a particular case."[71] Further, it does not sweep in a substantial amount of protected speech because, for the reasons stated in *Turney*, it does not implicate a substantial amount of protected speech, such as innocent advice, political demonstrations, or the mass dissemination of political ideas.[72]

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[69] *People v McCarty*, 303 Mich 629, 633; 6 NW2d 919 (1942). Contemporaneous lay and legal dictionaries defined "willful" as "intentional." See, e.g., *Webster's New Practical Dictionary* (1957) ("Intentional[.]"); *Black's Law Dictionary* (Rev 4th ed) ("Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary.").

[70] *Turney*, 400 F3d at 1201 (emphasis omitted).

[71] *Id*. at 1203.

[72] *Id*. at 1203-1204.

Defendant also asserts that applying the statute's prohibition on jury tampering to his conduct in influencing prospective jurors is unconstitutional. "An as-applied challenge, to be distinguished from a facial challenge, alleges 'a present infringement or denial of a specific right or of a particular injury in process of actual execution' of government action."[73] But the above construction of MCL 750.120a(1) also demonstrates why the statute, as applied to defendant's conduct in tampering with prospective jurors, is constitutional. As recognized by a litany of United States Supreme Court cases, the state has a strong interest in protecting the fair administration of justice and the impartiality of jurors.[74] The state has chosen the least restrictive means available: by applying the statute to *knowing* and intentional conduct aimed at a *known* juror in order to influence the *outcome* of an *actual case*.

Applying that narrow regulation to the facts of this case, defendant's actions fell within the conduct proscribed by the statute. Defendant was interested in

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[73] *Bonner v City of Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014) (citation omitted).

[74] See, e.g., *Cox*, 379 US at 562 ("There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create. Since we are committed to a government of laws and not of men, it is of the utmost importance that the administration of justice be absolutely fair and orderly."); *Wood*, 370 US at 383 ("[T]he right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government . . . ."); *Gentile v State Bar of Nevada*, 501 US 1030, 1075; 111 S Ct 2720; 115 L Ed 2d 888 (1991) ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors . . . ."); *Williams-Yulee v Florida Bar*, 575 US 433, 446; 135 S Ct 1656; 191 L Ed 2d 570 (2015) ("[P]ublic perception of judicial integrity is a state interest of the highest order.") (quotation marks and citation omitted).

Yoder's case. He attended a pretrial hearing and contacted a reporter for the Big Rapids Pioneer in an attempt to get the newspaper to report on the case. Defendant stated that the case "piqued" his interest because it "interested [him] that the government would have jurisdiction on somebody's private property." Then, on the day that he knew Yoder's trial would be held, defendant went to the courthouse and passed out the FIJA pamphlets to two individuals who he *knew* were jurors in order to influence their decisions.[75] That conduct evinces an intent to influence known jurors in an actual case. Therefore, defendant's as-applied challenge also fails because his conduct falls within the narrow proscription of MCL 750.120a(1).[76]

III. CONCLUSION

In sum, the definition of "juror" in MCL 750.120a(1) includes both empaneled and prospective jurors. Un-

[75] This is evident because defendant handed both Johnson and DeVries a pamphlet *only after* he learned each of them was at the courthouse for jury service. Johnson, who initially believed that defendant was a courthouse official, approached him to ask for directions. During their brief conversation, defendant learned that she was there as a potential juror. Defendant then gave Johnson a pamphlet and directed her to go inside the courthouse. Then, as DeVries approached the courthouse, defendant took the initiative to approach her and specifically asked her if she was there for jury selection. When DeVries confirmed that she was, defendant handed her a pamphlet and said, " 'Do you know what your rights are for being a jury [sic]—on jury duty?' "

[76] Defendant also raises two other due-process contentions that are without merit. First, he claims MCL 750.120a(1) is void for vagueness. We have held that a penal statute may be unconstitutionally vague if it "(1) fail[s] to provide fair notice of what conduct is prohibited, (2) encourage[s] . . . arbitrary and discriminatory enforcement, or (3) [is] overbroad and imping[es] on First Amendment freedoms." *People v Lino*, 447 Mich 567, 576; 527 NW2d 434 (1994). However, this vagueness contention is without merit in light of the conclusions that I have

der this interpretation, and as the statute was applied in this case, defendant's First Amendment contentions fail. For those reasons, I respectfully dissent from the majority's decision to reverse the judgment of the Court of Appeals.

MARKMAN, J., concurred with VIVIANO, J.

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already reached. Most importantly, the definition of "juror" is ascertainable to individuals who have access to a dictionary. See *People v Harris*, 495 Mich 120, 138 & n 49; 845 NW2d 477 (2014) (explaining that a statute is not vague when the meaning of the words can be ascertained by reference to a dictionary). As discussed above, anyone who cracked open a good dictionary in 1955—one that reflected the common usages of the day—would see that summoned jurors were jurors. The same holds true today, as the meaning of "juror" remains the same. See *Wood*, 326 Mich App at 572 (noting that modern dictionaries include summoned jurors in their definitions of "juror").

Second, defendant contends that he was denied a fair trial because he could not cross-examine the magistrate who confronted defendant outside the courthouse when he was passing out the FIJA pamphlets and also presided over his arraignment on the same day. A violation of the Confrontation Clause may occur if the defendant was prohibited from engaging in cross-examination to show a witness's bias. *Delaware v Van Arsdall*, 475 US 673, 678-680; 106 S Ct 1431; 89 L Ed 2d 674 (1986). But a denial of the right is subject to harmless-error review. *Id*. at 684. An analysis of the facts of this case shows that it was harmless error for the trial court to deny defendant the right to cross-examine the magistrate. The magistrate's testimony at defendant's trial only provided context for defendant's arrest, such as the magistrate's strong request that defendant stop passing out the pamphlets. Other witnesses, such as Johnson and DeVries, testified to the interactions they had with defendant that gave rise to defendant's criminal liability. The magistrate did not describe the pamphlet's content or testify about defendant's interactions with Johnson and DeVries. The magistrate's testimony was not material to defendant's conviction, and therefore, the denial of his right to cross-examine the magistrate was harmless.

MAYS v GOVERNOR

Docket Nos. 157335 through 157337 and 157340 through 157342. Argued March 4, 2020 (Calendar No. 2). Decided July 29, 2020.

Melissa Mays and other water users and property owners in Flint, Michigan (plaintiffs) brought a class action in the Court of Claims against defendants Governor Rick Snyder, the state of Michigan, the Michigan Department of Environmental Quality (the MDEQ), and the Michigan Department of Health and Human Services (collectively, the state defendants) and against defendants Darnell Earley and Jerry Ambrose (the city defendants), who are former emergency managers for the city of Flint. Plaintiffs' complaint alleged that from 1964 through late April 2014, the Detroit Water and Sewerage Department (DWSD) supplied Flint water users with their water, which was drawn from Lake Huron. On April 16, 2013, the Governor authorized a contract to explore the development of an alternative water delivery system, and at the time of the contract, the Governor and various state officials knew that the Flint River would serve as an interim source of drinking water for the residents of Flint. Plaintiffs alleged that the Governor and these officials had knowledge of a 2011 study commissioned by Flint officials that cautioned against the use of Flint River water as a source of drinking water. On April 25, 2014, under the direction of Earley and the MDEQ, Flint switched its water source from the DWSD to the Flint River, and Flint water users began receiving Flint River water from their taps. Plaintiffs alleged that the switch occurred despite the fact that the water treatment plant's laboratory and water-quality supervisor warned officials that the water treatment plant was not fit to begin operations and despite the fact that the 2011 study had noted that the water treatment plant would require facility upgrades costing millions of dollars. Less than a month after the switch, state officials began to receive complaints from Flint water users about the quality of the water coming out of their taps. In June 2014, residents complained that they were becoming ill after drinking the tap water. In October 2014, General Motors announced that it was discontinuing the use of Flint water in its Flint plant due to concerns about the corrosive nature of the water, and in the same month, Flint officials expressed

concern about a legionellosis outbreak and possible links between the outbreak and Flint's switch to the river water. In February 2015, the United States Environmental Protection Agency (the EPA) advised the MDEQ that the Flint water supply was contaminated with iron at levels so high that the testing instruments could not measure the exact level, and in the same month, the MDEQ was advised that black sediment found in some of the tap water was lead. Plaintiffs alleged that during this time, state officials failed to take any significant remedial measures to address the growing health threat and instead continued to downplay the health risk, advising Flint water users that it was safe to drink the tap water while simultaneously arranging for state employees in Flint to drink water from water coolers installed in state buildings. Additionally, plaintiffs alleged that the MDEQ advised the EPA that Flint was using a corrosion-control additive with knowledge that the statement was false. Through the summer and fall of 2015, state officials allegedly continued to cover up the health emergency, discredit reports that confirmed the presence of lead in the water system and a spike in the percentage of Flint children with elevated blood lead levels, and advise the public that the drinking water was safe despite knowledge to the contrary. In early October 2015, the Governor acknowledged that the Flint water supply was contaminated with dangerous levels of lead. On October 8, 2015, the Governor ordered Flint to reconnect to the DWSD, and the reconnection occurred on October 16, 2015. On January 21, 2016, plaintiffs brought a four-count class-action complaint against all defendants in the Court of Claims for state-created danger, violation of plaintiffs' due-process right to bodily integrity, denial of fair and just treatment during executive investigations, and unconstitutional taking via inverse condemnation. The state and city defendants separately moved for summary disposition on all four counts, arguing that plaintiffs had failed to satisfy the statutory notice requirements in MCL 600.6431 of the Court of Claims Act, MCL 600.6401 *et seq*., failed to allege facts to establish a constitutional violation for which a judicially inferred damages remedy is appropriate, and failed to allege facts to establish the elements of any of their claims. The Court of Claims, MARK T. BOONSTRA, J., granted defendants' motions for summary disposition on plaintiffs' causes of action under the state-created-danger doctrine and the Fair and Just Treatment Clause of the 1963 Michigan Constitution, art 1, § 17, after concluding that neither cause of action is cognizable under Michigan law. However, the Court of Claims denied summary disposition on all of defendants' remaining grounds, concluding that plaintiffs satisfied the statutory

notice requirements and adequately pleaded claims of inverse condemnation and a violation of their right to bodily integrity. In Court of Appeals Docket No. 335555, the state defendants appealed, and the city defendants and plaintiffs cross-appealed; in Court of Appeals Docket No. 335725, the Court of Appeals granted the city defendants' application for leave to appeal; and in Court of Appeals Docket No. 335726, the Court of Appeals granted the state defendants' application for leave to appeal. The Court of Appeals consolidated the appeals. In its judgment, the Court of Appeals, JANSEN, P.J., and FORT HOOD, J. (RIORDAN, J., dissenting), affirmed the Court of Claims' rulings on the statutory notice requirements, plaintiffs' claim of violation of their right to bodily integrity, and plaintiffs' claim of inverse condemnation. 323 Mich App 1 (2018). Both the state defendants and the city defendants sought leave to appeal in the Supreme Court. The Supreme Court granted the applications for leave to appeal. 503 Mich 1030 (2019).

In a lead opinion by Justice BERNSTEIN, joined by Chief Justice MCCORMACK and Justice CAVANAGH, and a separate opinion by Justice VIVIANO, concurring in part and dissenting in part, the Supreme Court *held*:

Plaintiffs sufficiently alleged a claim of inverse condemnation to survive a motion for summary disposition brought under MCR 2.116(C)(8). Viewed in the light most favorable to plaintiffs and accepting their factual allegations as true, the pleadings established that defendants' actions were a substantial cause of the decline in plaintiffs' property value, that defendants took affirmative actions directed at plaintiffs' property, and that plaintiffs suffered a unique or special injury different in kind, not simply in degree, from the harm suffered by all persons similarly situated. While state and municipal agencies performing governmental functions are generally immune from tort liability, the government may voluntarily subject itself to liability, which also means that it may place conditions or limitations on the liability imposed. One condition on the right to sue state governmental agencies is the notice provision of the Court of Claims Act, MCL 600.6431. But it would be premature to grant summary disposition regarding the inverse-condemnation claim on the basis of the six-month notice period because questions of fact remain as to when plaintiffs' claims accrued.

Court of Appeals judgment regarding plaintiffs' inverse-condemnation claim expressly affirmed; Court of Appeals judgment otherwise affirmed by equal division, including with regard to whether plaintiffs presented a cognizable claim for violation of

their right to bodily integrity under Michigan's Due Process Clause; case remanded to the Court of Claims for further proceedings.

In the lead opinion, Justice BERNSTEIN, joined by Chief Justice MCCORMACK and Justice CAVANAGH, stated that plaintiffs adequately alleged a claim of inverse condemnation. A plaintiff alleging inverse condemnation must establish that the government's actions were a substantial cause of the decline of the property's value and that the government abused its powers in affirmative action directly aimed at the property. The right to just compensation in the context of an inverse-condemnation suit for diminution in value exists only when the landowner can allege a unique or special injury, i.e., an injury that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated. In this case, plaintiffs met the first element of an inverse-condemnation claim because they alleged that switching the water source from the DWSD to the Flint River resulted in physical damage to pipes, service lines, and water heaters and that the contaminated water limited the use of their property and substantially impaired its value and marketability because after the water crisis became public knowledge, lenders were hesitant to authorize loans for the purchase of realty within Flint and property values decreased. Plaintiffs met the second element of an inverse-condemnation claim because they alleged that defendants committed an affirmative act directed at their property when the state defendants authorized the city defendants to use the Flint River as an interim water source while both sets of defendants knew that using the river could result in harm to property. Defendants then allegedly concealed or misrepresented data and made false statements about the safety of the river water in an attempt to downplay the risk of its use and consumption. Following United States Supreme Court precedent in comparing plaintiffs to a generalized group of similar individuals—other municipal water users who generally experience harms such as service disruptions and externalities associated with construction—plaintiffs alleged injuries that were different in kind, not just degree, from other municipal water users when they alleged that water contaminated with Legionella bacteria and toxic levels of iron and lead flowed through their pipes, service lines, and water heaters, which damaged the infrastructure and diminished their property's value. Accordingly, plaintiffs' allegations were sufficient to conclude that plaintiffs had alleged a claim of inverse condemnation to survive a motion for summary disposition. With regard to defendants' argument that plaintiffs failed to satisfy the statutory notice requirements, MCL 600.6431 provides that in actions for property damage

or personal injuries, the claimant must file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within six months following the happening of the event giving rise to the cause of action. Under MCL 600.5827, a claim accrues at the time the wrong upon which the claim is based was done, which is the date on which the defendant's breach harmed the plaintiff. In this case, questions of fact remained as to when plaintiffs sustained their injuries; therefore, summary disposition at this stage of the litigation was premature. With regard to plaintiffs' constitutional-tort claim, plaintiffs sufficiently pleaded a claim for violation of their substantive due-process right to bodily integrity under Const 1963, art 1, § 17. While the Legislature has never created an exception to immunity for a constitutional tort, *Smith v Dep't of Pub Health*, 428 Mich 540 (1987), aff'd sub nom *Will v Mich Dep't of State Police*, 491 US 58 (1989), held that when a plaintiff brings a constitutional-tort claim against the state, in certain instances, the government is not immune from liability for violations of its Constitution. Michigan courts have recognized the existence of constitutional torts as outlined in *Smith* and, in certain circumstances, have allowed constitutional-tort claims to survive motions for summary disposition. Accordingly, plaintiffs sufficiently alleged a constitutional tort for violation of their right to bodily integrity when they alleged that defendants' decision to switch the city of Flint's water source to the Flint River, which defendants knew was contaminated, resulted in a nonconsensual entry of toxic water into plaintiffs' bodies. Plaintiffs' allegations painted a picture of a public health crisis of the government's own making, intentionally concealed by state actors despite their knowledge that Flint residents were being harmed. Those actions, if proven, were shocking to the conscience. With regard to inferred damages, while no test for assessing a damages inquiry for a constitutional violation has ever been endorsed, the multifactor test outlined in Justice BOYLE's separate opinion in *Smith* provided a framework for assessing a damages inquiry. Under that test, various factors are weighed, including: (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. In considering each of the five factors in that test, the first and fifth factors weighed in favor of inferring a damages remedy, the second and third factors weighed somewhat against recognizing a damages remedy, and the fourth factor was neutral regarding the propriety of an inferred

damages remedy. Recognizing that discovery had not yet occurred and accepting plaintiffs' allegations as true, at this stage of the litigation, holding that monetary damages were unavailable for this claim would have been premature.

In a separate concurrence, Justice BERNSTEIN wrote to counter Justice MARKMAN's arguments about plaintiffs' purported failure to adhere to the Court of Claims Act's statutory notice requirements and to counter Justice VIVIANO's argument that plaintiffs should be denied the right to sue for their personal injuries that resulted from a violation of their right to bodily integrity and should be denied a damages remedy. Justice BERNSTEIN agreed with the Court of Appeals' application of the harsh-and-unreasonable-consequences exception to the MCL 600.6431 notice requirement in the event that plaintiffs' claims are proved but untimely. While *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007), *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378 (2007), and *McCahan v Brennan*, 492 Mich 730 (2012), each demanded strict compliance with statutory limitations and notice requirements in the context of legislatively granted rights, no Supreme Court case has ever held that constitutional claims against the state should be treated like those legislatively granted rights. Justice BERNSTEIN also would affirm the Court of Appeals' ruling that the fraudulent-concealment exception of MCL 600.5855 applies to MCL 600.6431 and that this exception may provide an alternative basis to deny defendants' motions for summary disposition if plaintiffs' claims are proved but untimely. The omission of a fraudulent-concealment exception to MCL 600.6431 is not reconcilable with the Legislature's intent to provide claimants with two years from the date of discovery to bring suit for harm that was fraudulently concealed, as expressed in MCL 600.6452(2). Adopting defendants' arguments as they relate to fraudulent concealment would result in reading out MCL 600.6452(2) entirely, because plaintiffs would never be able to use the fraudulent-concealment exception. Finally, the Michigan Supreme Court is the only institution that determines the meaning of the Michigan Constitution, and it does so independently of the Legislature's action or inaction in a given area. Justice BERNSTEIN therefore would have held that an examination of the text of Michigan's Due Process Clause and case precedents pertaining to this provision revealed that Michigan's Due Process Clause plainly encompasses a right to bodily integrity.

Chief Justice MCCORMACK, joined by Justice CAVANAGH, fully concurred with the lead opinion but wrote separately to respond to Justice VIVIANO's critique of *Smith*. Chief Justice MCCORMACK

disagreed with Justice VIVIANO's argument that *Smith*'s foundations have been eroded by the United States Supreme Court's partial retreat from *Bivens v Six Unknown Fed Bureau of Narcotics Agents*, 403 US 388 (1971), which held that a plaintiff may obtain monetary damages for injuries sustained as a result of federal agents' violation of the Fourth Amendment. It was not clear that the relevant holding of *Smith* was at all or exclusively based on *Bivens*. *Smith* never cited or referred to *Bivens*. Additionally, like *Smith*, *Bivens* established that monetary damages may be available to remedy a constitutional violation even in the absence of statutory authorization for such a claim. Though the United States Supreme Court has declined to extend *Bivens* to new contexts and claims in recent years, its fundamental principles are good law. Even assuming that *Smith* was a state Constitution, *Bivens*-like decision, the Michigan Supreme Court decides the meaning of the Michigan Constitution and does not take its cue from any other court, including the United States Supreme Court. Furthermore, the critiques of *Bivens* were far less weighty here because there are no corresponding federalism concerns. Perhaps most importantly, there was no federal analogue for the type of action here, which diminishes the relevance of the Supreme Court's *Bivens* jurisprudence. The typical *Bivens* scenario arises from errant conduct by a rogue federal official, but plaintiffs in this case alleged that the government itself was responsible for a conscience-shocking constitutional tort committed against the citizens of an entire city. This action—against these particular defendants—could not have been brought in federal court. However, *Smith* held that Michiganders can sue the government directly for violating their Michigan constitutional rights. These meaningful differences between federal *Bivens* claims and Michigan constitutional-tort actions made the United States Supreme Court's *Bivens* jurisprudence of limited value when determining how to approach state constitutional torts.

Justice VIVIANO, concurring in part and dissenting in part, agreed with the lead opinion's analysis of plaintiffs' inverse-condemnation claim and with the lead opinion's remand for further factual development to determine when that claim accrued. But he would have reversed the Court of Appeals' denial of defendants' motion for summary disposition concerning plaintiffs' claim for a violation of bodily integrity because he did not believe that substantive due process encompasses a right to be protected from exposure to contaminated water and he did not believe that plaintiffs alleged conscience-shocking conduct on the part of defendants. A substantive due-process analysis must begin with a careful description of the asserted right and a determination of

whether that right is deeply rooted in this country's history. In this case, the right that plaintiffs asserted in their amended complaint was a right not to be exposed to contaminated water, and no caselaw existed holding that such a right is encompassed in substantive due process. Several cases explicitly hold that there is no right to a contaminant-free environment. The Court of Appeals in this case did not follow this analysis and erred by describing the right so generally. Furthermore, plaintiffs did not allege conscience-shocking behavior. The bar for conduct that shocks the conscience is so high that it has been described as virtually insurmountable. In this case, plaintiffs alleged that defendants switched Flint's water source despite a study cautioning against using the Flint River, but additional studies stated that the initial study was unreliable. The studies and expert opinions plaintiffs cited in their complaint were not sufficient to show that defendants' behavior was deliberately indifferent. Other evidence had to be weighed in the balance: former Governor Snyder testified that he was repeatedly assured by the MDEQ that the water was safe, and there was no broad consensus that using the Flint River as a water source would cause a serious public health crisis. While mistakes had been made, plaintiffs did not allege actions that surmounted the high bar of conscience-shocking behavior. Furthermore, Justice VIVIANO would not have inferred a damages remedy even if plaintiffs did allege a substantive due-process claim for two reasons: even if *Smith* applied, the factors that Justice BOYLE listed in her partial concurrence for implying an inferred damages remedy weighed against the creation of a claim for damages, and Justice VIVIANO had doubts about whether *Smith* was correctly decided and whether it should be extended. Additionally, Justice VIVIANO stated that an implied claim for damages arising from a state constitutional violation would raise serious separation-of-powers concerns.

Justice MARKMAN, joined by Justice ZAHRA, dissenting, would have reversed the decision of the Court of Appeals and remanded the case to the Court of Claims for entry of an order disposing of all of plaintiffs' claims and dismissing the case because plaintiffs failed to comply with MCL 600.6431(3), which required plaintiffs to file a notice of intention to file a claim or the claim itself within six months following the happening of the event giving rise to the cause of action. The period of limitations begins to run when a plaintiff suffers harm, not when a plaintiff first learns of that harm. In this case, plaintiffs filed their complaint on January 21, 2016, and thus the event giving rise to the cause of action must have happened on or after July 21, 2015, for plaintiffs' action to have been filed in a timely manner under MCL 600.6431(3).

Because plaintiffs alleged in their complaint and in their amended complaint that the event giving rise to the cause of action was the switching of the water supply on April 25, 2014, Justice MARKMAN would have held that plaintiffs' action was untimely. Furthermore, Justice MARKMAN would have held that the harsh-and-unreasonable-consequences exception and the fraudulent-concealment exception of MCL 600.5855 were each clearly inapplicable.

Justice CLEMENT did not participate because of her prior involvement as chief legal counsel for Governor Rick Snyder.

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Amici Curiae:

Kaitlin Morrison, *Sarah Tallman*, and *Jeremy Orr* for the Natural Resources Defense Council.

Bonsitu A. Kitaba and *Daniel S. Korobkin* for the American Civil Liberties Union Fund of Michigan.

Nicholas Leonard for the Great Lakes Environmental Law Center.

BERNSTEIN, J. This putative class action involves a series of events commonly referred to as the "Flint water crisis." Plaintiffs, who are water users and property owners in the city of Flint, sued former Governor Rick Snyder, the state of Michigan, the Michigan Department of Environmental Quality (MDEQ), and the Michigan Department of Health and Human Services (DHHS) (collectively, the state defendants).[1] Plaintiffs also sued former city of Flint emergency managers Darnell Earley and Jerry Ambrose (collectively, the city defendants).[2] The state defen-

[1] The name of the MDEQ was changed to the Michigan Department of Environment, Great Lakes, and Energy (EGLE) after the filing of this lawsuit. See Executive Order No. 2019-06. For consistency's sake, in this case we refer to the Department as the MDEQ. We note that the Department of Human Services and the Department of Community Health were combined to form DHHS during the pendency of this case. See Executive Order No. 2015-04.

[2] An emergency manager is an official appointed by the governor "to address a financial emergency" within a local government. MCL 141.1549(1). Under our state's law, emergency managers effectively replace locally elected government officials and have broad powers to address financial emergencies:

> Upon appointment, an emergency manager shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government. The emergency manager shall have broad powers in receivership to rectify the financial emergency and to assure the fiscal accountability of the local government and the local government's capacity to provide or cause to be provided necessary governmental services essential to the public health, safety, and welfare. Following appointment of an emergency manager and during the pendency of receivership, the governing body and the chief administrative officer of

dants and the city defendants brought separate motions for summary disposition under MCR 2.116(C)(4), (7), and (8). Defendants argued that plaintiffs' lawsuit should be dismissed because plaintiffs failed to provide timely notice and did not sufficiently plead their claims. The Court of Claims granted partial summary disposition to defendants on claims not relevant to the issues presented in this Court. The Court of Claims denied defendants' motions for summary disposition with respect to plaintiffs' claim for violation of their right to bodily integrity under the Due Process Clause of the 1963 Michigan Constitution, art 1, § 17, and plaintiffs' claim of inverse condemnation. The state defendants appealed, and cross-appeals followed. The Court of Appeals affirmed the Court of Claims. Both sets of defendants filed applications for leave to appeal in this Court. We granted leave to appeal, and after hearing oral argument on defendants' applications, a majority of this Court expressly affirms the Court of Appeals' conclusion regarding plaintiffs' inverse-condemnation claim. The Court of Appeals opinion is otherwise affirmed by equal division. See MCR 7.315(A).

I. FACTS

The trial court record is limited because defendants brought their motions for summary disposition before discovery could be conducted. The facts of the case are disputed. However, because this is an appeal from an opinion that mainly concerns motions for summary disposition under MCR 2.116(C)(7) and (8), we accept

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the local government shall not exercise any of the powers of those offices except as may be specifically authorized in writing by the emergency manager or as otherwise provided by this act and are subject to any conditions required by the emergency manager. [MCL 141.1549(2).]

the contents of the complaint as true unless contradicted by documentation submitted by the movant[3] and we construe the factual allegations in a light most favorable to plaintiffs.[4] See *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). The Court of Claims summarized plaintiffs' pleadings as follows:

> From 1964 through late April 2014, the Detroit Water and [Sewerage] Department ("DWSD") supplied Flint water users with their water, which was drawn from Lake Huron. Flint joined Genesee, Sanilac, and Lapeer Counties and the City of Lapeer, in 2009, to form the Karegondi Water Authority ("KWA") to explore the development of a water delivery system that would draw water from Lake Huron and serve as an alternative to the Detroit water delivery system. On March 28, 2013, the State Treasurer recommended to [former Governor Snyder] that he authorize the KWA to proceed with its plans to construct the alternative water supply system. The State Treasurer made this decision even though an independent engineering firm commissioned by the State Treasurer had concluded that it would be more cost efficient if Flint continued to receive its water from the DWSD. Thereafter, on April 16, 2013, the Governor authorized then-Flint Emergency Manager Edward Kurtz to contract with the KWA for the purpose of switching the source of Flint's water from the DWSD to the KWA beginning in mid-year 2016.
>
> At the time Emergency Manager Kurtz contractually bound Flint to the KWA project, the Governor and various state officials knew that the Flint River would serve as an interim source of drinking water for the residents of Flint. Indeed, the State Treasurer, the emergency manager and others developed an interim plan to use Flint River water before the KWA project became operational. They did so

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[3] We conclude that defendants have not produced sufficient evidence at this stage of litigation to contradict plaintiffs' allegations.

[4] Later in this opinion, we review defendants' motions for summary disposition on plaintiffs' procedural compliance with statutory notice requirements under MCR 2.116(C)(4) and (7).

despite knowledge of a 2011 study commissioned by Flint officials that cautioned against the use of Flint River water as a source of drinking water and despite the absence of any independent state scientific assessment of the suitability of using water drawn from the Flint River as drinking water.

On April 25, 2014, under the direction of then Flint Emergency Manager Earley and the [MDEQ,] Flint switched its water source from the DWSD to the Flint River and Flint water users began receiving Flint River water from their taps. This switch was made even though Michael Glasgow, the City of Flint's water treatment plant's laboratory and water-quality supervisor, warned that Flint's water treatment plant was not fit to begin operations. The 2011 study commissioned by city officials had noted that Flint's long dormant water treatment plant would require facility upgrades costing millions of dollars.

Less than a month later, state officials began to receive complaints from Flint water users about the quality of the water coming out of their taps. Flint residents began complaining in June of 2014 that they were becoming ill after drinking the tap water. On October 13, 2014, General Motors announced that it was discontinuing the use of Flint water in its Flint plant due to concerns about the corrosive nature of the water. That same month, Flint officials expressed concern about a Legionellosis outbreak and possible links between the outbreak and Flint's switch to the river water. On February 26, 2015, the United States Environmental Protection Agency ("EPA") advised the MDEQ that the Flint water supply was contaminated with iron at levels so high that the testing instruments could not measure the exact level. That same month, the MDEQ was also advised of the opinion of Miguel Del Toral of the EPA that black sediment found in some of the tap water was lead.

During this time, state officials failed to take any significant remedial measures to address the growing public health threat posed by the contaminated water. Instead, state officials continued to downplay the health risk and advise Flint water users that it was safe to drink the tap water while at the same time arranging for state employees

in Flint to drink water from water coolers installed in state buildings. Additionally, the MDEQ advised the EPA that Flint was using a corrosion control additive with knowledge that the statement was false.

By early March 2015, state officials knew they faced a public health emergency involving lead poisoning and the presence of the deadly Legionella bacteria, but actively concealed the health threats posed by the tap water, took no measures to effectively address the dangers, and publicly advised Flint water users that the water was safe and that there was no widespread problem with lead leaching into the water supply despite knowledge that these latter two statements were false.

Through the summer and into the fall of 2015, state officials continued to cover up the health emergency, discredit reports from Del Toral of the EPA and Professor Marc Edwards of Virginia Tech confirming serious lead contamination in the Flint water system, conceal critical information confirming the presence of lead in the water system, and advise the public that the drinking water was safe despite knowledge to the contrary. In the fall of 2015, various state officials attempted to discredit the findings of Dr. Mona [Hanna]-Attisha of Hurley Hospital, which reflected a "spike in the percentage of Flint children with elevated blood lead levels from blood drawn in the second and third quarter of 2014."

In early October of 2015, however, the Governor acknowledged that the Flint water supply was contaminated with dangerous levels of lead. He ordered Flint to reconnect to the Detroit water system on October 8, 2015, with the reconnection taking place on October 16, 2015. This suit followed. [*Mays v Governor*, unpublished opinion of the Court of Claims, issued October 26, 2016 (Docket No. 16-000017-MM), pp 3-6 (citation omitted).]

Plaintiffs brought suit against defendants in the Court of Claims, alleging, in part, a claim for inverse condemnation and seeking economic damages both for the physical harm done to their property as well as the

diminution of their property's value. Plaintiffs alleged that despite both sets of defendants knowing that the Flint River water was toxic and corrosive, the state defendants authorized the city defendants to service their property with the Flint River water. As a result, plaintiffs alleged that their pipes, service lines, and water heaters were damaged. Plaintiffs also alleged that after the water crisis had become public knowledge, their property's value substantially declined.

Plaintiffs additionally brought a claim for violation of their right to bodily integrity under the Michigan Constitution's Due Process Clause, Const 1963, art 1, § 17. Plaintiffs alleged that despite knowing the dangers associated with switching the city of Flint's water source to the Flint River, defendants made the switch with indifference to the known serious medical risks and then misled and deceived the public while concealing information about the toxicity and corrosiveness of the water. Plaintiffs alleged that they sustained personal injury from using and ingesting the Flint water as a result of defendants' actions. Specifically, plaintiffs alleged that as a result of ingesting the tainted water, they have suffered physical symptoms, such as neuropathy, sleepiness, gastrointestinal discomfort, dermatological disorders, hair loss, and other symptoms, as well as substantial economic losses from their medical expenses and lost wages. Plaintiffs also alleged that some Flint citizens suffered life-threatening and irreversible bodily injuries.

The state defendants and the city defendants brought separate motions for summary disposition under MCR 2.116(C)(4), (7), and (8). Both sets of defendants argued that plaintiffs failed to satisfy the statutory notice requirements in MCL 600.6431 of the Court of Claims Act (COCA), MCL 600.6401 *et seq*.; that plaintiffs failed to allege facts to establish a

constitutional claim under the Michigan Constitution's Due Process Clause for violation of their right to bodily integrity; that a judicially inferred damages remedy for such a claim is inappropriate; and that plaintiffs otherwise failed to allege sufficient facts to establish the legal elements of their claims.

In an opinion and order, the Court of Claims granted partial summary disposition to defendants and in other respects denied defendants' motions for summary disposition. The Court of Claims determined that plaintiffs satisfied the statutory notice requirements and adequately pleaded claims of inverse condemnation and a violation of their right to bodily integrity. The state defendants appealed, and the city defendants and plaintiffs filed cross-appeals.

In a published opinion, the Court of Appeals affirmed the Court of Claims' rulings on the statutory notice requirements, plaintiffs' claim of violation of their right to bodily integrity, and plaintiffs' claims of inverse condemnation. *Mays v Governor*, 323 Mich App 1; 916 NW2d 227 (2018). Both the state defendants and the city defendants then filed applications for leave to appeal in this Court. We granted leave to appeal and heard oral argument on defendants' applications. *Mays v Governor*, 503 Mich 1030 (2019).

II. ANALYSIS

A. INVERSE CONDEMNATION[5]

1. STANDARD OF REVIEW

Defendants moved for summary disposition of plaintiffs' inverse-condemnation claim under MCR 2.116(C)(8). This Court reviews a motion for summary

[5] We address plaintiffs' claim of inverse condemnation first because it is the sole claim in which a majority exists to expressly affirm the Court of Appeals.

disposition under MCR 2.116(C)(8) for the legal sufficiency of a claim. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). We accept all factual allegations in the complaint as true, deciding the motion on the pleadings alone. *Id*. at 160. "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." *Id*.

2. LEGAL BACKGROUND

The Fifth Amendment of the United States Constitution and Article 10, § 2 of Michigan's 1963 Constitution prohibit the taking of private property without just compensation. US Const, Am V; Const 1963, art 10, § 2. A claim of inverse condemnation is "a cause of action against a governmental defendant to recover the value of property which has been taken . . . even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 129; 680 NW2d 485 (2004) (quotation marks and citation omitted). "Inverse condemnation can occur without a physical taking of the property; a diminution in the value of the property or a partial destruction can constitute a 'taking.' " *Id*. at 125.

"[A] plaintiff alleging inverse condemnation must prove a causal connection between the government's action and the alleged damages." *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). Government actions directed at a plaintiff's property must have "the effect of limiting the use of the property." *Charles Murphy, MD, PC v Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993). "[A]ll of the [defendants'] actions in the aggregate, as opposed to just one incident, must be analyzed to determine the extent of

the taking." *Merkur Steel Supply, Inc*, 261 Mich App at 125. A plaintiff "must establish (1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property." *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 277; 792 NW2d 798 (2010). In *Spiek v Dep't of Transp*, 456 Mich 331, 348; 572 NW2d 201 (1998), this Court opined:

> The right to just compensation, in the context of an inverse condemnation suit for diminution in value . . . , exists only where the landowner can allege a unique or special injury, that is, an injury that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated.

3. PLAINTIFFS ADEQUATELY ALLEGED A CLAIM OF INVERSE CONDEMNATION

With respect to the first element of an inverse-condemnation claim, plaintiffs allege that switching the water source from the DWSD to the Flint River resulted in physical damage to pipes, service lines, and water heaters. Plaintiffs also allege that the contaminated water limited the use of their property and substantially impaired its value and marketability because after the water crisis became public knowledge, lenders were hesitant to authorize loans for the purchase of realty within Flint and property values "plummeted." Taking these factual allegations as true, as we are required to do, we conclude that plaintiffs sufficiently alleged that defendants' actions were a substantial cause of the decline of their property's value. See MCR 2.116(C)(8); *El-Khalil*, 504 Mich at 160.

With respect to the second element of an inverse-condemnation claim, defendants argue that plaintiffs

have failed to allege that they abused their powers and took affirmative actions directed at plaintiffs' property. Again, we disagree. Plaintiffs allege that defendants committed an affirmative act directed at their property when the state defendants authorized the city defendants to use the Flint River as an interim water source while both sets of defendants knew that using the river could result in harm to property. Defendants then allegedly concealed or misrepresented data and made false statements about the safety of the river water in an attempt to downplay the risk of its use and consumption. The state defendants argue that if there were an affirmative act that was directed at the plaintiffs' property, it was the city defendants who effectuated the act, not the state defendants. While discovery may bear evidence that supports this conclusion, at this stage of proceedings, we must accept all of plaintiffs' allegations as true. See MCR 2.116(C)(8); *El-Khalil*, 504 Mich at 160. If true, plaintiffs' allegations are sufficient to conclude that the state defendants abused their powers and took affirmative actions directly aimed at plaintiffs' property.

Finally, defendants argue that plaintiffs have not alleged a unique or special injury different in kind from the harm suffered by those similarly situated. In their analysis, defendants attempt to define those similarly situated to plaintiffs as other Flint water users. Defendants then contend that plaintiffs' injury is no different in kind from the harm suffered by those individuals and, thus, plaintiffs' inverse-condemnation claim fails. The Court of Appeals rejected defendants' arguments, determining that plaintiffs are similarly situated to municipal water users generally and that they suffered a unique or special injury when compared to those similarly situated. We agree that defendants' analysis is flawed.

Fundamentally, we disagree with defendants as to how to define those who are similarly situated to plaintiffs. In *Richards v Washington Terminal Co*, 233 US 546, 554; 34 S Ct 654; 58 L Ed 1088 (1914), the United States Supreme Court held that residents whose homes were located near a railroad tunnel could not state a claim of inverse condemnation for cracks in their homes caused by vibrations from adjacent trains, because anyone living near a railroad risked similar harm. However, the Court concluded that the plaintiffs could state a claim of inverse condemnation for damage caused by a fanning system within the tunnel that blew pollutants into their homes, because that harm was unique to the plaintiffs given how the plaintiffs' property was particularly situated in relation to the rail tunnel. *Id*. at 556. In other words, when compared with anyone living near train tracks, the harms allegedly caused by the train tunnel's fanning system were unique to the plaintiffs. *Id*.

Similarly, in *Thom v State Hwy Comm'r*, 376 Mich 608, 628; 138 NW2d 322 (1965), this Court concluded that compensation must be awarded to a farmer whose property was "destroy[ed] or . . . interfere[d] [with] seriously" by a change in the grade of an improved road passing by his land. In reaching this conclusion, the Court determined that the farmer's injury was different from the injuries of other property owners whose property was adjacent to improved roads that were constructed in a customary fashion. *Id*. at 622-623, 628. See also *Hill v State Hwy Comm*, 382 Mich 398, 404; 170 NW2d 18 (1969) (holding that property owners whose right of ingress and egress of their neighborhood was closed in two directions because of highway construction could not bring a claim of inverse condemnation because they could not show that their injuries were different from "members of the

traveling public or property owners whose use of these streets ha[d] been restricted by the construction of the . . . expressway"); *Spiek*, 456 Mich at 332-333 (holding that owners of residential property who sought compensation for damages to their property from the noise, dust, vibrations, and fumes produced by vehicles traveling on adjacent roadways could not bring a claim for inverse condemnation because the harm to their property was no different than the harm "incurred by all property owners who reside adjacent to freeways or other busy highways").

When taken together, in determining whether the plaintiffs suffered a unique or special injury, the United States Supreme Court and this Court have compared the plaintiffs to a generalized group of individuals who experience a similar but not identical harm. In parsing this inquiry, the United States Supreme Court and this Court have analyzed whether the harm the plaintiff suffers is part of the "common burden" shared among all, which, if not imposed, would halt a socially necessary activity, or whether the harm "naturally and unavoidably result[s]" in a taking unique to that plaintiff. *Richards*, 233 US at 554.

In *Richards*, the United States Supreme Court explained that railroads are a public necessity, much like highways, so proprietors are immune to suit for "incidental damages accruing to owners of nonadjacent land through the proper and skillful management and operation of the railways." *Id*. When diminution of value to private property is not "peculiar[]" but is merely "sharing in the common burden of incidental damages arising from the legalized nuisance," there is no "taking" in the constitutional sense. *Id*. Damages that are part of the "common burden" are "such damages as naturally and unavoidably result from the

proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad." *Id*. Absent such a distinction, the "practical result would be to bring the operation of railroads to a standstill." *Id*. at 555. The doctrine, "being founded upon necessity, is limited accordingly." *Id*.

In *Richards*, the United States Supreme Court compared the plaintiffs to all property owners who lived next to the railway, not those whose property was also in close proximity to the rail tunnel's fan system. *Id*. at 556. Although members of the public share a "common burden" for the benefit of railroads that includes noise and vibration, the direct fanning of train pollution into a home was deemed to be a unique and uncommon burden that rendered the harm a compensable taking. *Id*. at 554, 556.

This Court has ruled similarly. In *Thom* and *Hill*, this Court reasoned that no taking occurs when a property owner's use of streets is limited in the same way as the rest of the traveling public but that a taking does occur when a property owner's individual access to an abutting highway is completely foreclosed. *Thom*, 376 Mich at 622-623, 628; *Hill*, 382 Mich at 403-404. The former is a common burden, while the latter is not. In *Spiek*, this Court compared the plaintiffs to others whose property abutted highways, not to property owners who lived adjacent to the exact expressway at issue in that case. *Spiek*, 456 Mich at 332-333. The plaintiffs' allegations involving noise, dust, vibrations, and fumes were common burdens shared by all members of the public in return for receiving the social benefit of public roadways. Rather than comparing plaintiffs to other Flint water users, we agree with the Court of Appeals that plaintiffs are similarly situated to municipal water

users generally. We therefore compare plaintiffs to a generalized group of similar individuals—other municipal water users—and consider what "common burden" the public bears from the provision of water.[6]

We recognize that users of public water systems may routinely experience gaps in service and externalities associated with system construction and maintenance. These types of frustrations are common burdens shared by members of society for the provision of water. However, in their amended complaint, plaintiffs allege that the state defendants authorized the city defendants to use the Flint River as an interim water source despite both sets of defendants knowing the potential harm of doing so. Plaintiffs contend that after the switch to the Flint River was effectuated, water contaminated with Legionella bacteria and toxic levels of iron and lead flowed through their pipes, service lines, and water heaters, which damaged the infrastructure and diminished their property's value. These alleged injuries are clearly different in kind, not just degree, from harms that municipal water users experience generally, e.g., service disruptions and externalities associated with construction. Moreover, plaintiffs' allegations do not "naturally and unavoidably result" from the provision of public water. *Richards*, 233 US at 554.

In sum, we conclude that plaintiffs have sufficiently alleged a claim of inverse condemnation to survive a motion for summary disposition brought under MCR 2.116(C)(8). Viewed in the light most favorable to plaintiffs and accepting their factual allegations as true, we hold that the pleadings establish that defendants' actions were a substantial cause of the decline in

[6] In the context of this unique case, the analysis is somewhat ill-fitting because we do not normally consider delivery of water to the public as a "legalized nuisance." See *Richards*, 233 US at 554.

plaintiffs' property value, that defendants took affirmative actions directed at plaintiffs' property, and that plaintiffs suffered a unique or special injury different in kind, not simply in degree, from the harm suffered by all persons similarly situated.

B. STATUTORY NOTICE REQUIREMENTS

The Court of Appeals also concluded that a genuine issue of material fact existed regarding whether plaintiffs satisfied the statutory notice requirements of MCL 600.6431.[7] We agree. On this issue, the Court of Appeals is affirmed by equal division.

1. STANDARD OF REVIEW

Defendants argue that the Court of Claims erred when it denied their motions for summary disposition under MCR 2.116(C)(4) and (7) because plaintiffs failed to satisfy the statutory notice requirements of MCL 600.6431. We disagree.

A motion for summary disposition under MCR 2.116(C)(4) tests the trial court's subject-matter jurisdiction. We review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(4) de novo. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). "[W]hether MCL 600.6431 requires dismissal of a plaintiff's claim for failure to provide the designated notice raises questions of statutory interpretation," which we also review de novo. *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012).

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[7] This provision was amended after plaintiffs filed their suit. See 2020 PA 42 (effective March 3, 2020). We analyze the version of the statute in effect when plaintiffs filed their lawsuit in 2016.

A motion for summary disposition brought under MCR 2.116(C)(7) may be granted when a claim is barred by immunity. *Maiden*, 461 Mich at 118. "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co*, 287 Mich App 406, 428; 729 NW2d 211 (2010).

2. LEGAL BACKGROUND

State and municipal agencies performing governmental functions are generally immune from tort liability. *McCahan*, 492 Mich at 736. However, the government may voluntarily subject itself to liability, which also means that it may place conditions or limitations on the liability imposed. *Id*. For example, the Legislature may impose procedural requirements on a plaintiff's available remedies, such as a statutory limitations period or notice obligation. *Rusha v Dep't of Corrections*, 307 Mich App 300, 307; 859 NW2d 735 (2014).

One condition on the right to sue state governmental agencies is the notice provision of the COCA. The pertinent provisions of the COCA, MCL 600.6431(1) and (3), provide:

> (1) No claim may be maintained against the state unless the claimant, *within 1 year after such claim has accrued*, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

* * *

> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself *within 6 months following the happening of the event giving rise to the cause of action*. [Emphasis added.]

For purposes of statutory limitations periods, our Legislature has stated that a claim accrues "at the time the wrong upon which the claim is based was done," MCL 600.5827, and this Court has clarified that "the wrong . . . is the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which defendant breached his duty," *Frank v Linkner*, 500 Mich 133, 147; 894 NW2d 574 (2017) (quotation marks and citation omitted). A claim does not accrue until each element of the cause of action, including some form of damages, exists. See *Henry v Dow Chem Co*, 319 Mich App 704, 720; 905 NW2d 422 (2017), rev'd in part on other grounds 501 Mich 965 (2018). Thus, determining the time when plaintiffs' claims accrued requires us to determine when plaintiffs were first harmed. See *id*.

3. QUESTIONS OF FACT REMAIN AS TO WHEN PLAINTIFFS SUSTAINED THEIR INJURIES

As noted by the Court of Appeals, plaintiffs filed their complaint on January 21, 2016, without having filed a separate notice of intention to file a claim. In their complaint, plaintiffs assert that their constitutional-tort claim accrued on October 16, 2015,[8]

[8] While plaintiffs' amended complaint states that their claim "accrued on October 16, **2016**, when Defendants re-connected the Flint water system to water supplied by the [DWSD]," elsewhere in their complaint plaintiffs acknowledge that defendants actually reconnected Flint to the DWSD on October 16, **2015**. (Emphasis added.) In reviewing the com-

when defendants reconnected the Flint water system to the water supplied by DWSD. Defendants argue that plaintiffs' claims accrued, and the statutory notice period thus began to run, in either June 2013, when plaintiffs allege that the state authorized the use of the Flint River water, or on April 25, 2014, when Flint's water source was actually switched to the Flint River. On this basis, defendants suggest that regardless of which date is chosen, plaintiffs' complaint was not filed within the six-month statutory notice period required by MCL 600.6431(3). We disagree.

In *Henry v Dow Chem Co*, this Court held that the relevant statutory limitations period began running "from 'the time the claim accrues,' " which is when " 'the wrong upon which the claim is based was done regardless of the time when damage results.' " *Henry v Dow Chem Co*, 501 Mich 965, 965 (2018), quoting MCL 600.5827 and citing *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 387; 738 NW2d 664 (2007). This Court concluded that because the claimed harm was the presence of dioxin in the soil of the plaintiffs' properties, the accrual date was tied to the occurrence of this wrong. *Henry*, 501 Mich at 965.

Justice MARKMAN's dissent argues that our holding in *Henry* means that the accrual date here should be April 25, 2014, when plaintiffs were first exposed to water from the Flint River. However, we note that *Henry* was decided by order and contained no in-depth analysis; instead, the order relied heavily on language from *Trentadue*. *Henry* cites *Trentadue* for the proposition that "[t]he wrong is done when the plaintiff is harmed," *Henry*, 501 Mich at 965, citing *Trentadue*, 479 Mich at 388, and *Trentadue* itself further explains

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plaint as a whole, we conclude that plaintiffs' mention of that event occurring in 2016 was made in error.

that " '[t]he wrong is done when the plaintiff is harmed *rather than when the defendant acted*,' " *Trentadue*, 479 Mich at 388, quoting *Boyle v Gen Motors Corp*, 468 Mich 226, 231 n 5; 661 NW2d 557 (2003) (emphasis added).

To the extent that *Henry* can be read to support the proposition that the accrual date began at the point when dioxin reached the plaintiffs' properties, the order in *Henry* noted that "the claimed harm to the plaintiffs in this case is the presence of dioxin in the soil of their properties." *Henry*, 501 Mich at 965. In the instant case, plaintiffs do not allege that their claimed harms resulted *at the time* Flint's water source was switched. As explained by the Court of Appeals, plaintiffs allege various affirmative actions taken by defendants that resulted in distinct harms to plaintiffs. The economic damage plaintiffs allege from the diminution of their properties' value could not have occurred on the date the water source was switched. Plaintiffs' property diminished in value at a later date, yet to be determined, when a buyer or bank had the requisite information to be disinclined to buy or finance the purchase of property in Flint. At this stage of litigation, it is not yet clear when plaintiffs suffered actionable personal injury as a result of their use and consumption of the contaminated water; in other words, it remains uncertain whether the personal injuries alleged would have occurred after just one sip of Flint River water. Plaintiffs have also alleged injuries that might include plaintiffs who suffered in vitro exposure to toxic water.[9] It would simply be illogical to foreclose

[9] Justice MARKMAN asserts that plaintiffs do not allege injuries from in vitro exposure to Flint water. We disagree. While plaintiffs do not mention in vitro exposure explicitly, they make allegations regarding personal injury from exposure to and ingestion of Flint water on behalf of themselves and *other* Flint water users. In our view, it is reasonable

a plaintiff's suit if the plaintiff had been exposed to the Flint water in the womb and thus suffered harm but had not yet been born as of April 2014. Therefore, questions of fact remain as to when plaintiffs suffered injury to person and property and as to when each plaintiff's claims accrued relative to the filing of the complaint.[10] At this juncture, summary disposition is therefore premature.

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to assume that plaintiffs exist in this putative class who were exposed to Flint water in the womb, suffered injury, and were born after April 2014.

[10] Plaintiffs' amended complaint alleges *numerous* harms resulting from *separate* tortious acts. These allegations are different from a continuing harm resulting from a *single* tortious act. For purposes of determining the accrual date of plaintiffs' claims, each of plaintiffs' individual causes of action must be considered separately. See *Joliet v Pitoniak*, 475 Mich 30, 42; 715 NW2d 60 (2006).

Moreover, we disagree with Justice MARKMAN's characterization of *Hart v Detroit*, 416 Mich 488; 331 NW2d 438 (1982), as no longer good law. Justice MARKMAN notes that plaintiffs rely on *Hart* to argue that their inverse-condemnation claim was timely filed. In *Hart*, this Court recognized that with regard to an inverse-condemnation claim in which plaintiffs allege that their property was taken via a continuous wrong, the statute of limitations does not begin to run "until the consequences of the condemnor's actions have stabilized." *Id*. at 504. Justice MARKMAN argues that "*Hart* is no longer good law because this Court in *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263; 696 NW2d 646 (2005) [(analyzing a discrimination claim)], later abolished the 'continuing violations' doctrine because it was inconsistent with the language of the statute of limitations." In our view, Justice MARKMAN misapplies the continuing-violations doctrine to plaintiffs' claim of inverse condemnation. The continuing-violations doctrine is often applied by the federal courts in the context of Title VII, civil-rights actions, and other discrimination claims. See, e.g., *Hunt v Bennett*, 17 F3d 1263, 1266 (CA 10, 1994); *Lockridge v Univ of Maine Sys*, 597 F3d 464, 474 (CA 1, 2010); *Kovacevich v Kent State Univ*, 224 F3d 806, 829 (CA 6, 2000). In contrast, the stabilization doctrine was developed in the context of inverse-condemnation claims. See, e.g., *United States v Dickinson*, 331 US 745, 749; 67 S Ct 1382; 91 L Ed 1789 (1947); *Hart*, 416 Mich at 504; *Etchegoinberry v United States*, 114 Fed Cl 437, 475 (2013); *Banks v United States*, 741 F3d 1268, 1281 (CA Fed, 2014). We have found no instance in which our Court has applied the continuing-violations doctrine to a claim of inverse condemnation. We also note that this Court's decision in *Garg* never mentioned *Hart*, nor did it abolish

Because we agree that whether plaintiffs' complaint was timely filed and when their specific claims accrued are questions to be resolved in further proceedings, we conclude that it is unnecessary to address whether any exceptions to the MCL 600.6431(3) notice requirement apply.[11]

C. INJURY TO BODILY INTEGRITY

Defendants argue that the Court of Appeals erred by determining that plaintiffs sufficiently pleaded a claim for violation of their substantive due-process right to bodily integrity under Const 1963, art 1, § 17. Defendants also argue that the Court of Appeals erred by recognizing the availability of a damages remedy for plaintiffs' claim. We again disagree. Instead, we believe that the Court of Appeals properly held that plaintiffs pleaded a cognizable claim for violation of their right to bodily integrity under the Due Process Clause of Michigan's Constitution. Given that this case is still in the very early stages of the proceedings, we decline to hold at this point that monetary damages are unavailable for this claim. On this issue, the Court of Appeals is again affirmed by equal division.

1. STANDARD OF REVIEW

Defendants moved for summary disposition of plaintiffs' violation-of-bodily-integrity claim under MCR 2.116(C)(7) and (8). Summary disposition is appropri-

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the stabilization doctrine. We believe that *Hart* remains good law because this Court has never overruled it.

[11] Plaintiffs argue that the harsh-and-unreasonable-consequences doctrine and the fraudulent-concealment doctrine also support their claims that satisfactory notice was filed. Because we believe that there still remain questions of fact about when plaintiffs' harms accrued, we see no need to look to these doctrines at this point in the proceedings. Once discovery is completed, the applicability of these doctrines may be reconsidered as necessary.

ate under MCR 2.116(C)(7) when a claim is barred by immunity. *Maiden*, 461 Mich at 118. When reviewing a motion under MCR 2.116(C)(7), we must accept all well-pleaded factual allegations as true and construe them in favor of plaintiffs, unless other evidence contradicts them. *Dextrom*, 287 Mich App at 428. We review a motion for summary disposition under MCR 2.116(C)(8) for the legal sufficiency of a claim, accepting all factual allegations in the complaint as true and deciding the motion on the pleadings alone. *El-Khalil*, 504 Mich at 159-160.

2. LEGAL BACKGROUND

The Legislature has never created an exception to immunity for a constitutional tort. Nonetheless, this Court has recognized that when a plaintiff brings a "constitutional tort" action against the state, in certain instances, the government is not immune from liability for violations of its Constitution. *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Mich Dep't of State Police*, 491 US 58 (1989). Plaintiffs contend that their claims arise under these circumstances.

Smith was a divided memorandum opinion, but two of the pertinent tenets that a majority of four were able to agree on were the following:

> 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. [*Smith*, 428 Mich at 544.]

The *Smith* opinion was silent as to why a majority of the Court had agreed on these tenets. A later Court of Appeals panel noted that this lack of analysis was due to the justices' differing views, given that "the Court was only able to agree on the bare proposition that '[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases.' " *77th Dist Judge v Michigan*, 175 Mich App 681, 693; 438 NW2d 333 (1989) (citation omitted).

After *Smith*, courts have cited Justice BOYLE's separate opinion in *Smith* to explain the reasoning behind the majority's holding that constitutional torts may be recognized in certain circumstances. See, e.g., *Jones v Powell*, 462 Mich 329, 336-337; 612 NW2d 423 (2000); *Reid*, 239 Mich App at 628. While Justice BOYLE's reasoning is not binding, it is, in our view, persuasive. Justice BOYLE postulated that because the state's Constitution is preeminent, immunity does not bar recovery for violations of the state Constitution perpetrated by custom or policy. *Smith*, 428 Mich at 641 (BOYLE, J., concurring in part and dissenting in part). Justice BOYLE wrote:

> Assuming the plaintiff proves an unconstitutional act by the state which is otherwise appropriate for a damage remedy, the question which confronts this Court is whether sovereign or governmental immunity shields the state from liability for damages for its alleged acts which violate our state constitution. We would hold that neither common-law sovereign immunity nor the governmental immunity found in MCL 691.1407; MSA 3.996(107) bars recovery.
>
> In our constitutional form of government, the sovereign power is in the people, and "[a] Constitution is made for the people and by the people." *Michigan Farm Bureau v Secretary of State*, 379 Mich 387, 391; 151 NW2d 797 (1967) (quoting Cooley, Constitutional Limitations [6th ed], p 81).

The Michigan Constitution is a limitation on the plenary power of government, and its provisions are paramount. See, generally, *Dearborn Twp v Dearborn Twp Clerk*, 334 Mich 673, 688; 55 NW2d 201 (1952). It is so basic as to require no citation that the constitution is the fundamental law to which all other laws must conform. . . .

In light of the preeminence of the constitution, statutes which conflict with it must fall. . . .

MCL 691.1407; MSA 3.996(107) does not, by its terms, declare immunity for unconstitutional acts by the state. 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 language of MCL 691.1407; MSA 3.996(107). We would not ascribe such a result to our Legislature.

Neither does common-law sovereign immunity immunize the state from liability for its alleged unconstitutional acts. This Court abrogated common-law sovereign immunity in *Pittman v City of Taylor*, 398 Mich 41; 247 NW2d 512 (1976). Even absent such general abrogation, however, we would decline to apply sovereign immunity to violations by the state of our state constitution. The curious doctrine of sovereign immunity in America, subject to great criticism over the years, see, generally, Jaffe, *Suits against governments and officers: Sovereign immunity*, 77 Harv L R 1 (1963), should, as a matter of public policy, lose its vitality when faced with unconstitutional acts of the state. The 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.

. . . For "constitutional torts," liability should only be imposed on the state in cases where a state "custom or policy" mandated the official or the employee's actions. . . .

The state's liability should be limited to those cases in which the state's liability would, but for the Eleventh Amendment, render it liable under the 42 USC 1983 standard for local governments articulated in

Monell v New York City Dep't of Social Services, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978).[12] Liability should be imposed on the state only where the action of a state agent "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers . . . [or] governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id*., pp 690-691. [*Smith*, 428 Mich at 640-643 (BOYLE, J., concurring in part and dissenting in part).]

3. HISTORICAL RECOGNITION OF CONSTITUTIONAL TORTS

Defendants contend that historically, courts have not recognized actions against the state when no waiver of immunity has occurred. Although defendants' general assertion might be true, our precedent with regard to constitutional torts is more nuanced. Michigan courts have indeed recognized the existence of constitutional torts as outlined in *Smith* and, in certain circumstances, have allowed constitutional-tort claims to survive motions for summary disposition.

The Court of Appeals has repeatedly relied on *Smith* to recognize that immunity is not available in a state-court action in which it is alleged that the state has violated a right conferred by the Michigan Constitution. See *Burdette v Michigan*, 166 Mich App 406, 408-409; 421 NW2d 185 (1988) (recognizing that constitutional torts are viable but holding that the plaintiff had not brought a viable constitutional-tort claim against the state); *Marlin v Detroit*, 177 Mich App 108, 114; 441 NW2d 45 (1989) (remanding the case to the

[12] The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." US Const, Am XI.

trial court "for a determination of whether plaintiff has pled a violation of the Michigan Constitution by virtue of governmental custom or policy"), lv den 448 Mich 900 (1995); *Pawlak v Redox Corp*, 182 Mich App 758, 764; 453 NW2d 304 (1990) (recognizing constitutional claims against the state described in *Smith* as law); *Johnson v Wayne Co*, 213 Mich App 143, 150; 540 NW2d 66 (1995) (recognizing that *Smith* stood for the proposition that a claim for damages against the state for a violation of the Michigan Constitution may be recognized in appropriate cases but holding that the plaintiff did not adequately allege which constitutional provision the government had violated), lv den 554 NW2d 903 (1996); *Carlton v Dep't of Corrections*, 215 Mich App 490, 504, 510; 546 NW2d 671 (1996) (recognizing claims against the state for violations of the Michigan Constitution but concluding that the plaintiff's claim failed), lv den 453 Mich 969 (1996); *Reid*, 239 Mich App at 628 (recognizing the viability of constitutional-tort claims under *Smith*); *Co Rd Ass'n of Mich v Governor*, 287 Mich App 95, 121; 782 NW2d 784 (2010) (noting instances in which constitutional-tort theories were applied), lv den 488 Mich 877 (2010), recon den 488 Mich 1019 (2010); *LM v Michigan*, 307 Mich App 685, 694-695; 862 NW2d 246 (2014) (recognizing that constitutional torts exist but declining to apply the doctrine); *Rusha*, 307 Mich App at 305 (recognizing that this Court has held that a claim against the state for violations of the Michigan Constitution exists under certain circumstances).

In *Jones*, 462 Mich at 336-337, this Court declined to apply a constitutional-tort theory to claims made against a municipality but nevertheless recognized that the theory provided a remedy, albeit a "narrow remedy," against the state. In *Lewis v Michigan*, 464 Mich 781, 786; 629 NW2d 868 (2001), this Court again

recognized the *Smith* majority's holding as to the viability of certain constitutional-tort claims.

4. PLAINTIFFS SUFFICIENTLY ALLEGE A CONSTITUTIONAL TORT FOR VIOLATION OF THEIR BODILY INTEGRITY

We also recognize that when a plaintiff alleges a constitutional tort like the one alleged in this case, recovery is available for constitutional violations pursuant to a state custom or policy and may survive the state's claims of immunity. *Smith*, 428 Mich at 544.

The Court of Appeals provided an extensive history of the development of the right to bodily integrity:

> Violation of the right to bodily integrity involves "an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective." *Rogers v Little Rock, Arkansas*, 152 F3d 790, 797 (CA 8, 1998), citing *Sacramento Co v Lewis*, 523 US 833, 847 n 8; 118 S Ct 1708; 140 L Ed 2d 1043 (1998). . . . [T]o survive dismissal, the alleged "violation of the right to bodily integrity must be so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Villanueva v City of Scottsbluff*, 779 F3d 507, 513 (CA 8, 2015) (quotation marks and citation omitted); see also *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 198; 761 NW2d 293 (2008) (explaining that in the context of individual governmental actions or actors, to establish a substantive due-process violation, "the governmental conduct must be so arbitrary and capricious as to shock the conscience").
>
> "Conduct that is merely negligent does not shock the conscience, but 'conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.' " *Votta v Castellani*, 600 F Appx 16, 18 (CA 2, 2015), quoting *Sacramento Co*, 523 US at 849. At a minimum, proof of deliberate indifference is required. *McClendon v City of Columbia*, 305 F3d 314, 326 (CA 5, 2002). A state actor's failure to alleviate "a significant risk

> that he should have perceived but did not" does not rise to the level of deliberate indifference. *Farmer v Brennan*, 511 US 825, 838; 114 S Ct 1970; 128 L Ed 2d 811 (1994). To act with deliberate indifference, a state actor must " 'know[] of and disregard[] an excessive risk to [the complainant's] health or safety.' " *Ewolski v City of Brunswick*, 287 F3d 492, 513 (CA 6, 2002), quoting *Farmer*, 511 US at 837. "The case law . . . recognizes official conduct may be more egregious in circumstances allowing for deliberation . . . than in circumstances calling for quick decisions . . . ." *Williams v Berney*, 519 F3d 1216, 1220-1221 (CA 10, 2008). [*Mays*, 323 Mich App at 60-61.]

With this framing of the elements of plaintiffs' claim in mind, we affirm the Court of Appeals and conclude that plaintiffs have alleged facts that, if proved, support a claim for a constitutional violation by defendants.

Plaintiffs allege that defendants' decision to switch the city of Flint's water source to the Flint River, which defendants knew was contaminated, resulted in a nonconsensual entry of toxic water into plaintiffs' bodies. Plaintiffs contend that defendants neglected to upgrade Flint's water treatment system before switching to the Flint River despite knowing and being warned that the system was inadequate. After receiving information that suggested the Flint River was contaminated with bacteria, toxic levels of lead, and other contaminants, defendants allegedly concealed scientific data and made misleading statements about the safety of the Flint River water.

There is obviously no legitimate governmental objective in poisoning citizens. Plaintiffs' allegations, if true, are so egregious and outrageous that they shock the contemporary conscience and support a finding of defendants' deliberate indifference to plaintiffs' health and safety. See *Villanueva*, 779 F3d at 513; *Mettler Walloon, LLC*, 281 Mich App at 198; *McClendon*, 305

F3d at 326. Plaintiffs' allegations make out more than a negligent decision to switch water sources. They allege that "[d]efendants had time for deliberation in their decisions to expose Flint residents to toxic water, and their decision to do so was made with deliberate indifference to the known serious medical risks." Their allegations paint a picture of a public health crisis of the government's own making, intentionally concealed by state actors despite their knowledge that Flint residents were being harmed so long as the untreated water continued to flow through their pipes. We find it difficult to characterize the actions that defendants allegedly took as anything short of shocking to the conscience. "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Sacramento Co v Lewis*, 523 US 833, 853; 118 S Ct 1708; 140 L Ed 2d 1043 (1998).

Plaintiffs have also alleged that a state "custom or policy" mandated the actions that led to the violation of their substantive due-process right to bodily integrity. *Smith*, 428 Mich at 544. The state and its officials will only be held liable for violation of the state Constitution " 'in cases where a state "custom or policy" mandated the official or employee's actions.' " *Carlton*, 215 Mich App at 505, quoting *Smith*, 428 Mich at 642 (BOYLE, J., concurring in part and dissenting in part). As the Court of Appeals noted:

> Official governmental policy includes "the decisions of a government's lawmakers" and "the acts of its policymaking officials." *Johnson v VanderKooi*, 319 Mich App 589, 622; 903 NW2d 843 (2017) (quotation marks and citation omitted). See also *Monell*, 436 US at 694 (stating that a governmental agency's custom or policy may be "made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy"). A "single decision" by a policymaker or governing body "unquestionably constitutes

> an act of official government policy," regardless of whether "that body had taken similar action in the past or intended to do so in the future[.]" *Pembaur v Cincinnati*, 475 US 469, 480; 106 S Ct 1292; 89 L Ed 2d 452 (1986). . . . The [United States Supreme] Court clarified that not all decisions subject governmental officers to liability. *Id*. at 481. Rather, it is "where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id*. at 483. [*Mays*, 323 Mich App at 63-64.]

Plaintiffs allege that the city of Flint's choice to provide Flint residents with the Flint River water was approved and implemented by the state defendants, arguing that both sets of defendants were decision-makers in the adoption of a plan that, once effectuated, resulted in violations of their substantive due-process rights. Defendants then purportedly made decisions to conceal the consequences of the water-source switch and misled the public about the safety of the Flint River water. Plaintiffs allege that defendants' aforementioned actions exposed them to unnecessary harm for months after the switch was made. Plaintiffs' allegations, if proved, support a conclusion that defendants considered an array of options and made a deliberate choice to effectuate the Flint River switch despite knowing the potential harms of doing so.

Having reviewed plaintiffs' allegations in their totality, we conclude that plaintiffs pleaded a recognizable due-process claim under Michigan's Constitution for a violation of their right to bodily integrity.

5. DAMAGES REMEDY

Because we have determined that plaintiffs' allegations, if proved, are sufficient to sustain a constitutional tort against defendants, we must next deter-

mine whether it is appropriate to recognize a damages remedy for the constitutional violation. Not every constitutional violation merits damages. However, at this point in the litigation, we are not prepared to foreclose the possibility of monetary damages.[13]

This Court has never explicitly endorsed a test for assessing a damages inquiry for a constitutional violation. However, we 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. Under that test, we weigh various factors, including (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. See *Smith*, 428 Mich at 648-652 (BOYLE, J., concurring in part and dissenting in part). At this stage of the proceedings, we accept plaintiffs' allegations as true and review them in a light most favorable to plaintiffs.

As to the first factor, we have already determined that plaintiffs set forth allegations to establish a clear violation of the Michigan Constitution. We therefore conclude that the first factor weighs in favor of a judicially inferred damages remedy.

As to the second and third factors, in *Smith*, Justice BOYLE recognized that the protections of the Due Pro-

[13] We conclude that Justice VIVIANO's arguments to the contrary are premature. Plaintiffs should be permitted to develop their factual allegations through discovery before it is determined whether monetary damages are available.

cess Clause are not as "clear-cut" as specific protections found elsewhere in the Constitution. *Id*. at 651. Indeed, we have not found a decision of a Michigan appellate court expressly recognizing a protection under the Due Process Clause of the Michigan Constitution or an independent constitutional tort for violation of the right to bodily integrity. We therefore conclude that the second and third factors weigh somewhat against recognition of a damages remedy.

As to the fourth factor, the availability of an alternative remedy, we must determine whether plaintiffs have any available alternative remedies for their constitutional-tort claim against these specific defendants. Defendants argue that this fourth factor is dispositive and that the availability of any other remedy forecloses the possibility of a judicially inferred damages remedy in this case. Citing *Jones*, 462 Mich at 337, defendants highlight that "*Smith* only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy." Like the Court of Appeals and the Court of Claims, we conclude that defendants err in their reading of *Jones*. The *Jones* Court's use of the word "only" referred to a sentence that followed, distinguishing claims against the state and specifically limiting the Court's holding to cases involving a municipality or an individual defendant. *Id*. We decline to hold that the availability of an alternative remedy acts as an absolute bar to a judicially inferred damages remedy. The existence of alternative remedies is given considerable weight, *Smith*, 428 Mich at 647, but it is not dispositive.[14]

[14] We note that plaintiffs seek injunctive relief against several of the named defendants in a related federal-court action. Plaintiffs seek an order to remediate the harm caused by defendants' conduct, including repairs to property and the establishment of a medical-monitoring fund.

We conclude that because defendants enjoy expansive immunity under federal and state law, plaintiffs have no alternative recourse to vindicate their rights beyond bringing a constitutional-tort claim under Michigan's Constitution. Any suit brought in federal court for monetary damages under 42 USC 1983 for violation of rights granted under the federal Constitution or a federal statute cannot be maintained in any court against a state, a state agency, or a state official sued in his or her official capacity because the Eleventh Amendment affords the state and its agencies immunity from such liability. See *Howlett v Rose*, 496 US 356, 365; 110 S Ct 2430; 110 L Ed 2d 332 (1990).

Generally, under state law, state-government employees acting within the scope of their authority are immune from tort liability unless their actions constitute gross negligence, MCL 691.1407(2), and even if governmental employees are found liable for gross negligence, the state may not be held vicariously liable unless an exception to governmental immunity applies under the governmental tort liability act, MCL 691.1401 *et seq*. State agencies are also "immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). Moreover, the Local Financial Stability and Choice Act, MCL 141.1541 *et seq*., grants emergency managers immunity from liability as provided in MCL 691.1407. MCL 141.1560(1).

Defendants suggest that plaintiffs' injuries can be vindicated under the federal Safe Drinking Water Act

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Plaintiffs seek an award of compensatory and punitive damages. Although plaintiffs may seek alternative remedies in federal court, that fact does not affect our decision regarding the *availability* of alternative remedies. The availability of these remedies remains to be seen. If those remedies materialize, they, of course, may affect any future consideration of appropriate remedies in this action.

(SDWA), 42 USC 300f *et seq*., and the Michigan Safe Drinking Water Act (MSDWA), MCL 325.1001 *et seq*. We disagree. The SDWA and MSDWA do not provide a right to address constitutional violations. As the United States Court of Appeals for the Sixth Circuit recognized in a federal case arising from the Flint water crisis, the protections of the SDWA and the federal Constitution "are 'not . . . wholly congruent' " and would not foreclose constitutional claims arising under the federal Constitution. See *Boler v Earley*, 865 F3d 391, 408-409 (CA 6, 2017) (citation omitted). We conclude that the same is true for the MSDWA. Neither the SDWA nor the MSDWA addresses the alleged conduct at issue in this case, which includes knowingly and deliberately distributing contaminated water as well as fraudulent concealment of the hazardous consequences of consuming and using the Flint River water. The SDWA and MSDWA largely address the regulation of water quality by municipalities. These statutes do not provide an alternative remedy for plaintiffs' claim of injury to bodily integrity. We therefore conclude that the fourth factor is neutral regarding the propriety of an inferred damages remedy.

Finally, as to the fifth factor, which directs us to assess all other relevant considerations, we agree with the Court of Appeals that it is appropriate to give substantial weight to the shocking and outrageous nature of defendants' alleged conduct. Plaintiffs present allegations involving one of the most troublesome breaches of public trust in this state's history, with catastrophic consequences for Flint citizens' health, well-being, and property. If plaintiffs' allegations are proved true, we agree that the nature of defendants' alleged constitutional violations weighs markedly in favor of recognizing a damages remedy.

In considering each of these five factors, recognizing that discovery has yet to take place and accepting plaintiffs' allegations as true, we believe that a damages remedy for plaintiffs' claim of violation of their right to bodily integrity under Const 1963, art 1, § 17 might be the appropriate remedy for plaintiffs' harms.

III. CONCLUSION

We expressly affirm the Court of Appeals with regard to plaintiffs' inverse-condemnation claim. In all other aspects, the Court of Appeals opinion is affirmed by equal division. MCR 7.315(A). We remand to the Court of Claims for further proceedings consistent with this opinion.

MCCORMACK, C.J., and CAVANAGH, J., concurred with BERNSTEIN, J.

BERNSTEIN, J. (*concurring*). This Court should never elevate adherence to convoluted legalism and procedure over the well-being of Michigan's people. Plaintiffs in this case raise some of the most disturbing allegations of malfeasance by government actors in Michigan's history.

Before highlighting the facts of this case, it is hard not to acknowledge the unique natural resources Michigan possesses. The state of Michigan holds the largest freshwater reserves of any state in our nation. Yet, plaintiffs allege that in an effort to save a relatively small amount of money in the context of sizable municipal budgets, the state of Michigan and former Governor Snyder's administration disregarded the known dangers of switching Flint's municipal water source, used without incident for nearly 60 years, to the Flint River. At the time of plaintiffs' alleged injuries, the city of Flint

was under the financial management of the state, purportedly for the city's own benefit. Plaintiffs contend that the state defendants authorized state-appointed emergency managers to provide them with water that was contaminated with toxic levels of lead, E. coli, and Legionella bacteria. Before the switch, defendants purportedly knew that the Flint River was contaminated and that water from the Flint River was dangerous to consume and use. Without taking the proper steps to ensure that Flint's drinking water was safe, defendants nevertheless initiated the water-source switch to the Flint River. Defendants then allegedly misled the public and obfuscated the extent of the water crisis to quell its potential fallout. After the water switch was initiated, plaintiffs contend that they suffered significant personal injury and economic loss from damage to their property. They allege that their properties' values diminished after the full extent of the water crisis became public. This lawsuit followed.

After nearly six years of litigation, this Court is tasked with answering one simple question: do plaintiffs possess the right to sue the government and its actors in their official capacities for their injuries? I believe the answer to that question is obvious. It is particularly important to note that this Court's decision will affect not only the named plaintiffs in this case but thousands of other citizens who experienced similar injuries and losses from the use and ingestion of contaminated Flint River water. The putative class surely includes seniors with preexisting health conditions, pregnant individuals, and, of course, young children who will likely experience the most significant and life-altering effects of lead poisoning.

Even when presented with this context, two of my dissenting colleagues would dismiss plaintiffs' claims

because of purported procedural defects in their pleadings. By way of highly legalistic analyses, they would deny plaintiffs the opportunity to conduct any discovery, proceed with their case, and prove their claims. I write this separate opinion, in part, to counter Justice MARKMAN's arguments about plaintiffs' purported failure to adhere to the Court of Claims Act's (COCA) statutory notice requirements. As the lead opinion explains, I believe that questions of fact remain as to when plaintiffs' claims accrued. Dismissing plaintiffs' claims at this juncture, in my view, would therefore be premature. However, regardless of which dates the harms plaintiffs allege are later determined to have occurred and accrued, I believe that two exceptions to the COCA's statutory notice requirement might still apply.

I write also to briefly counter Justice VIVIANO's argument that this Court should deny plaintiffs the right to sue for their personal injuries and deny a damages remedy because the Legislature has not explicitly created a right to bodily integrity with such a remedy. It is well known that this Court is the sole institution that may interpret and define the parameters of Michigan's Constitution. That being the case, I am completely unfazed that the Legislature has not explicitly created a statutory right to bodily integrity. In my opinion, plaintiffs may proceed with their claim because the Michigan Constitution's Due Process Clause, Const 1963, art 1, § 17, encompasses the right to bodily integrity.

I. ANALYSIS

A. STATUTORY NOTICE REQUIREMENTS

Plaintiffs allege that defendants attempted to conceal the water crisis from the public and misled them

for months before acknowledging the toxic and corrosive nature of the water from the Flint River. Defendants argue that plaintiffs' claims should be dismissed because plaintiffs failed to file the claims in a timely manner. The irony of defendants' argument, given that defendants are accused of concealing the existence of plaintiffs' potential claims, is not lost on me.

1. THE HARSH-AND-UNREASONABLE-CONSEQUENCES EXCEPTION

Justice MARKMAN argues that the Court of Appeals erred in applying the harsh-and-unreasonable-consequences exception, see *Rusha v Dep't of Corrections*, 307 Mich App 300, 312; 859 NW2d 735 (2014), and by applying it to this case. I disagree. In my view, if plaintiffs' allegations are proved, the harsh-and-unreasonable-consequences exception releases them from the notice requirements of MCL 600.6431.

In *Rusha*, the plaintiff alleged constitutional claims against the state for failing to treat his multiple sclerosis during his incarceration, but he failed to file a notice of intent to file a claim within six months of the alleged injury pursuant to MCL 600.6431. *Rusha*, 307 Mich App at 301. The Court of Appeals noted that "Michigan courts routinely enforce statutes of limitations where constitutional claims are at issue." *Id*. at 311. However, the Court of Appeals also held that there exists an exception to such enforcement when strict enforcement of a limitations period would be so harsh and unreasonable in its consequences that it "effectively divest[s]" a plaintiff "of the access to the courts intended by the grant of [a] substantive right." *Id*. (quotation marks and citation omitted). More specifically, the Court of Appeals then extended this exception to also relieve a plaintiff of statutory notice requirements, like the one found in MCL 600.6431(3).

Defendants argue that the *Rusha* Court's recognition of this exception conflicts with this Court's holdings in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 200; 731 NW2d 41 (2007), *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386-387; 738 NW2d 664 (2007), and *McCahan v Brennan*, 492 Mich 730, 733; 822 NW2d 747 (2012).

But I would not find such conflict to exist and would instead find our past precedent to be distinguishable. *Rowland*,[1] *Trentadue*,[2] and *McCahan*[3] each demanded strict compliance with statutory limitations and notice requirements in the context of legislatively granted rights rather than rights granted under the Constitution. However, this Court has never held that constitutional claims against the state—and due-process claims in particular—should be treated like the personal-injury claims raised in *Rowland* and *McCahan*. Indeed, a separate concurrence in *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 194; 931 NW2d 539 (2019) (MCCORMACK, C.J., concurring), questioned whether the strict-notice rules from *Rowland*

[1] In *Rowland*, a personal-injury case against a municipality in which the plaintiff fell and was injured while crossing a street, this Court ruled that a suit may be dismissed for failure to comply with a statutory notice requirement even if the defendant was not prejudiced by the lack of notice. The Court explained, "[I]nasmuch as the Legislature is not even required to provide a defective highway exception to governmental immunity, it surely has the authority to allow such suits only upon compliance with rational notice limits." *Rowland*, 477 Mich at 212.

[2] *Trentadue*, 479 Mich at 386-387 (considering the statute of limitations for a wrongful-death action).

[3] In *McCahan*, 492 Mich at 732-733, the Court determined that the notice requirement of MCL 600.6431 is a "condition precedent to sue the state," *McCahan v Brennan*, 291 Mich App 430, 433; 804 NW2d 906 (2011), aff'd 492 Mich 730 (2012), and that a claimant's failure to strictly comply warrants dismissal of the claim, *McCahan*, 492 Mich at 746-747.

and *McCahan* should apply to constitutional claims against the state. The concurrence noted:

> [W]e have not held that the same [rules from *Rowland* and *McCahan* are] true of constitutional claims generally, or due-process claims in particular. And I'm not sure we should: *Rowland*'s governmental-immunity rationale is less persuasive in the constitutional context. The *Rowland* and *McCahan* plaintiffs' substantive claims (for personal injuries resulting from a defective highway condition in *Rowland*, and for automobile tort liability in *McCahan*) existed only by legislative grace—there is no constitutional guarantee of safe roads or payment of personal injury benefits. The state enjoys broad immunity from suit unless it waives its immunity by creating a statutory right of action; the Legislature may place whatever conditions it wishes on rights of its own creation, including a notice requirement. And courts shouldn't undermine those legislatively created conditions.
>
> But it is the Constitution that forbids the government from depriving a person of his property without due process of law. The Legislature is not the source of the due-process right (more often its target), so the fundamental principle that animated our decisions in *Rowland* and *McCahan* isn't implicated here. Whether and how much the Legislature can limit a person's ability to pursue a due-process claim is a first-principles question: A strict-compliance interpretation of the MCL 600.6431(3) notice requirement applied to a due-process claim will permit the Legislature to burden or curtail constitutional rights. How much of a burden is too much?
>
> To be sure, the due-process right, like any other constitutional right, is not absolute. "A constitutional claim can become time-barred just as any other claim can. Nothing in the Constitution requires otherwise." *Block v North Dakota*, 461 US 273, 292; 103 S Ct 1811; 75 L Ed 2d 840 (1983) (citations omitted). Constitutional remedies may be "subject to a reasonable time bar designed to protect other important societal values." *Hair v United States*, 350 F3d 1253, 1260 (CA Fed, 2003). The Legislature may, at its

> discretion, restrict or change "the forms of action or modes of remedy . . . provided adequate means of enforcing the right remain. In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable." *Terry v Anderson*, 95 US 628, 633; 24 L Ed 365 (1877).
>
> But that's the question: is the six-month, no-exceptions notice provision reasonable when the government has taken a person's property without due process? . . . Hypotheticals show why it's a hard question: If the Legislature enacted a statute that required me to notice my intent to challenge a local ordinance that limits gun ownership to one weapon per household within 24 hours of having my weapon confiscated, we would surely be troubled by that barrier to my ability to vindicate my Second Amendment rights. And likewise if I wait 50 years to complain that denial of a park permit for my annual church picnic violated the First Amendment, we would think it unfair for the government to be on the hook when there is likely no information available or witnesses around to contest the complaint. I don't know where this six-month notice period for a claim that the state has taken my tax refund without due process falls on that continuum. [*Bauserman*, 503 Mich at 195-197.]

In this case, even if it is later determined that plaintiffs failed to timely file a notice of intention to file a claim under MCL 600.6431(3), I agree with the Court of Appeals that, consistent with *Rusha*, the application of this procedural requirement to bar plaintiffs' claims would not be reasonable under the circumstances. See *Terry*, 95 US at 633. As the Court of Appeals noted:

> [T]his is not a case in which an ostensible, single event or accident has given rise to a cause of action, but one in which the event giving rise to the cause of action was not readily apparent at the time of its happening. Similarly, a significant portion of the injuries alleged to persons and property likely became manifest so gradually as to have

> been well established before becoming apparent to plaintiffs because the evidence of injury was concealed in the water supply infrastructure buried beneath Flint and in the bloodstreams of those drinking the water supplied via that infrastructure. Plaintiffs in this case did not wait more than two years after discovering their claims to file suit. Rather, they filed suit within six months of the state's public acknowledgment and disclosure of the toxic nature of the Flint River water to which plaintiffs were exposed.
>
> Further supporting the application of the harsh-and-unreasonable-consequences exception to the requirement of statutory notice are plaintiffs' allegations of affirmative acts undertaken by numerous state actors, including named defendants, between April 25, 2014 and October 2015 to conceal both the fact that the Flint River water was contaminated and hazardous and the occurrence of any event that would trigger the running of the six-month notice period. Under these unique circumstances, to file statutory notice within six months of the date of the water source switch would have required far more than ordinary knowledge and diligence on the part of plaintiffs and their counsel. It would have required knowledge that defendants themselves claim not to have possessed at the time plaintiffs' causes of action accrued. [*Mays v Governor*, 323 Mich App 1, 35-36; 916 NW2d 227 (2018) (quotation marks and citations omitted).]

To foreclose plaintiffs' claims at this stage of the litigation would effectively divest plaintiffs of the opportunity to vindicate their constitutional rights. Plaintiffs should be afforded the opportunity to conduct discovery and support their allegations before their claims are dismissed. If their claims are proved but untimely, plaintiffs should be able to utilize the harsh-and-unreasonable-consequences exception.

2. THE FRAUDULENT-CONCEALMENT EXCEPTION

Justice MARKMAN and defendants argue that the Court of Appeals erred in reading the fraudulent-

concealment exception of MCL 600.5855 to relieve plaintiffs from the notice requirements of MCL 600.6431. I disagree and would affirm the Court of Appeals' ruling that the fraudulent-concealment exception of MCL 600.5855 applies to MCL 600.6431. If plaintiffs prove the allegations in their complaint, the exception may provide an alternative basis to deny defendants' motions for summary disposition.

The Legislature created the fraudulent-concealment exception to relieve certain plaintiffs from having their actions time-barred by statutes of limitations. The exception is codified in the Revised Judicature Act (RJA), MCL 600.101 *et seq*., specifically MCL 600.5855, which states:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

MCL 600.5855 allows for the tolling of a statutory limitations period for two years if a defendant has fraudulently concealed the existence of a claim for which that defendant is liable.[4] A "plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment" and "prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery." *Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996).

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[4] I note that the RJA has no statutory notice requirement. See MCL 600.101 *et seq*.

In crafting the COCA, the Legislature imported the RJA's fraudulent-concealment exception, MCL 600.5855, into the COCA's statute-of-*limitations* provision. See MCL 600.6452(2). MCL 600.6452(2) thus permits the commencement of an action within two years after a claimant discovers or should have discovered a fraudulently concealed claim. Yet, the statutory notice period of MCL 600.6431 prohibits the commencement of an action unless notice is filed within six months following the event giving rise to the cause of action or one year of the date on which the claim accrued. The Legislature did not create a fraudulent-concealment exception for the statutory *notice* provision in the COCA. See MCL 600.6431.

I conclude that the omission of a fraudulent-concealment exception to MCL 600.6431 is not reconcilable with the Legislature's intent to provide claimants with two years from the date of discovery to bring suit for harm that was fraudulently concealed, as expressed in MCL 600.6452(2). The filing of a notice of intent to sue often occurs before the actual filing of a complaint. If the fraudulent-concealment exception is not applied to the statutory notice period in MCL 600.6431 and a claim is fraudulently concealed from a plaintiff for more than six months, a plaintiff's otherwise justiciable claim would always be dismissed on notice grounds. The plaintiff would never have an ability to utilize the Legislature's fraudulent-concealment exception in MCL 600.6452(2) to toll the statutory notice period. "[S]tatutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). "A statute is rendered nugatory when an interpretation fails to give it meaning or effect." *Apsey v Mem Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007).

Adopting defendants' arguments as they relate to fraudulent concealment would result in reading out MCL 600.6452(2) entirely, because plaintiffs would never be able to utilize the fraudulent-concealment exception. I agree with the Court of Appeals and reject the contentions of both Justice MARKMAN and defendants.

The application of the fraudulent-concealment exception to statutory notice periods does not undermine or frustrate the purpose of requiring timely statutory notice. As this Court has previously recognized, the purpose of the notice provision in MCL 600.6431 is to "establish[] a clear procedure" for pursuing a claim against the state and "eliminate[] any ambiguity" about whether a claim will be filed. *McCahan*, 492 Mich at 744 n 24. But when defendants, who allegedly have knowledge of an event giving rise to liability, actively conceal information to prevent litigation, the state suffers no ambiguity or shock when those harmed sue. In those cases, I would hold that the fraudulent-concealment exception indeed applies to toll the statutory notice period.

As the lead opinion states, whether plaintiffs can satisfy the exception is a factual question that necessitates further discovery. At this stage of the litigation, summary disposition on this ground would be inappropriate. If plaintiffs' claims are proved but untimely, plaintiffs should be able to utilize a fraudulent-concealment exception to the COCA's notice requirements.

B. A RIGHT TO BODILY INTEGRITY EXISTS IN MICHIGAN'S CONSTITUTION

Justice VIVIANO writes at length that a right to bodily integrity does not exist and that our Legislature has

not enumerated and created a damages remedy for such a right in Michigan law. But his analysis misses a fundamental point: this Court is the only institution that determines what our state's Constitution means, and it does so independently of the Legislature's action or inaction in a given area. It is this Court alone that may interpret our Constitution to encompass a right to bodily integrity. I believe that if our state's Constitution is to hold any tangible meaning, surely *this* is the case in which a remedy for such a constitutional violation must be recognized. I would hold that the Due Process Clause of Michigan's Constitution includes a right to bodily integrity.

Michigan's Due Process Clause states, "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." Const 1963, art 1, § 17. When the Court construes our Constitution, it is "a fundamental principle of constitutional construction that we determine the intent of the framers of the Constitution and of the people adopting it," *Holland v Heavlin*, 299 Mich 465, 470; 300 NW 777 (1941), and we do this principally by examining its language, *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 699-700; 178 NW2d 484 (1970). "In interpreting our Constitution, we are not bound by the United States Supreme Court's interpretation of the United States Constitution, even where the language is identical." *People v Goldston*, 470 Mich 523, 534; 682 NW2d 479 (2004). Instead, "[this Court] must determine what law ' "the people have made." ' " *Id*. (citation omitted). "We are obligated to interpret our own organic instrument of government." *Sitz v Dep't of State Police,* 443 Mich 744, 763; 506 NW2d 209 (1993). Accordingly, this Court must independently examine the text of Michigan's Due Process Clause as well as this Court's precedents

pertaining to this provision to ascertain whether a right to bodily integrity exists.

As I recognize in the lead opinion, this Court has not previously recognized a right to bodily integrity. Thus, my focus lies on the language of the Due Process Clause itself. "The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification [in 1963]." *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004). "In applying this principle of construction, the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.' " *People v Nutt*, 469 Mich 565, 573-574; 677 NW2d 1 (2004) (citation omitted).

The United States Supreme Court has recognized for over a century that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac R Co v Botsford*, 141 US 250, 251; 11 S Ct 1000; 35 L Ed 734 (1891). Plaintiffs allege a substantive due-process claim based on defendants' conduct that caused their severe bodily injuries and impaired their liberty. Plaintiffs frame these allegations as a violation of their constitutional right to bodily integrity. Although this Court has not opined on the right before, I believe that it is one of the most fundamental rights ensured by Michigan's Constitution. The right is implicit in our Due Process Clause and would have been obvious to those who ratified our Constitution. I conclude that common

notions of liberty in this state are so inextricably entwined with physical freedom and freedom from state incursions into the body that Michigan's Due Process Clause plainly encompasses a right to bodily integrity. See *Cruzan v Dir, Missouri Dep't of Health*, 497 US 261, 287; 110 S Ct 2841; 111 L Ed 2d 224 (1990) (O'CONNOR, J., concurring) ("Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause."). In my view, given the extensive history and strong prominence of the right to bodily autonomy in our society, the Constitution's ratifiers would agree.

II. CONCLUSION

Plaintiffs have waited for years for this Court to make a final determination as to whether they even have a right to sue for their injuries. For the reasons expressed in this concurrence and the lead opinion, I resoundingly answer "yes."

Plaintiffs allege that defendants failed to acknowledge their own mistakes and then compounded those mistakes by failing to provide basic solutions for the harms they caused. To add insult to injury, in the context of these legal proceedings, defendants have acted as a roadblock to any equitable resolution. Defendants have fought plaintiffs *every* step of the way by attempting to foreclose their lawsuit through procedural grounds. Yet the people of Flint have endured, and they now ask for an opportunity to be heard. The judiciary should be the *one* governmental institution that hears their grievances and affords them the opportunity to at least proceed with their case.

The world continues to turn, and new crises are ever present, but Flint remains much the same as it was shortly after the water crisis began. Many of those who were injured remain irreparably harmed—properties remain damaged, property values remain depressed, and some Flint residents continue to distrust the safety of the water coming from their taps. After a litany of indignities suffered at the hands of their government, the citizens of Flint should not have to wait any longer for the opportunity to prove their allegations.

MCCORMACK, C.J. (*concurring*). I concur fully with the lead opinion and agree that the plaintiffs have adequately pled a conscience-shocking violation of their fundamental right to bodily integrity.[1] I write

[1] I respectfully disagree with Justice VIVIANO's framing of the right in question as the right "not to be exposed to contaminated water." Plaintiffs' substantive due-process claim is based on the alleged violation of their constitutional right to bodily integrity. This well-established right is among the most fundamental. "Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause." *Cruzan v Dir, Missouri Dep't of Health*, 497 US 261, 287; 110 S Ct 2841; 111 L Ed 2d 224 (1990) (O'Connor, J., concurring). See also *Union Pac R Co v Botsford*, 141 US 250, 251; 11 S Ct 1000; 35 L Ed 734 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."); *Schmerber v California*, 384 US 757, 772; 86 S Ct 1826; 16 L Ed 2d 908 (1966) ("The integrity of an individual's person is a cherished value of our society.").

Justice VIVIANO relies on *Washington v Glucksberg*, 521 US 702, 720-721; 117 S Ct 2258; 138 L Ed 2d 772 (1997), to define the right at such a level of specificity. But the viability of *Glucksberg*'s specificity prong is in serious question. In *Obergefell v Hodges*, the Court acknowledged *Glucksberg*'s call for a "careful description" of the asserted right

separately to respond to Justice VIVIANO's critique of *Smith v Dep't of Pub Health*, 428 Mich 540; 410 NW2d 749 (1987). This Court is ultimately responsible for enforcing our state's Constitution, and remedies are how we do that. In *Smith*, a majority of justices agreed that "[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Id*. at 544.

Justice VIVIANO believes that *Smith*'s foundations have been eroded by the United States Supreme

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but concluded that "while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy." *Obergefell v Hodges*, 576 US 644, 671; 135 S Ct 2584; 192 L Ed 2d 609 (2015). Dissenting Chief Justice Roberts asserted that "the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process." *Id*. at 702 (Roberts, C.J., dissenting). See also *Lawrence v Texas*, 539 US 558, 566; 123 S Ct 2472; 156 L Ed 2d 508 (2003) (rejecting the framing of the issue presented, as described in *Bowers v Hardwick*, 478 US 186, 190; 106 S Ct 2841; 92 L Ed 2d 140 (1986), as " 'whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy,' " because it "fail[s] to appreciate the extent of the liberty at stake"); Yoshino, *A New Birth of Freedom?:* Obergefell v Hodges, 129 Harv L Rev 147, 154-159 (2015) (describing the development of *Glucksberg*'s "careful description" requirement and the "*battle royale* over how abstractly an alleged liberty interest could be defined"); Tribe, *Equal Dignity: Speaking Its Name*, 129 Harv L Rev F 16, 17 (2015) ("[T]here is no doubt that *Glucksberg*'s cramped methodology cast a significant pall that Justice Kennedy's *Lawrence v. Texas* opinion in 2003 only partially swept away . . . and that his *Obergefell* opinion in 2015 finally displaced decisively.") (citation omitted). The alleged exposure to contaminated water is *how* the plaintiffs' fundamental right to bodily integrity was violated; indeed, this is precisely what the plaintiffs alleged in their complaint. In the same way that the *Obergefell* Court defined the fundamental right as "the right to marry" rather than the "right to same-sex marriage," *Obergefell*, 576 US at 671, the fundamental right asserted here is the right to bodily integrity, not the right to contaminant-free water.

Court's partial retreat from *Bivens v Six Unknown Fed Bureau of Narcotics Agents*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971). I respectfully disagree. First, it is not at all clear that the relevant holding of *Smith* is at all or exclusively based on *Bivens*. *Smith* was a memorandum opinion, signed by the six participating justices, and *Smith* did not cite *Bivens* or refer to it at all. All we know is that at least four justices agreed that monetary damages may be available for state constitutional-tort claims. See *Smith*, 428 Mich at 545 (stating that "at least four Justices concur in every holding, statement and disposition of this memorandum opinion" but not identifying which justices agreed with which of the seven propositions or why they agreed). Maybe this holding was informed by *Bivens*, but maybe not.

Second, like *Smith*, *Bivens* established that monetary damages may be available to remedy a constitutional violation even in the absence of statutory authorization for such a claim. Although United States Supreme Court Justices Thomas and Gorsuch have expressed their willingness to overrule *Bivens*, no other justice has expressed any interest in that path. To the contrary, the United States Supreme Court has reaffirmed *Bivens* as recently as three years ago. See *Ziglar v Abbasi*, 582 US ___, ___; 137 S Ct 1843, 1856-1857; 198 L Ed 2d 290 (2017) ("And it must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the

law, are powerful reasons to retain it in that sphere."). Though the Supreme Court has declined to *extend* *Bivens* to new contexts and claims in recent years, its fundamental principles are good law.

Of course, there are other reasons to conclude that monetary damages are available in state constitutional-tort actions. When our sister state courts have so held, they have typically based their decisions on the common law, the Restatement of Torts,[2] an analogy to *Bivens*, or a combination of all three. See, e.g., *Brown v New York*, 89 NY2d 172, 187; 674 NE2d 1129 (1996). 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.

But even assuming that *Smith* was a state Constitution, *Bivens*-like decision, I do not believe that this Court should feel compelled to abandon it simply because some members of the United States Supreme Court have grown sour on *Bivens*-style remedies in a different context altogether. There are a number of reasons why. For one, we are separate sovereigns. We decide the meaning of the Michigan Constitution and do not take our cue from any other court, including the highest Court in the land.

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[2] Restatement Torts, 2d, § 874A provides: "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 suitable existing tort action or a new cause of action analogous to an existing tort action." This section makes clear that the term "legislative provision" includes a constitutional provision. See *id*. at comment *a*.

And there is more that makes *Bivens* apples to *Smith*'s oranges. For example, the critiques of *Bivens* are far less weighty here because there are no corresponding federalism concerns. As Justice Harlan explained in his *Bivens* concurrence, the question in that case was rooted not in the separation of powers, but in federalism: whether the liability of federal officers should depend on "the vagaries of [state] common-law actions," *Bivens*, 403 US at 409 (Harlan, J., concurring in the judgment), or one uniform body of federal law. Even the government in *Bivens* did not argue that the judiciary lacked the power to fashion a remedy. Instead, the government claimed that those remedies should be found only in the state courts, not the federal courts. *Id*. at 390 (opinion of the Court) ("Respondents do not argue that petitioner should be entirely without remedy for an unconstitutional invasion of his rights by federal agents. In respondents' view, however, the rights that petitioner asserts—primarily rights of privacy—are creations of state and not of federal law. Accordingly, they argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts.").

Principles of federalism and comity have continued to animate the Supreme Court's *Bivens* and 42 USC 1983[3] jurisprudence.[4] As then Judge Gorsuch observed

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[3] Section 1983 of the Civil Rights Act of 1871 authorizes suits for monetary damages for federal civil-rights violations committed under color of state law.

[4] "Examples of the influence of federalism include: the existence and scope of absolute and qualified individual immunities; the 'official policy or custom' requirement for local government liability; and the various 'procedural' defenses the Court has applied to section 1983, such as statutes of limitations, preclusion and abstention." Nahmod, *State Constitutional Torts:* DeShaney*, Reverse-Federalism and Community*, 26 Rutgers L J 949, 950 (1995) (citations omitted). See also Friesen,

in *Browder v Albuquerque*, 787 F3d 1076, 1084 (CA 10, 2015) (Gorsuch, J., concurring), "[o]ften, after all, there's no need to turn federal courts into common law courts and imagine a whole new tort jurisprudence under the rubric of § 1983 and the Constitution in order to vindicate fundamental rights when we have state courts ready and willing to vindicate those same rights using a deep and rich common law that's been battle tested through the centuries." Indeed, one of the "happy incidents" of our federalist system is that it permits states to forge their own paths in this area and function as laboratories of experiments. *New State Ice Co v Liebmann*, 285 US 262, 310-311; 52 S Ct 371; 76 L Ed 747 (1932) (Brandeis, J., dissenting). See also Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (New York: Oxford University Press, 2018), p 18 ("A mistaken or an ill-conceived constitutional decision is also easier to correct at the state level than it is at the federal level. Not only do state court decisions cover a narrower jurisdiction and affect fewer individuals, but the people at the state level also have other remedies at their disposal: an easier constitutional amendment process and, for richer or poorer, judicial elections. State courts, like state legislatures, thus have far more freedom to 'try novel social and economic experiments without risk to the rest of the country' than the U.S. Supreme Court."), quoting *New State Ice Co*, 285 US at 311.

Perhaps most importantly, there is no federal analogue for the type of action here, which diminishes the relevance of the Supreme Court's *Bivens* jurispru-

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Recovering Damages for State Bills of Rights Claims, 63 Tex L Rev 1269, 1275 (1985) (arguing that state-court judges "should not suffer from the conservatizing influences, which affect federal courts, of the need to make nationally uniform rules, which often bind the officials of another sovereign").

dence. The plaintiffs allege more than a constitutional violation committed by a single rogue officer that often serves as the basis for a *Bivens* claim. See *Turkmen v Hasty*, 789 F3d 218, 265 (CA 2, 2015) (Raggi, J., concurring in part and dissenting in part) (noting that "the typical *Bivens* scenario" arises from "errant conduct by a rogue official"); *Correctional Servs Corp v Malesko*, 534 US 61, 70; 122 S Ct 515; 151 L Ed 2d 456 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."). Instead, the plaintiffs here allege that our government itself is responsible for a conscience-shocking constitutional tort committed against the citizens of an entire city. They sued the governor in his official capacity, the state of Michigan, the Michigan Department of Environmental Quality, the Michigan Department of Health and Human Services, and two emergency managers in their official capacities. This action—against these particular defendants—could not be brought in federal court, even if the plaintiffs based their constitutional-tort claim on the federal Due Process Clause. A nonconsenting state is generally immune from suits by its own citizens in federal court. *Hans v Louisiana*, 134 US 1, 13; 10 S Ct 504; 33 L Ed 842 (1890). This bar applies to suits seeking monetary damages against a governor in his or her official capacity. See *Governor of Georgia v Madrazo*, 26 US 110, 123-124; 7 L Ed 73 (1828); *Edelman v Jordan*, 415 US 651, 663; 94 S Ct 1347; 39 L Ed 2d 662 (1974). It also applies to governmental entities that are considered "arm[s] of the State" for Eleventh Amendment purposes, such as state agencies. See, e.g., *Mt Healthy City Sch Dist Bd of Ed v Doyle*, 429 US 274, 280; 97 S Ct 568; 50 L Ed 2d 471 (1977).

Nor could this action be brought as a § 1983 action in state or federal court. That statute only authorizes

suits against a *person*, and neither the state nor a state official is considered a "person" for purposes of a damages suit under § 1983. *Will v Mich Dep't of State Police*, 491 US 58, 63-65; 109 S Ct 2304; 105 L Ed 2d 45 (1989). *Bivens* actions cannot be brought against federal agencies, *Fed Deposit Ins Corp v Meyer*, 510 US 471, 486; 114 S Ct 996; 127 L Ed 2d 308 (1994), or against the President of the United States, *Nixon v Fitzgerald*, 457 US 731, 749; 102 S Ct 2690; 73 L Ed 2d 349 (1982) (holding that a former president "is entitled to absolute immunity from damages liability predicated on his official acts").

In *Smith*, the Court held that Michiganders can sue the government directly for violating their Michigan constitutional rights. *Smith*, 428 Mich at 544 ("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."). They can sue the governor in his or her official capacity. They can sue state agencies. They can sue the state of Michigan itself. These meaningful differences between federal *Bivens* claims and Michigan constitutional-tort actions make the United States Supreme Court's *Bivens* jurisprudence of limited value as we determine how to approach state constitutional torts.[5]

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[5] For what it is worth, I do not share Justice VIVIANO's critique of *Bivens*'s foundation. The Supreme Court has a long history of permitting suits for damages against rogue federal officers. See Fallon, *Bidding Farewell to Constitutional Torts*, 107 Calif L Rev 933, 941-946 (2019); see also, e.g., *Murray v Schooner Charming Betsy*, 6 US (2 Cranch) 64; 2 L Ed 208 (1804); *Little v Barreme*, 6 US (2 Cranch) 170; 2 L Ed 243 (1804) (affirming tort damages against government officers for ultra vires seizures of vessels); cf. *Armstrong v Exceptional Child Ctr, Inc*, 575 US 320, 327; 135 S Ct 1378; 191 L Ed 2d 471 (2015) (noting the "long history of judicial review of illegal executive action, tracing back to England").

Ultimately, this Court has a duty to protect the state constitutional rights of Michiganders. The judiciary serves as a check on our coequal branches of government and ensures that their acts are constitutional. See *Marbury v Madison*, 5 US (1 Cranch) 137, 178; 2 L Ed 60 (1803). I agree with Justice Harlan that "the judiciary has a particular responsibility to assure the vindication of constitutional interests," *Bivens*, 403 US at 407 (Harlan, J., concurring in the judgment), and this responsibility is especially true of the state courts. See Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv L Rev 1362, 1401 (1953) ("In the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."). When a fundamental constitutional right has been violated, it falls to the courts to determine what remedy is appropriate to vindicate it.

That the judicial power includes the ability to fashion remedies is a principle as old as our republic. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v Hood*, 327 US 678, 684; 66 S Ct 773; 90 L Ed 939 (1946). The Constitution does not explicitly authorize the courts to invalidate acts of Congress, issue injunctions, or exclude evidence seized in violation of

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Nor do I share Justice VIVIANO's understanding that "[t]he United States Supreme Court's abandonment of implied causes of action in the statutory context has cast doubt on *Bivens* . . . ." The difference between statutory-based claims and constitutional-tort claims is significant. It makes sense to defer to the Legislature to authorize a cause of action arising under a statute, which exists only by the Legislature's creation, but, as discussed below, I do not believe that the Legislature has exclusive jurisdiction over crafting remedies for violations of the Constitution, which was created by the people, exists independently of the Legislature, and reigns supreme in our system.

the Fourth Amendment. Yet in their exercise of the judicial power, the courts have created and applied those remedies. See *Marbury*, 5 US at 177 (the judiciary has the power to void unconstitutional legislation); *Osborn v Bank of US*, 22 US (9 Wheat) 738, 869; 6 L Ed 204 (1824) (power to issue injunctions); *Mapp v Ohio*, 367 US 643, 655; 81 S Ct 1684; 6 L Ed 2d 1081 (1961) (power to order the exclusion of evidence). And monetary damages are an ordinary, long-established remedy. *Bivens*, 403 US at 395 ("That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."). See also Nordstrom, *Toward a Law of Damages*, 18 Case W Res L Rev 86, 89 (1966) (tracing the law of damages to "the customs and orders of the Anglo-Saxons, well before the Norman Conquest in 1066 A.D.").

Given this understanding of the judicial power, it is not clear to me why authorizing damages for a constitutional-tort action would be *exclusively* a function of the Legislature such that the judiciary is precluded from taking up the task, especially because constitutional rights most often serve to limit the government's power. Chief Justice John Marshall questioned this too: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury*, 5 US at 176. And as Justice Harlan observed, "it would be at least anomalous to conclude that the federal judiciary . . . is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instru-

ment of the popular will." *Bivens*, 403 US at 403-404 (Harlan, J., concurring in the judgment).

Smith's holding that monetary damages are available in the appropriate case is therefore unremarkable. What good is a constitutional right without a remedy? "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. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury*, 5 US at 163.

CAVANAGH, J., concurred with MCCORMACK, C.J.

VIVIANO, J. (*concurring in part and dissenting in part*). I agree with the lead opinion's analysis of plaintiffs' inverse-condemnation claim and remand for further factual development to determine when that claim accrued.[1] But I would reverse the Court of Appeals' denial of defendants' motion for summary disposition concerning plaintiffs' substantive due-process claim for a violation of bodily integrity because I do not believe that substantive due process encompasses a right to be protected from exposure to contaminated water and I do not believe that plaintiffs allege conscience-shocking conduct on the part of defendants. And even if plaintiffs did allege such a substantive due-process claim, I would not infer a damages remedy for such a claim in any event.

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[1] In other words, I join Parts II(A), (B)(1), (B)(2), and (B)(3) of the lead opinion. Because I believe more factual development is needed to determine when plaintiffs' inverse-condemnation claim accrued, I would not yet reach a conclusion as to whether the fraudulent-concealment exception or the harsh-and-unreasonable-consequences exception might apply if the claim is later determined to be untimely.

I. SUBSTANTIVE DUE PROCESS

The Due Process Clause of the Michigan Constitution provides that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law."[2] Our constitutional provision "is coextensive with its federal counterpart" in the Fourteenth Amendment.[3] We have held that the Due Process Clause offers "two separate types of protections—substantive and procedural[.]"[4] Procedural due process, which is not at issue

[2] Const 1963, art 1, § 17.

[3] *Cummins v Robinson Twp*, 283 Mich App 677, 700-701; 770 NW2d 421 (2009). The Due Process Clause of the federal Constitution states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws." US Const, Am XIV (emphasis added).

We have held out the possibility that our Due Process Clause grants greater protection than the federal clause. *AFT Mich v Michigan*, 497 Mich 197, 245 n 28; 866 NW2d 782 (2015) ("The portions of Const 1963, art 1, § 17 and US Const, Am XIV addressing due process are worded differently, so they may grant disparate levels of protection. This Court has, on occasion, applied distinctive due process protections under Const 1963, art 1, § 17 broader than have been afforded under US Const, Am XIV."). In general, however, "[w]e have often spoken indistinguishably about the standards governing our respective constitutions and been vague as to which constitution we were interpreting." *Delta Charter Twp v Dinolfo*, 419 Mich 253, 276 n 7; 351 NW2d 831 (1984), citing *Robinson Twp v Knoll*, 410 Mich 293; 302 NW2d 146 (1981); *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524; 273 NW2d 829 (1979); *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich 465; 242 NW2d 3 (1976); *Manistee Bank & Trust Co v McGowan*, 394 Mich 655; 232 NW2d 636 (1975), overruled on other grounds by *Harvey v Michigan*, 469 Mich 1 (2003). Because plaintiffs do not argue that our state's Constitution provides greater protection in this instance, and because the particular language at issue is identical, it is unnecessary for me to address whether Const 1963, art 1, § 17 offers more protection than its federal counterpart.

[4] *Bonner v Brighton*, 495 Mich 209, 226; 848 NW2d 380 (2014). See also *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 66 n 9; 445

in the instant case, requires that before a person is deprived of life, liberty, or property, he or she must be given notice and an opportunity to be heard.[5]

"Textually, only procedural due process is guaranteed by the Fourteenth Amendment [and Const 1963, art 1, § 17]; however, under the aegis of substantive due process, individual liberty interests likewise have been protected against ' "certain government actions regardless of the fairness of the procedures used to implement them." ' "[6] There are two types of substan-

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NW2d 61 (1989) ("The Due Process Clause of the Fourteenth Amendment embodies a dual function. Not only does it afford *procedural* safeguards to protected life, liberty, and property interests, but it also protects *substantive* aspects of those interests against impermissible governmental restrictions."); *In re Beck*, 287 Mich App 400, 401; 788 NW2d 697 (2010) ("There are two types of due process: procedural and substantive."), aff'd on other grounds 488 Mich 6 (2010).

[5] *Bonner*, 495 Mich at 235 ("[D]ue process of law requires that deprivation of life, liberty, or property by adjudication must be preceded by notice and an opportunity to be heard. To comport with these procedural safeguards, the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner.") (citations omitted). See also *In re Beck*, 287 Mich App at 401-402 ("The fundamental requirements of procedural due process are notice and a meaningful opportunity to be heard before an impartial decision maker.").

[6] *People v Sierb*, 456 Mich 519, 522-523; 581 NW2d 219 (1998), quoting *Collins v Harker Hts*, 503 US 115, 125; 112 S Ct 1061; 117 L Ed 2d 261 (1992), in turn quoting *Daniels v Williams*, 474 US 327, 331; 106 S Ct 662; 88 L Ed 2d 662 (1986). See also *Trellsite Foundry & Stamping Co v Enterprise Foundry*, 365 Mich 209, 214; 112 NW2d 476 (1961) ("The concept of procedural due process was deeply rooted in American jurisprudence from an early day, but that of substantive due process appeared in the cases at about the middle of the 19th century.").

Substantive due process has often been criticized because of its lack of textual basis. See, e.g., *TXO Prod Corp v Alliance Resources Corp*, 509 US 443, 470-471; 113 S Ct 2711; 125 L Ed 2d 366 (1993) (Scalia, J., concurring) ("I am willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret

tive due-process claims—ones that claim an interference with a constitutional right (either an enumerated right or a right deeply rooted in our history and tradition), and ones that allege arbitrary abuses of power.[7]

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repository of all sorts of other, unenumerated, substantive rights—however fashionable that proposition may have been (even as to economic rights of the sort involved here) at the time of the *Lochner*-era cases the plurality relies upon."); *Albright v Oliver*, 510 US 266, 275; 114 S Ct 807; 127 L Ed 2d 114 (1994) (Scalia, J., concurring) ("I reject the proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty."); *McDonald v Chicago*, 561 US 742, 791; 130 S Ct 3020; 177 L Ed 2d 894 (2010) (Scalia, J., concurring) (referring to his "misgivings about Substantive Due Process"); Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchstone, 1990), p 31 (stating that the "transformation of the due process clause from a procedural to a substantive requirement was an obvious sham"). However, because I find that plaintiffs have not adequately alleged a violation of due process, it is unnecessary for me to address the merits (or lack thereof) of substantive due process generally.

[7] As *Lillard v Shelby Co Bd of Ed*, 76 F3d 716, 724 (CA 6, 1996), explained:

> This court has recognized two categories of substantive due process rights:
>
> > The first type includes claims asserting denial of a right, privilege, or immunity secured by the Constitution or by federal statute other than procedural claims under "the Fourteenth Amendment *simpliciter*." . . .
> >
> > The other type of claim is directed at official acts which may not occur regardless of the procedural safeguards accompanying them. The test for substantive due process claims of this type is whether the conduct complained of "shocks the conscience" of the court.
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> *Mertik v. Blalock*, 983 F.2d 1353, 1367–68 (6th Cir.1993). The first type of claim exists, for example, when a plaintiff alleges that his right to be free from unreasonable seizures under the Fourth Amendment was violated. *See Wilson v. Beebe*, 770 F.2d 578, 585–86 (6th Cir.1985) (*en banc*); *see also Braley v. City of Pontiac*, 906 F.2d 220, 225 (6th Cir.1990). The latter type of claim,

I discuss both types of claims below.[8]

A. THERE IS NO SUBSTANTIVE DUE-PROCESS RIGHT NOT TO BE EXPOSED TO CONTAMINATED WATER

As to the first type of substantive due-process claim, in addition to those rights enumerated in the Constitution, rights have been recognized in " 'matters relating to marriage, family, procreation, and the right to bodily integrity.' "[9] Importantly, a substantive due-process analysis " 'must begin with a careful description of the asserted right,' for there has 'always been reluctan[ce] to expand the concept of substantive due

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however, does not "require[] a claim that some specific guarantee of the Constitution apart from the due process clause be violated . . . . This is a substantive due process right akin to the 'fundamental fairness' concept of procedural due process." *Wilson*, 770 F.2d at 586.

Compare *Lillard*, 76 F3d 716, with 1 Bodensteiner & Levinson, State & Local Government Civil Rights Liability (November 2019 update), § 1:16 ("There are three aspects to substantive due process. First, it protects the enumerated rights (Bill of Rights) from state interference. Second, it provides the source for protecting certain, unenumerated, nontextual, yet significant, rights from interference by the legislative branch of government. Third, it prohibits arbitrary abuses of power by government officials."). I point out that it is not entirely clear whether plaintiffs must show both the deprivation of a constitutional right and conscience-shocking behavior, or whether they must only show one or the other. *Guertin v Michigan*, 912 F3d 907, 946 (CA 6, 2019) (McKeague, J., concurring in part and dissenting in part) ("At times we have treated these two elements (deprivation of a constitutional right and conscience-shocking behavior) as separate methods of stating a substantive-due-process claim. *Range v. Douglas*, 763 F.3d 573, 588 (6th Cir. 2014). At other times we have concluded they are both required. See *Am. Express Travel Related Servs. Co., Inc. v. Kentucky*, 641 F.3d 685, 688 (6th Cir. 2011)."). Because I conclude that plaintiffs have shown neither, it is not necessary to decide whether only one would be sufficient.

[8] It is not entirely clear from plaintiffs' amended complaint which type of claim they assert.

[9] *Sierb*, 456 Mich at 529, quoting *Albright*, 510 US at 272.

process' given that '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.' "[10] After formulating a careful description of the right in question, a court must then determine whether that right is deeply rooted in this country's history. As the United States Supreme Court explained in *Washington v Glucksberg*:[11]

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking" that direct and restrain our exposition of the Due Process Clause.[12]

Importantly, a "careful description" of the right must be sufficiently specific in order to determine whether it is deeply rooted in our nation's history.[13] Notably,

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[10] *Bonner*, 495 Mich at 226-227, quoting *Reno v Flores*, 507 US 292, 302; 113 S Ct 1439; 123 L Ed 2d 1 (1993), and *Collins*, 503 US at 125 (alterations in original).

[11] *Washington v Glucksberg*, 521 US 702; 117 S Ct 2258; 138 L Ed 2d 772 (1997).

[12] *Id*. at 720-721 (citations omitted). See also *id*. at 725 (noting that the Court in *Cruzan v Dir, Missouri Dep't of Health*, 497 US 261; 110 S Ct 2841; 111 L Ed 2d 224 (1990), had grounded its decision in "the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment," not "from abstract concepts of personal autonomy").

[13] See *Glucksberg*, 521 US at 722 ("[T]he development of this Court's substantive-due-process jurisprudence . . . has been a process whereby

" '[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. . . . The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.' "[14]

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the outlines of the 'liberty' specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition.") (citation omitted). For example, in *Glucksberg* the Court clarified that the right at issue was not "a right to die" or "a liberty to choose how to die" but more specifically "a right to commit suicide which itself includes a right to assistance in doing so." *Id*. at 722-723 (quotation marks and citations omitted).

Chief Justice MCCORMACK contends that "the viability of *Glucksberg*'s specificity prong is in serious question." But *Glucksberg* has not been overruled. And though the majority stated in *Obergefell v Hodges*, 576 US 674, 671; 135 S Ct 2584; 192 L Ed 2d 609 (2015), that the careful-description approach "is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy," this case, of course, does not involve marriage or intimacy.

[14] *Sierb*, 456 Mich at 528, quoting *Collins*, 503 US at 125. As Justice Scalia explained in *Michael H v Gerald D*, 491 US 110, 121-123; 109 S Ct 2333; 105 L Ed 2d 91 (1989):

> Without that core textual meaning as a limitation, defining the scope of the Due Process Clause "has at times been a treacherous field for this Court," giving "reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court." *Moore v. East Cleveland*, 431 U.S. 494, 502[; 97 S Ct 1932; 52 L Ed 2d 531] (1977). The need for restraint has been cogently expressed by Justice WHITE:
>
> > That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the

In this case, then, even assuming that the Due Process Clause in our state's Constitution protects a right to bodily integrity—a conclusion that, until the Court of Appeals decision below, no appellate court in this state had ever reached[15]—plaintiffs must carefully describe a particular right to bodily integrity, and that right must be deeply rooted in the nation's history and tradition.

So what is the right that plaintiffs assert? In their amended complaint, plaintiffs allege that "[d]efendants deliberately and knowingly breached the consti-

> Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers . . . , the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority. *Moore*, [431 US] at 544 (dissenting opinion).
>
> In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U. S. 97, 105[; 54 S Ct 330; 78 L Ed 674] (1934) (Cardozo, J.). Our cases reflect "continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society . . . ." *Griswold v. Connecticut*, 381 U. S. 479, 501[; 85 S Ct 1678; 14 L Ed 2d 510] (1965) (Harlan, J., concurring in judgment).

[15] *Mays v Governor*, 323 Mich App 1, 66; 916 NW2d 227 (2018) ("Michigan appellate courts have acknowledged that the substantive component of the federal Due Process Clause protects an individual's right to bodily integrity, but this Court is unaware of any Michigan appellate decision expressly recognizing the same protection under the Due Process Clause of the Michigan Constitution or a stand-alone constitutional tort for violation of the right to bodily integrity.") (citation omitted).

tutionally protected bodily integrity of Plaintiffs *by creating and perpetuating the ongoing exposure to contaminated water*, with deliberate indifference to the known risks of harm which said exposure would, and did, cause to Plaintiffs." (Emphasis added.) In other words, the right that plaintiffs allege may carefully be described as a right not to be exposed to contaminated water.[16] With that careful description of the right in mind, we must next determine whether such a right is " 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' "[17]

Importantly, I am aware of no case holding that such a right is encompassed in substantive due process. In fact, there are several cases explicitly holding that there is no such right to a contaminant-free environment. While considering a challenge to the addition of fluoride to the water supply, one California court stated, "[T]he right to bodily integrity is not coextensive with the right to be free from the introduction of an allegedly contaminated substance in the public drinking water."[18] As Judge McKeague explained in his

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[16] See also *Guertin*, 912 F3d at 956 (McKeague, J., concurring in part and dissenting in part) (describing the right as "protection from exposure to lead-contaminated water allegedly caused by policy or regulatory decisions or statements").

I believe that the majority in *Guertin* erred by describing the right too generally. See *id*. at 921 (opinion of the court) (affirming the district court's conclusion that it is a violation of the substantive due-process right to bodily integrity when a government actor " 'knowingly and intentionally introduc[es] life-threatening substances into individuals without their consent, especially when such substances have zero therapeutic benefit' "). See also *Hootstein v Amherst-Pelham Regional Sch Comm*, 361 F Supp 3d 94 (D Mass, 2019) (relying on *Guertin*).

[17] *Glucksberg*, 521 US 720-721 (citations omitted).

[18] *Coshow v City of Escondido*, 132 Cal App 4th 687, 709-710; 34 Cal Rptr 3d 19 (2005). Several federal courts have similarly held that there

partial concurrence and dissent in *Guertin v Michigan*,[19] another case arising from the Flint water crisis, "The mere fact that no court of controlling authority has ever recognized the type of due process right that plaintiffs allege in this case is all we need to conclude the right is not clearly established."[20]

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is no right to a contaminant-free environment. *S F Chapter of A Philip Randolph Institute v US Environmental Protection Agency*, unpublished opinion of the United States District Court for the Northern District of California, issued March 28, 2008 (Case No. C 07-04936 CRB), pp 6-7 (rejecting the plaintiffs' claim that they had a right to be free from climate-change pollution); *Concerned Citizens of Nebraska v US Nuclear Regulatory Comm*, 970 F2d 421, 426-427 (CA 8, 1992) ("[W]e are unable to conclude that a right to an environment free of any non-natural radiation is so 'deeply rooted in this Nation's history and tradition' as to render it fundamental."); *In re "Agent Orange" Prod Liability Litigation*, 475 F Supp 928, 934 (EDNY, 1979) ("Since there is not yet a constitutional right to a healthful environment, there is not yet any constitutional right under the fifth, ninth, or fourteenth amendments to be free of the allegedly toxic chemicals involved in this litigation. Plaintiffs' constitutional claims are dismissed for failure to state a claim.") (citation omitted); *Pinkney v Ohio Environmental Protection Agency*, 375 F Supp 305, 310 (ND Ohio, 1974) ("[T]he Court is unable to rule that the right to a healthful environment is a fundamental right under the Constitution."); *Fed Employees for Non-Smokers' Rights v United States*, 446 F Supp 181, 184 (DDC, 1978); *Tanner v Armco Steel Corp*, 340 F Supp 532, 537 (SD Tex, 1972) ("[N]o legally enforceable right to a healthful environment, giving rise to an action for damages, is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution."); *Ely v Velde*, 451 F2d 1130, 1139 (CA 4, 1971) (holding that there is no constitutional right to a healthful environment). See also Murthy, *A New Constitutive Commitment To Water*, 36 BC J L & Soc Just 159, 159-160 (2016) ("A constitutional right to affordable water for drinking, hygiene, and sanitation does not exist in the United States."); *Mansfield Apartment Owners Ass'n v City of Mansfield*, 988 F2d 1469, 1476 (CA 6, 1993) (holding that the plaintiffs failed to state a claim for violation of substantive due process by challenging the defendants' policy of turning off water to the landlords' real estate when the tenants failed to pay their water bills).

[19] *Guertin v Michigan*, 912 F3d 907 (CA 6, 2019).

[20] *Id*. at 942 (McKeague, J., concurring in part and dissenting in part). As even the majority in *Guertin* recognized: "There is, of course, no

There is no debate to be had on this subject. Because the right to be free from exposure to contaminated water "is neither implicit in the concept of ordered liberty nor deeply rooted in this nation's history and tradition[,] [i]t would be an impermissibly radical departure from existing tradition, and from the principles that underlie that tradition, to declare that there is such a fundamental right protected by the Due Process Clause."[21]

Nevertheless, the Court of Appeals majority did not begin its analysis with a careful description of the right that plaintiffs assert. It did refer to a right to be free of " 'an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate

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fundamental right to water service. Moreover, the Constitution does not guarantee a right to live in a contaminant-free, healthy environment." *Id*. at 921-922 (opinion of the court) (quotation marks and citation omitted), citing *Lake v Southgate*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued February 28, 2017 (Case No. 16-10251), p 4 (collecting cases).

[21] *People v Kevorkian*, 447 Mich 436, 481; 527 NW2d 714 (1994). See also *Sierb*, 456 Mich at 523-524 ("[C]ourts should reject the 'unprincipled creation of state constitutional rights that exceed their federal counterparts.' "), quoting *Sitz v Dep't of State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993).

In fact, there are very few cases in which plaintiffs challenge contaminants in the water, and what few cases exist are relatively recent. See, e.g., *Hootstein*, 361 F Supp 3d 94; *Brown v Detroit Pub Sch Community Dist*, 763 F Appx 497 (CA 6, 2019); *In re Camp Lejeune North Carolina Water Contamination Litigation*, 263 F Supp 3d 1318 (ND Ga, 2016); *Rietcheck v Arlington*, unpublished opinion of the United States District Court for the District of Oregon, issued January 4, 2006 (Case No. 04-CV-1239-BR); *Coshow*, 132 Cal App 4th 687; *City of Austin v Quick*, 930 SW2d 678 (Tex App, 1996); *Ayers v Jackson Twp*, 189 NJ Super 561; 461 A2d 184 (Law Div, 1983). As the United States Supreme Court explained in *Reno*, 507 US at 303, "The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it; the alleged right certainly cannot be considered ' "so rooted in the traditions and conscience of our people as to be ranked as fundamental." ' " (Citation omitted.)

governmental objective.' "[22] And the majority then summarized plaintiffs' allegations as consisting of "a nonconsensual entry of contaminated and toxic water into [plaintiffs'] bodies as a direct result of defendants' decision to pump water from the Flint River into their homes and defendants' subsequent affirmative act of physically switching the water source."[23]

This general description of a right against nonconsensual entry of substances into the body can be found in other cases, such as *In re Cincinnati Radiation Litigation*.[24] There the defendant physicians experimented on terminal cancer patients by subjecting them to large doses of radiation, all while concealing the nature of the experiment.[25] But the facts in the instant case are very different than those in *In re Cincinnati*. Plaintiffs do not allege that defendants knowingly and secretly performed dangerous experiments on them. Plaintiffs allege that defendants switched the source of Flint's drinking water "despite knowledge of a 2011 study commissioned by Flint officials that cautioned against the use of Flint River water as a source of drinking water and despite the absence of any independent state scientific assessment of the suitability of using water drawn from the Flint River as drinking

[22] *Mays*, 323 Mich App at 60, quoting *Rogers v Little Rock, Arkansas*, 152 F3d 790, 797 (CA 8, 1998). See also *Guertin*, 912 F3d at 920-921 ("Involuntarily subjecting nonconsenting individuals to foreign substances with no known therapeutic value—often under false pretenses and with deceptive practices hiding the nature of the interference—is a classic example of invading the core of the bodily integrity protection.").

[23] *Mays*, 323 Mich App at 60.

[24] *In re Cincinnati Radiation Litigation*, 874 F Supp 796 (SD Ohio, 1995).

[25] *Id*. at 800. The United States District Court for the Southern District of Ohio denied the defendants' motion to dismiss the plaintiffs' substantive due-process claim. *Id*. at 801.

water" and then engaged in a cover-up.[26] Plaintiffs have made serious accusations about the manner in which these decisions were made and the grave consequences that followed for plaintiffs and other Flint residents. I do not take these allegations lightly. However, I think it is clear that the facts alleged in this case are distinct from those in *In re Cincinnati*.[27] As Judge McKeague noted in his partial concurrence in *Guertin*:

> These cases [like *In re Cincinnati*] delineate the contours of the right to bodily integrity in terms of intrusive searches or forced medication. . . . Even the few district court or sister circuit cases cited by the majority do not clarify the contours of plaintiffs' alleged right. All except one of those cases deal with medical professionals performing government-sponsored invasive procedures or harmful experiments on unsuspecting patients. The last one deals with police officers who coerced individuals to ingest marijuana while those individuals were under the officer's control. So those cases further elaborate the ways in which medical or law enforcement personnel may interfere with an individual's right to bodily integrity. But they say nothing about how non-custodial policy or regulatory decisions or statements affecting the quality of an environmental resource may do so. In short, neither our Nation's history and traditions nor governing bodily integrity jurisprudence suggests that the conduct alleged here is comparable to a "forcible physical intrusion[] of the body by the government." *Planned Parenthood Sw. Ohio Region*, 696 F.3d [490, 506 (CA 6, 2012)]. "The mere novelty

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[26] *Mays*, 323 Mich App at 20.

[27] So are other cases involving forced medication. See, e.g., *Washington v Harper*, 494 US 210, 221-222; 110 S Ct 1028; 108 L Ed 2d 178 (1990) (stating that the inmate "possess[ed] a significant liberty interest in avoiding unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment"); *Cruzan*, 497 US at 278 (stating that the Fourteenth Amendment encompasses "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment").

> of such a claim is reason enough to doubt that 'substantive due process' sustains it." *Reno v. Flores*, 507 U.S. 292, 303, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)."[28]

I believe the Court of Appeals erred by describing the right so generally that it encompasses cases with very different facts.

A right to be free from contaminated public water is clearly not " 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty . . . .' "[29] Like Justice Scalia, I "believe[] that the text of the Constitution, and our traditions, say what they say and there is no fiddling with them."[30] There is simply no historical support for a right to receive public water free from contaminants.[31] It is "judicial usurpation," as Justice Scalia called it, to use substantive due process to add the rights we prefer to those explicitly set forth in the Constitution or protected by longstanding history and tradition.[32] By neglecting

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[28] *Guertin*, 912 F3d at 956-957 (McKeague, J., concurring in part and dissenting in part).

[29] *Glucksberg*, 521 US at 721 (citations omitted). See also *Cruzan*, 497 US at 294 (Scalia, J., concurring) ("It is at least true that no 'substantive due process' claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against state interference.").

[30] *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 998; 112 S Ct 2791; 120 L Ed 2d 674 (1992) (Scalia, J., concurring in part and dissenting in part).

[31] That there is no constitutional right does not mean that our citizens should not expect and demand to receive public water free from contaminants or hold their public officials accountable for providing contaminated water (whether at the ballot box or by asserting other viable legal claims, which plaintiffs have done here and in a number of other related suits arising out of the Flint water crisis).

[32] *Chicago v Morales*, 527 US 41, 85; 119 S Ct 1849; 144 L Ed 2d 67 (1999) (Scalia, J., dissenting). See also *Webster v Reproductive Health Servs*, 492 US 490, 532; 109 S Ct 3040; 106 L Ed 2d 410 (1989) (Scalia, J.,

both to formulate a careful description of the right that plaintiffs assert and to take notice of the readily

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concurring in part and concurring in the judgment) ("The outcome of today's case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike needlessly to prolong this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical—a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive."); *Casey*, 505 US at 980 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the 'concept of existence, of meaning, of the universe, and of the mystery of human life.' Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.") (citation omitted); *Cruzan*, 497 US at 293 (Scalia, J., concurring) ("I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one's life; that the point at which life becomes 'worthless,' and the point at which the means necessary to preserve it become 'extraordinary' or 'inappropriate,' are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory; and hence, that even when it *is* demonstrated by clear and convincing evidence that a patient no longer wishes certain measures to be taken to preserve his or her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored. It is quite impossible (because the Constitution says nothing about the matter) that those citizens will decide upon a line less lawful than the one we would choose; and it is unlikely (because we know no more about 'life and death' than they do) that they will decide upon a line less reasonable."); *Obergefell*, 576 US at 713-714 (Scalia, J., dissenting) ("The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create 'liberties' that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important

apparent fact that there have been no historical or legal protections for it, this Court, by leaving in place the Court of Appeals majority opinion, has discarded the tether that "sought to limit the damage" of our Court's " 'right-making' power."[33]

B. DEFENDANTS' ACTIONS DO NOT SHOCK THE CONSCIENCE

Alternatively, if a plaintiff does not claim a violation of a right that is deeply rooted in our nation's history and tradition, there may still be a due-process violation if the defendant's conduct shocked the conscience. The Court of Appeals correctly recounted the requirement that a plaintiff allege conscience-shocking behavior in order to plead a violation of substantive due process:

> Violation of the right to bodily integrity involves "an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective." *Rogers v Little Rock, Arkansas*, 152 F3d 790, 797 (CA 8, 1998), citing *Sacramento Co v Lewis*, 523 US 833, 847 n 8; 118 S Ct 1708; 140 L Ed 2d 1043 (1998). . . . [T]o survive dismissal, the alleged "violation of the right to bodily integrity must be so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Villanueva v City of Scottsbluff*, 779 F3d 507, 513 (CA 8, 2015) (quotation marks and citation omitted); see also *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 198; 761 NW2d 293 (2008) (explaining that in the context of individual governmental actions or actors, to establish a substantive due-process violation, "the governmental conduct must be so arbitrary and capricious as to shock the conscience").
>
> "Conduct that is merely negligent does not shock the conscience, but 'conduct intended to injure in some way

liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.").

[33] *Morales*, 527 US at 85 (Scalia, J., dissenting).

> unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.' " *Votta v Castellani*, 600 F Appx 16, 18 (CA 2, 2015), quoting *Sacramento Co*, 523 US at 849. At a minimum, proof of deliberate indifference is required. *McClendon v City of Columbia*, 305 F3d 314, 326 (CA 5, 2002). A state actor's failure to alleviate "a significant risk that he should have perceived but did not" does not rise to the level of deliberate indifference. *Farmer v Brennan*, 511 US 825, 838; 114 S Ct 1970; 128 L Ed 2d 811 (1994). To act with deliberate indifference, a state actor must " 'know[] of and disregard[] an excessive risk to [the complainant's] health or safety.' " *Ewolski v City of Brunswick*, 287 F3d 492, 513 (CA 6, 2002), quoting *Farmer*, 511 US at 837. "The case law . . . recognizes official conduct may be more egregious in circumstances allowing for deliberation . . . than in circumstances calling for quick decisions . . . ." *Williams v Berney*, 519 F3d 1216, 1220-1221 (CA 10, 2008).[34]

If the above quote is not sufficiently clear, the bar for conduct that "shock[s] the conscience" is so high that it has been described as "virtually insurmountable."[35]

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[34] *Mays*, 323 Mich App at 60-61. See also *In re Beck*, 287 Mich App at 402 (" '[T]he essence of a substantive due process claim is the arbitrary deprivation of liberty or property interests.' A person claiming a deprivation of substantive due process 'must show that the action was so arbitrary (in the constitutional sense) as to shock the conscience.' ") (citations omitted).

[35] *Rimmer-Bey v Brown*, 62 F3d 789, 791 n 4 (CA 6, 1995) (describing the task of showing conscience-shocking conduct as "a virtually insurmountable uphill struggle"). See also *Cruz v Puerto Rico Power Auth*, 878 F Supp 2d 316, 328 (D Puerto Rico, 2012) (" 'The burden to show state conduct that "shocks the conscience" is extremely high, requiring "stunning" evidence of "arbitrariness and caprice" that extends beyond "[m]ere violations of state law, even violations resulting from bad faith" to "something more egregious and more extreme." ' "), quoting *J R v Gloria*, 593 F3d 73, 80 (CA 1, 2010), in turn quoting *DePoutot v Raffaelly*, 424 F3d 112, 119 (CA 1, 2005); *Al-Ami'n v Clarke*, unpublished opinion of the United States District Court for the Eastern District of Virginia, issued February 11, 2014 (Case No. 2:13cv167), p 3 ("This

Plaintiffs allege that defendants switched Flint's water source despite a 2011 study cautioning against the use of water from the Flint River and warning that the Flint Water Treatment Plant needed upgrades.[36]

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standard is very high and difficult to meet[.]"); *Uhlrig v Harder*, 64 F3d 567, 574 (CA 10, 1995) ("[T]he 'shock the conscience' standard requires a high level of outrageousness . . . ."); 16B Am Jur 2d, Constitutional Law (July 2020 update), § 960 ("State conduct offends substantive due process when it shocks the conscience, constitutes a force that is so brutal as to offend even hardened sensibilities, or is offensive to human dignity. In fact, only a substantial infringement of state law prompted by personal or group animus or a deliberate flouting of the law that trammels significant personal or property rights is a substantive due-process violation. . . . [A] mere violation of state law is not the kind of truly irrational governmental action which gives rise to a substantive due-process claim.") (citations omitted).

In fact, the "deliberate indifference" standard was borrowed from Eighth Amendment jurisprudence. See *Sacramento Co*, 523 US at 849-850. In the Eighth Amendment context, deliberate indifference is also an extremely high standard. See, e.g., *Arenas v Calhoun*, 922 F3d 616, 620 (CA 5, 2019) (" 'Deliberate indifference is an extremely high standard to meet.' "), quoting *Domino v Texas Dep't of Criminal Justice*, 239 F3d 752, 756 (CA 5, 2001); *Battista v Clarke*, 645 F3d 449, 453 (CA 1, 2011) (stating that the deliberate-indifference standard "leave[s] ample room for professional judgment, constraints presented by the institutional setting, and the need to give latitude to administrators who have to make difficult trade-offs as to risks and resources").

[36] ROWE Professional Services Company & Lockwood, Andrews & Newnam, Inc, *Analysis of the Flint River as a Permanent Water Supply for the City of Flint* (July 2011), available at <https://www.greatlakeslaw.org/Flint/LAN_2011_Report_with_Appendices.pdf> (accessed July 13, 2020) [https://perma.cc/KJ8F-PNU8]. This study did conclude that there would "need to be some modifications to existing facilities, operating agreements, and permits" if the Flint River was to be used for the water supply. *Id*. at 12. It then suggested various modifications that would be needed to meet expected future demand but stated that without those modifications the river could supply approximately 2/3 of the expected daily demand. *Id*. In another section, the study stated: "Preliminary analysis indicates that water from the river can be treated to meet current regulations; however, additional treatment will be required than for [sic] Lake Huron water. This results in higher operating costs than the alternative of a new Lake Huron supply." *Id*. at 7. But I see nothing in this particular study that clearly indicates that using the Flint River as a water source would risk a public health crisis.

Following that study, there was continuing debate about whether the water source should be switched, with some additional studies indicating it should not, but with other individuals arguing that those studies were not reliable. After switching water sources, certain experts continued to warn about the dangers associated with the water from the Flint River. Almost immediately, plaintiffs and other Flint residents began to complain about the quality of the water. As time went on, there were more and more indications that the water was not safe, including various large public and private entities deciding to switch water sources, an outbreak of Legionnaires' disease, and medical testing indicating that children had increased levels of lead in their blood. While this evidence mounted, defendants' representatives continued to assure the public that the water was safe. Finally, defendants opted to change back to the previous water source.

I am not convinced that the studies and expert opinions plaintiffs cite in their complaint are sufficient to show that defendants' behavior was deliberately indifferent.[37] In any complex decision, there are many factors and alternatives that must be considered. This is especially true for major decisions like this one—

[37] Defendants moved for summary disposition regarding plaintiffs' claim of a substantive due-process right to bodily integrity under MCR 2.116(C)(7) and (8). For motions under MCR 2.116(C)(7), "[t]he contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Motions under MCR 2.116(C)(8) "test[] the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. Courts decide motions under MCR 2.116(C)(8) by considering only the pleadings. *Id*. at 119-120. A motion "may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' " *Id*. at 119, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

each option will likely present various risks and costs that must be weighed against the potential benefits. Weighing these factors is a difficult task. Though the evidence plaintiffs cite, viewed in isolation and with the benefit of hindsight, certainly provides some indications of the risks associated with switching Flint's water source, plaintiffs themselves also recount that former Governor Snyder testified that he was repeatedly assured by the Department of Environmental Quality that the water was safe. Plaintiffs have not alleged that there was uniform agreement or a broad consensus that using the Flint River as a water source would cause a serious public health crisis. While there were certainly more indications of serious water-quality problems as time went on, the initial studies and expert analyses were contradictory concerning the nature and extent of the water-quality problems and whether the problems could be corrected.[38] Defendants continued to gather information regarding the quality of the water and took that information into account when determining their course of action.[39] Defendants

[38] For example, the high incidence of Legionnaires' disease was, at first, only noted as having a "possible connection to [the] water supply." There was also disagreement among experts regarding the quality of the water. After Agent Miguel Del Toral of the Environmental Protection Agency (EPA) prepared a memorandum stating that there were high levels of lead, EPA Region 5 Director Dr. Susan Hedman told Mayor Dwayne Walling that "what he was given was a preliminary draft [of the memorandum] and that it would be premature to draw any conclusions based on that draft." Specifically regarding studies of blood lead levels in children, plaintiffs recount that though the Michigan Department of Health and Human Services had data showing elevated blood lead levels, others at the Childhood Lead Poisoning Prevention Program disputed that the water was the cause or that there even were elevated blood lead levels. In sum, despite the various signs that the water posed health risks, plaintiffs cite the Task Force Report, which recounts that there were "repeated assurances that the water was safe."

[39] As to gathering information, plaintiffs note that in January 2015, "[s]taff from Genesee County hospitals, [the Michigan Department of

then took steps to reduce the health risks, allocated funds to improve Flint's water quality, appointed a Flint Water Advisory Task Force, and ultimately reconnected to the Detroit water system.

While hindsight shows that defendants' decision to switch Flint's water source has had tragic consequences, I do not believe that plaintiffs have shown that defendants were deliberately indifferent in their decision to supply Flint residents with an alternative water source.[40] While defendants may have failed to perceive "a significant risk that [they] should have perceived," that does not constitute deliberate indifference.[41] Consequently, while it is clear that mistakes were made, I do not believe that plaintiffs have alleged actions on the part of defendants that surmount the high bar of conscience-shocking behavior.[42]

In sum, even if there were a substantive due-process right to bodily integrity, I do not believe that plaintiffs have alleged the facts necessary to show either that defendants interfered with a deeply rooted right or

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Health and Human Services (MDHHS)], [the Michigan Department of Environmental Quality (MDEQ)] and [the Genesee County Health Department (GCHD)] [met], and MDHHS Director Nick Lyon direct[ed] GCHD to conduct and complete its evaluation of the causes of the increased Legionellosis cases that had begun to occur in 2014." And on January 30, 2015, "Brad Wurfel/MDEQ e-mail[ed] Dave Murray, Governor Snyder's deputy press secretary, re: Legionella, saying said [sic] he didn't want MDEQ Director Wyant 'to say publicly that the water in Flint is safe until we get the results of some county health department traceback work on 42 cases of Legionellosis disease in Genesee County since last May.' "

[40] *Votta*, 600 F Appx at 18.

[41] *Farmer*, 511 US at 838.

[42] Judge McKeague reached the same conclusion regarding the plaintiffs' allegations in *Guertin*. *Guertin*, 912 F3d at 947 (McKeague, J., concurring in part and dissenting in part) ("[T]he conduct alleged fails to meet the 'high' conscience-shocking standard.").

that defendants' conduct was conscience-shocking.[43] I would reverse the Court of Appeals and grant defendants' motion for summary disposition regarding plaintiffs' substantive due-process claim alleging a violation of their right to bodily integrity.

II. THE AVAILABILITY OF A DAMAGES REMEDY UNDER *SMITH v DEPARTMENT OF PUBLIC HEALTH*[44]

Even if substantive due process did encompass a right not to be exposed to contaminated water, I would conclude that there is no damages remedy for such a constitutional violation. There are two reasons why I would reach this conclusion. First, even if *Smith v Dep't of Pub Health* applies, the factors Justice BOYLE lists in her partial concurrence weigh against creation of a claim for damages. Second, I have doubts about whether *Smith* was correctly decided and, in any event, whether it should be extended.

A. THERE IS NO DAMAGES REMEDY UNDER *SMITH*

As the lead opinion recognizes, in *Smith v Dep't of Pub Health*, the 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."[45] *Smith* consolidated two cases, *Smith v*

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[43] In light of my conclusion that plaintiffs failed to allege a claim for a violation of substantive due process because the right they assert is not deeply rooted in our nation's history and they have not alleged conscience-shocking conduct on behalf of defendants, I need not reach the issue whether defendants acted pursuant to a custom or policy.

[44] *Smith v Dep't of Pub Health*, 428 Mich 540; 410 NW2d 749 (1987).

[45] *Id*. at 544. *Smith* addressed several issues—namely, "(1) whether the state is a 'person' for purposes of a damage suit under 42 USC 1983; (2) whether a state official, sued in an official capacity, is a 'person' for purposes of a damage suit under 42 USC 1983; (3) whether there is an

Michigan[46] and *Will v Dep't of Civil Serv*.[47] In *Smith*, the plaintiff was living at a state orphanage when the superintendent of his school, mistakenly believing that the plaintiff had a mental disability, had him transferred to an institution for people with mental disabilities.[48] The plaintiff lived there for 38 years. He then filed a complaint claiming, in relevant part, that the Department of Health and Human Services had violated his due-process and equal-protection rights under the state Constitution by improperly committing him to the institution.[49] In *Will*, the plaintiff was a state employee who had sought to be promoted to a data systems analyst. He was rejected for the position when the defendant, the Department of State Police, learned of his brother's political activities.[50] The plaintiff sued, claiming that the defendant's refusal to promote him based on his brother's political activities violated his due-process rights.[51]

Smith was a fractured decision with four different opinions.[52] Justice BOYLE put forward the following

'intentional tort' exception to governmental immunity; and (4) whether a plaintiff may sue the state for damages for violations of the Michigan Constitution." *Id*. But I focus only on the latter issue and the related holding above.

[46] *Smith v Michigan*, 122 Mich App 340; 333 NW2d 50 (1983).

[47] *Will v Dep't of Civil Serv*, 145 Mich App 214; 377 NW2d 826 (1985).

[48] *Smith*, 428 Mich at 550 (opinion by BRICKLEY, J.).

[49] *Id*. at 551.

[50] *Id*. at 546.

[51] *Id*. at 547.

[52] Justice BRICKLEY, joined by Justice RILEY, "decline[d] to infer any right to sue the state for damages on the basis of violations" that the plaintiff in *Smith* alleged. *Id*. at 612-613 (opinion by BRICKLEY, J.). Justice BOYLE, joined by Justice CAVANAGH, concurred in part and dissented in part. Justice BOYLE said that she would remand the Court of Appeals decision in *Smith* to the Court of Claims for further

factors to determine whether courts should infer a damages remedy: (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.[53]

These factors weigh against inferring a damages remedy in this case. First, as explained above, I do not believe that there is a constitutional violation. However, even if there were a clear constitutional violation, the other factors weigh against the creation of a damages remedy. Second, as even the Court of Appeals majority noted, the degree of specificity in the constitutional protection weighs against an inferred damages remedy. As stated, plaintiffs bring a substantive

proceedings, namely, to determine whether the constitutional violation occurred by virtue of a governmental custom or policy and, if so, whether there would be a damages remedy for such a violation. *Id*. at 652 (BOYLE, J., concurring in part and dissenting in part). She proceeded to explain that "[w]e would recognize the propriety of an inferred damage remedy arising directly from violations of the Michigan Constitution in certain cases." *Id*. at 647. Justice ARCHER, joined by Justice LEVIN, dissented on other grounds not relevant to the purposes of this statement, but he agreed with Justice BOYLE's remand to the Court of Claims. *Id*. at 654-655 (ARCHER, J., dissenting). Justice LEVIN also agreed with Justice ARCHER and concurred in the remand. *Id*. at 652 (LEVIN, J., concurring). Justice GRIFFIN did not participate.

[53] See *id*. at 648-652 (BOYLE, J., concurring in part and dissenting in part). I point out that the Court of Appeals listed the final factors as " 'various other factors' militating for or against a judicially inferred damage remedy." *Mays*, 323 Mich App at 66. But Justice BOYLE instructed courts to consider "various other factors, dependent upon the specific facts and circumstances of a given case, [that] may militate against a judicially inferred damage remedy for violation of a specific constitutional provision." *Smith*, 428 Mich at 651 (BOYLE, J., concurring in part and dissenting in part).

due-process claim under Const 1963, art 1, § 17, our Constitution's parallel provision to the Fourteenth Amendment. But both Justice BRICKLEY and Justice BOYLE noted that Fourteenth Amendment violations are particularly unsuitable for courts to infer a cause of action for damages. Justice BRICKLEY counseled against creating a damages remedy for such a violation, remarking that "the Supreme Court has never extended the reasoning of *Bivens*[54] to violations of the Fourteenth Amendment, and, as Justice Harlan noted in his concurrence in *Bivens*, the appropriateness of money damages for other types of constitutionally protected interests might 'well vary with the nature of the personal interest asserted.' "[55] Justice BOYLE also noted: "Other concerns, such as the degree of specificity of the constitutional protection, should also be considered. For example, there was no question in *Bivens* . . . that the defendants had violated the warrant requirements of the Fourth Amendment. These search and seizure protections are, however, relatively clear-cut in comparison to the Due Process and Equal Protection Clauses."[56]

Third, nothing in the "text, history, and previous interpretations" indicates that there should be a damages remedy here.[57] If anything, that previous inter-

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[54] *Bivens v Six Unknown Fed Bureau of Narcotics Agents*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971).

[55] *Smith*, 428 Mich at 628 (opinion by BRICKLEY, J.). See also *id*. at 629-630 ("Therefore, the Supreme Court's hesitation to recognize a *Bivens*-style remedy for violations of the Fourteenth Amendment of the federal constitution suggests caution in recognizing such a novel theory of recovery in our jurisprudence.").

[56] *Id*. at 651 (BOYLE, J., concurring in part and dissenting in part).

[57] Regarding text, this Court and the Court of Appeals have declined to recognize an implied cause of action for damages for a violation of the Equal Protection Clause, Const 1963, art 1, § 2, based on the specific

pretations have noted there are few " 'guideposts for responsible decisionmaking' " in the realm of substantive due process indicates that courts should not infer a damages remedy.[58]

Fourth, I agree with the lead opinion that it is uncertain whether plaintiffs have alternative remedies at this point, and therefore, this factor is neutral. As Justice BERNSTEIN points out, the state defendants generally have both statutory immunity and Eleventh Amendment immunity. Though plaintiffs seek injunctive relief as well as compensatory and punitive damages against several of the named defendants in a related federal-court action, it is uncertain whether those remedies are available.[59] Moreover, the rights

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language of that provision. *Cremonte v Mich State Police*, 232 Mich App 240, 252; 591 NW2d 261 (1998) (determining that there is no such cause of action because the Equal Protection Clause, Const 1963, art 1, § 2, states that it shall be implemented by the Legislature); *Lewis v Michigan*, 464 Mich 781, 789; 629 NW2d 868 (2001) ("Given the language of the Michigan Constitution, we hold in this case that we are without proper authority to recognize a cause of action for money damages or other compensatory relief for past violations of Const 1963, art 1, § 2."). There is no such language in Const 1963, art 1, § 17.

Regarding history, our state's Constitution has guaranteed due process since the 1850 Constitution. Const 1908, art 2, § 16 ("No person shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty or property, without due process of law."); Const 1850, art 6, § 32 ("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."). When considering whether to add language guaranteeing that no " 'person be held to answer for a criminal offence unless on the presentment or indictment of a grand jury,' " Mr. S. Clark referred to the Due Process Clause, noting that the language came from the Magna Carta. *Report of the Proceedings and Debates in the Convention to Revise the Constitution of the State of Michigan, 1850* (Lansing: R W Ingals, 1850), pp 192-195. But this, of course, does not favor creating or not creating a damages remedy.

[58] *Sierb*, 456 Mich at 528, quoting *Collins*, 503 US at 125.

[59] Though I point out that in *In re Flint Water Cases*, 960 F3d 303, 325 (CA 6, 2020), a case involving some of the same plaintiffs here, the

and protections of the federal Safe Drinking Water Act (SDWA), 42 USC 300f *et seq*., and the Michigan Safe Drinking Water Act, MCL 325.1001 *et seq*., "are not . . . wholly congruent" with the constitutional rights and protections plaintiffs now allege.[60] Therefore, I agree that this factor is neutral, at least at this time.

Finally, I see no "various other factors," outside of those mentioned above, that militate against an inferred cause of action for damages.[61] In sum, the first,

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United States Court of Appeals for the Sixth Circuit has recently denied several defendants' motions to dismiss, including those of Darnell Earley and Jerry Ambrose, *id*. at 325, and former Governor Snyder, *id*. at 332. The Sixth Circuit also determined that Flint could not claim Eleventh Amendment immunity. However, the case is still at a relatively early stage, and the Sixth Circuit did not rule out that certain defendants might be immune in the future. See, e.g., *id*. at 324 ("Some judges of this court have even noted that, because the facts at this stage are yet undeveloped, 'it is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity. Although an officer's entitlement to qualified immunity is a threshold question to be resolved at the earliest possible point, that point is usually summary judgment and not dismissal under Rule 12.' "), quoting *Wesley v Campbell*, 779 F3d 421, 433-434 (CA 6, 2015). Thus, it appears that plaintiffs' federal case might provide an alternative remedy, which would weigh against the creation of a cause of action for damages in this case.

[60] See *Boler v Earley*, 865 F3d 391, 408-409 (CA 6, 2017) (noting that the SDWA protections are not " 'wholly congruent' " with the federal constitutional protections) (citation omitted).

[61] The Court of Appeals noted " 'the degree of outrageousness of the state actors' conduct as alleged by plaintiffs . . . .' " *Mays*, 323 Mich App at 72 (citation omitted). However, as stated above, I do not believe that Justice BOYLE opined that courts should take into account other factors weighing in *favor* of inferring a damages remedy. I recognize that Justice BOYLE's multifactor test is not binding. But even still, I do not believe that, for purposes of determining whether to infer a damages remedy, it is appropriate to consider the degree of outrageousness of the conduct plaintiffs allege. None of the other factors relates to the particular facts at issue; instead, the focus of the analysis is on the nature of the constitutional right at issue, whether it was clearly violated, whether there is any historical support for a damages remedy,

second, and third factors weigh against inferring a cause of action for damages, and the other factors are, at best, neutral. Considering all the above factors, I believe it is clear that courts should not infer a damages remedy for plaintiffs' claim of a violation of their right to bodily integrity under the Due Process Clause.

B. THE CONTINUING VIABILITY OF *SMITH*

While I would not recognize a claim for damages here for the reasons stated above, I would also be hesitant to do so in future cases, because I have serious doubts regarding whether *Smith* was correctly decided.[62] As previously explained, there are four opinions in *Smith*. Two of the opinions, Justice BRICKLEY's and Justice BOYLE's, explicitly rely on *Bivens*.[63] Four Justices—Justice BOYLE, Justice RILEY, Justice LEVIN, and Justice ARCHER—voted to remand *Smith v Michigan*[64] to the Court of Claims for that court to determine whether there would be a damages remedy for the constitutional violation.[65]

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and whether another remedy is available. Focusing on the egregiousness of the facts alleged would change the nature of the inquiry and lead to arbitrary outcomes.

[62] *Smith*, 428 Mich at 544.

[63] *Bivens*, 403 US 388.

[64] *Smith*, 122 Mich App 340.

[65] The plaintiff in *Will* had failed to preserve his claim, and the Court voted to reverse that portion of the Court of Appeals judgment that remanded *Will* to the Court of Claims for further proceedings regarding the liability of the Director of the State Police. *Smith*, 428 Mich at 544-545. Chief Justice MCCORMACK asserts that "it is not at all clear that the relevant holding of *Smith* is at all or exclusively based on *Bivens*." *Smith* is certainly an odd decision, since the Court's opinion was issued as a memorandum opinion consisting only of the issues presented, the Court's holdings, and its disposition of the case. Standing alone, that opinion would appear to lack any substantive legal effect because it

In *Bivens*, the United States Supreme Court considered "whether violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct."[66] The Court held that it did.[67] The petitioner in *Bivens* complained, in relevant part, that federal officers had violated the Fourth Amendment by searching his apartment without a warrant.[68] The respondents argued that the petitioner could only obtain monetary damages under state tort law. But the Court rejected this argument. First, the Court noted that the Fourth Amendment did not preclude only conduct that would be illegal under state law if done by private persons.[69] Second, "[t]he interests protected by state laws . . . , and those protected

violates Const 1963, art 6, § 6, which states that "[d]ecisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . . ." See *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012). However, I think it is clearly apparent from the separate opinions in *Smith* that the Court's holding was based on *Bivens*. Justice BRICKLEY's opinion, which was joined by Justice RILEY, discussed *Bivens* and its progeny at length, *Smith*, 428 Mich at 613-626 (opinion by BRICKLEY, J.), though it declined to recognize a damages remedy in either of the cases before the Court, *id*. at 626. Justice BOYLE's partial concurrence, which was joined by Justice CAVANAGH, also very clearly relied on *Bivens* to support the conclusion that damages were possible and that *Smith* should be remanded to determine whether such a remedy was proper. *Id*. at 645-648 (BOYLE, J., concurring in part and dissenting in part). In other words, four of the six justices explicitly considered *Bivens*. Though Justice ARCHER and Justice LEVIN wrote separate opinions, they concurred in Justice BOYLE's remand, *id*. at 652 (opinion by LEVIN, J.); *id*. at 658 (ARCHER, J., dissenting), and, presumably, her discussion of *Bivens* since the opinion did not provide any other rationale in support of Justice BOYLE's remand.

[66] *Bivens*, 403 US at 389.

[67] *Id*.

[68] *Id*.

[69] *Id*. at 392.

by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile."[70] Third, damages are considered an ordinary remedy, so allowing damages for a Fourth Amendment violation was "hardly . . . a surprising proposition."[71] In sum, the Court concluded that the petitioner had stated a cause of action and that he was "entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment."[72]

But *Bivens* was criticized from the outset as posing separation-of-powers concerns.[73] Justice Rehnquist

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[70] *Id*. at 394.

[71] *Id*. at 395.

[72] *Id*. at 397. Chief Justice MCCORMACK states that "[t]he Supreme Court has a long history of permitting suits for damages against rogue federal officers." However, the cases she cites are not examples of courts awarding damages for constitutional violations but rather involve common-law tort and statutory violations. Fallon, *Bidding Farewell to Constitutional Torts*, 107 Calif L Rev 933, 943 (2019) (discussing *Little v Barreme*, 6 US (2 Cranch) 170; 2 L Ed 243 (1804), and noting that "Barreme sought to recover by bringing a common law trespass action"); *Murray v Schooner Charming Betsy*, 6 US (2 Cranch) 64, 64-65; 2 L Ed 208 (1804) ("An American vessel . . . was not liable to seizure under the non-intercourse law of 27th of February 1800. If there was no reasonable ground of suspicion that she was a vessel trading contrary to that law, the commander of a *United States* ship of war, who seizes and sends her in, is liable for damages."). Indeed, it is undisputed that *Bivens* broke new ground in inferring causes of action for damages for constitutional violations. See *Bell v Hood*, 327 US 678, 684; 66 S Ct 773; 90 L Ed 939 (1946) (noting that the issue "whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments . . . has never been specifically decided by this Court"). And, not surprisingly, I am unaware of any binding precedent from our Court or the Court of Appeals implying a cause of action for damages for state constitutional violations prior to *Smith*.

[73] *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 solu-

strongly voiced these concerns regarding *Bivens* in his dissent in *Carlson v Green*:

> Although ordinarily this Court should exercise judicial restraint in attempting to attain a wise accommodation between liberty and order under the Constitution, to dispose of this case as if *Bivens* were rightly decided would in the words of Mr. Justice Frankfurter be to start with an "unreality." *Bivens* is a decision "by a closely divided court, unsupported by the confirmation of time," and, as a result of its weak precedential and doctrinal foundation, it cannot be viewed as a check on "the living process of striking a wise balance between liberty and order as new cases come here for adjudication."
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> In my view, it is "an exercise of power that the Constitution does not give us" for this Court to infer a private

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tion 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."); *id*. at 427-428 (Black, J., dissenting) ("There can be no doubt that Congress could create a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment. Although Congress has created such a federal cause of action against *state* officials acting under color of state law [in 42 USC 1983], it has never created such a cause of action against federal officials. If it wanted to do so, Congress could, of course, create a remedy against federal officials who violate the Fourth Amendment in the performance of their duties. But the point of this case and the fatal weakness in the Court's judgment is that neither Congress nor the State of New York has enacted legislation creating such a right of action. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us."); *id*. at 430 (Blackmun, J., dissenting) (referring to the majority opinion as "judicial legislation"). See also Chemerinsky, Federal Jurisdiction (7th ed), § 9.1.2, p 652 (discussing whether *Bivens* offends separation-of-powers principles). See generally Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L Rev 837, 865 (2009) ("Thus, legislative acts—enacting, amending, and repealing statutes—are those acts that alter the rights, duties, or responsibilities of those outside the legislature. When a branch other than Congress . . . legislates, that branch violates formalist separation of powers.").

> civil damages remedy from the Eighth Amendment or any other constitutional provision. The creation of such remedies is a task that is more appropriately viewed as falling within the legislative sphere of authority.
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> * * *
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> . . . [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. Just as there are some tasks that Congress may *not* impose on an Art. III court, there are others that an Art. III court may not simply seize for itself without congressional authorization.[74]

More recently, the United States Supreme Court has recognized these separation-of-powers concerns while noting that it is generally up to Congress to create a cause of action for a constitutional violation.

> When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is "who should decide" whether to provide for a damages remedy, Congress or the courts?
>
> The answer most often will be Congress. When an issue " 'involves a host of considerations that must be weighed and appraised,' " it should be committed to " 'those who write the laws' " rather than " 'those who interpret them.' "[75]

Moreover, when *Bivens* was decided, the United States Supreme Court was willing to create causes of

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[74] *Carlson v Green*, 446 US 14, 32, 34, 37; 100 S Ct 1468; 64 L Ed 2d 15 (1980) (Rehnquist, J., dissenting) (citations omitted).

[75] *Ziglar v Abbasi*, 582 US ___, ___; 137 S Ct 1843, 1857; 198 L Ed 2d 290 (2017) (citations omitted).

action in the statutory context. *Bivens* went further by allowing courts to create causes of action in the constitutional context. But in *Alexander v Sandoval*,[76] the Court definitively signaled that it would no longer create such causes of action in the statutory context, saying, "[P]rivate rights of action to enforce federal law must be created by Congress."[77] Justice Scalia, joined by Justice Thomas, explained the implications of this new refusal to create statutory causes of action for *Bivens*:

> *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. As the Court points out, we have abandoned that power to invent "implications" in the statutory field. There is even greater

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[76] *Alexander v Sandoval*, 532 US 275; 121 S Ct 1511; 149 L Ed 2d 517 (2001).

[77] *Id*. at 286. See also *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 496-497; 697 NW2d 871 (2005) ("Although the United States Supreme Court in the last century embraced a short-lived willingness to create remedies to enforce private rights, the Court 'abandoned' that approach to statutory remedies in *Cort v Ash*[, 422 US 66; 95 S Ct 2080; 45 L Ed 2d 26 (1975),] and '[has] not returned to it since.' ") (citations omitted); *Office Planning Group*, 472 Mich at 496-500 (explaining that *Cort* set forth a test for determining whether a court may imply a cause of action from a statute and stating that since "*Alexander*, the Court appears to have abandoned the *Cort* inquiry altogether in favor of a completely textual analysis in determining whether a private remedy exists under a particular statute"); *Hernandez v Mesa*, 589 US ___, ___; 140 S Ct 735, 750-751; 206 L Ed 2d 29 (2020) (Thomas, J., concurring) ("In the decade preceding *Bivens*, the Court believed that it had a duty 'to be alert to provide such remedies as are necessary to make effective' Congress' purposes in enacting a statute. Accordingly, the Court freely created implied private causes of action for damages under federal statutes. This misguided approach to implied causes of action in the statutory context formed the backdrop of the Court's decision in *Bivens*. . . . The Court, however, eventually corrected course. In the statutory context, the Court 're-treated from [its] previous willingness to imply a cause of action where Congress has not provided one.' ") (citations omitted).

> reason to abandon it in the constitutional field, since an "implication" imagined in the Constitution can presumably not even be repudiated by Congress.[78]

Perhaps because of its shaky grounding, the United States Supreme Court has only recognized a *Bivens*-style remedy in two cases—*Davis v Passman*[79] and *Carlson*.[80] The Court recently voiced its doubts regarding *Bivens* in *Hernandez v Mesa*,[81] stating as follows:

> 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*.[82]

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[78] *Correctional Servs Corp v Malesko*, 534 US 61, 75; 122 S Ct 515; 151 L Ed 2d 456 (2001) (Scalia, J., concurring) (citations omitted).

[79] *Davis v Passman*, 442 US 228; 99 S Ct 2264; 60 L Ed 2d 846 (1979).

[80] *Carlson*, 446 US 14. See also *Correctional Servs Corp*, 534 US at 70 ("In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally," i.e., *Carlson*, "or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct," i.e., *Davis*. "Where such circumstances are not present, we have consistently rejected invitations to extend *Bivens*, often for reasons that foreclose its extension here.").

Though lower federal courts have often refused to extend *Bivens*, see, e.g., *Turpin v Mailet*, 591 F2d 426, 427 (CA 2, 1979); *Arar v Ashcroft*, 585 F3d 559, 581 (CA 2, 2009); *De La Paz v Coy*, 786 F3d 367, 375 (CA 5, 2015); *Vanderklok v United States*, 868 F3d 189, 209 (CA 3, 2017); *Tun-Cos v Perrotte*, 922 F3d 514, 517-518 (CA 4, 2019), some lower federal courts have extended *Bivens*, see Chemerinsky, § 9.1.2, p 651 ("Lower federal courts have recognized *Bivens* suits for violations of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments.") (citations omitted).

[81] *Hernandez v Mesa*, 589 US ___; 140 S Ct 735; 206 L Ed 2d 29 (2020).

[82] *Id*. at 742-743 (citations omitted). See also *Ziglar*, 582 US at ___; 137 S Ct at 1857 ("Given the notable change in the Court's approach to

Relatedly, some justices have called for *Bivens* not to be extended in future cases. For example, Justice Scalia stated that he "would limit *Bivens* and its two follow-on cases ([*Davis*] and [*Carlson*]) to the precise circumstances that they involved."[83] Justice Thomas, joined by Justice Gorsuch, has gone even further and called for *Bivens* to be overturned:

> 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. *Stare decisis* provides no "veneer of respectability to our continued application of [these] demonstrably incorrect precedents." To ensure that we are not "perpetuat[ing] a usurpation of the legislative power," we should reevaluate our continued recognition of even a limited form of the *Bivens* doctrine.[84]

I agree with the persistent criticism of *Bivens*. In light of the United States Supreme Court's rejection of

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recognizing implied causes of action, however, the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity. This is in accord with the Court's observation that it has 'consistently refused to extend *Bivens* to any new context or new category of defendants.' Indeed, the Court has refused to do so for the past 30 years.") (citations omitted); *Ashcroft v Iqbal*, 556 US 662, 675; 129 S Ct 1937; 173 L Ed 2d 868 (2009) ("Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.' ") (citation omitted).

[83] *Correctional Servs Corp*, 534 US at 75 (Scalia, J., concurring). See also *Minneci v Pollard*, 565 US 118, 131; 132 S Ct 617; 181 L Ed 2d 606 (2012) (Scalia, J., concurring); *Wilkie v Robbins*, 551 US 537, 568; 127 S Ct 2588; 168 L Ed 2d 389 (2007) (Thomas, J., concurring) ("I write separately because I would not extend *Bivens* even if its reasoning logically applied to this case.").

[84] *Hernandez*, 589 US at ___; 140 S Ct at 750 (Thomas, J., concurring) (citations omitted).

implied causes of action in the statutory context, it makes little sense to continue implying them in the constitutional context. Doing so raises serious separation-of-powers concerns. Supporters of *Bivens* argue that its remedy is constitutionally required "in the sense that no other remedial scheme could possibly prevent the substantive constitutional requirements from becoming a 'mere form of words . . . .' "[85] However, I am skeptical that such a 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.[86] This power encompasses the power to create causes of action.[87] 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.[88]

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[85] Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv L Rev 1532, 1548-1549 (1972), quoting *Mapp v Ohio*, 367 US 643, 655; 81 S Ct 1684; 6 L Ed 2d 1081 (1961). See also Steinman, *Backing Off* Bivens *and the Ramifications of This Retreat for the Vindication of First Amendment Rights*, 83 Mich L Rev 269 (1984).

[86] US Const, art I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); Const 1963, art 4, § 1 ("Except to the extent limited or abrogated by article IV, section 6 or article V, section 2, the legislative power of the State of Michigan is vested in a senate and a house of representatives.").

[87] See *Mintz v Jacob*, 163 Mich 280, 283; 128 NW 211 (1910).

[88] Cooley, Constitutional Limitations (5th ed), pp 86-87 n 3 (" 'It is highly probable that inconveniences will result from following the Constitution as it is written. But that consideration can have no force with me. . . . I have never yielded to considerations of expediency in

The critiques of *Bivens* apply equally to *Smith*. By holding, as *Bivens* did, that courts may imply a cause of action for damages from violation of a constitutional provision, *Smith* poses the same separation-of-powers concerns that *Bivens* does. The United States Supreme Court's abandonment of implied causes of action in the statutory context has cast doubt on *Bivens*, which, in turn, undermines our reliance on that case in *Smith*.[89]

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expounding it [i.e., the fundamental law]. There is always some plausible reason for latitudinarian constructions . . . .' "), quoting *Oakley v Aspinwall*, 3 NY 547, 568 (1850).

In addition to the separation-of-powers concerns, I believe that there are practical problems with charging courts with deciding when to extend *Bivens* as well. As Justice Rehnquist explained:

> Because the judgments that must be made here involve many "competing policies, goals, and priorities" that are not well suited for evaluation by the Judicial Branch, in my view "[t]he task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States." [*Carlson*, 446 US at 36 (Rehnquist, J., dissenting) (citation omitted).]

[89] Like the United States Supreme Court, our Court has declined in recent decades to imply statutory causes of action. In *B F Farnell Co v Monahan*, 377 Mich 552, 555-556; 141 NW2d 58 (1966), this Court noted the " 'general rule' " that there would be a private cause of action under a statute: " 'where a statute imposes upon any person a specific duty for the protection or benefit of others, if he neglects or refuses to perform such duty, he is liable for any injury or detriment caused by such neglect or refusal, if such injury or hurt is of the kind which the statute was intended to prevent; nor is it necessary in such a case as this to declare upon or refer to the statute.' " (Citation omitted.) In *Pompey v Gen Motors Corp*, 385 Mich 537, 552; 189 NW2d 243 (1971), though the Court recognized "[t]he general rule . . . that where a new right is created or a new duty is imposed by statute, the remedy provided for enforcement of that right by the statute for its violation and nonperformance is exclusive," the Court noted "two important qualifications to this rule of statutory construction: In the absence of a pre-existent common law remedy, the statutory remedy is not deemed exclusive if such remedy is plainly inadequate, or unless a contrary intent clearly appears," *id*. at 552 n 14 (citations omitted). Later, the Court set forth a test to determine whether to create a new cause of action. *Gardner v*

Perhaps taking our cue from the United States Su-

Wood, 429 Mich 290, 302; 414 NW2d 706 (1987) ("In the interest of public policy, this Court has created a new cause of action to redress the violation of a penal statute and, pursuant to the following test, incorporated the statute as the specific standard of care: 'The court may adopt as the standard conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results.' ") (quotation marks and citation omitted).

However, the Court later disavowed *Pompey*'s two qualifications to the general rule that when a statute creates a new duty or a new right, the statutory remedy is exclusive. *Lash v Traverse City*, 479 Mich 180, 192 n 19; 735 NW2d 628 (2007) ("We need not address the dictum in the *Pompey* footnote that some quantum of additional remedy is permitted where a statutory remedy is 'plainly inadequate.' We do note that this principle, which has never since been cited in any majority opinion of this Court, appears inconsistent with subsequent caselaw."). Finally, though *Lash*, *id*. at 192-193, did cite the test from *Gardner*, 429 Mich at 302, to determine if the Court may create a new cause of action, only a week before *Lash* was issued, the Court issued *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518; 734 NW2d 533 (2007). In that case, the Court reaffirmed the more recent trend in our cases, which emphasizes that it is the Legislature's intent and the statutory language that control whether a party may pursue a particular remedy:

> "It is well settled that when a statute provides a remedy, a court should enforce the legislative remedy rather than one the court prefers." To determine whether a plaintiff may bring a cause of action for a specific remedy, this Court "must determine whether [the Legislature] intended to create such a cause of action." " ' "Where a statute gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only." ' " Accordingly, this Court has previously declined to establish a remedy that the Legislature has not provided. [*Id*. at 528-529, quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 66 n 5; 642 NW2d 663 (2002); *Office Planning Group*, 472 Mich at 496; *McClements v Ford Motor Co*, 473 Mich 373, 382; 702 NW2d 166 (2005), quoting *Monroe Beverage Co, Inc v Stroh Brewery Co*, 454 Mich 41, 45; 559 NW2d

preme Court,[90] our Court has never extended *Smith*, and the Court of Appeals has only done so in one other unpublished case.[91]

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297 (1997), in turn quoting *Lafayette Transfer & Storage Co v Pub Utilities Comm*, 287 Mich 488, 491; 283 NW 659 (1939).]

See also *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 225; 934 NW2d 713 (2019) (citing *Lash* for the conclusion that though the plaintiffs could not bring a cause of action for damages when the statute created a new right but did not provide an express cause of action, the plaintiffs could seek injunctive or declaratory relief).

[90] Chief Justice MCCORMACK argues that the fact that the United States Supreme Court now looks askance at *Bivens* should not lead us to question *Smith* because "we are separate sovereigns. We decide the meaning of the Michigan Constitution and do not take our cue from any other court, including the highest Court in the land." Of course, I agree that we are separate sovereigns and that we alone are tasked with interpreting our Constitution. However, it would hardly be a mark of our independence to continue to follow *Bivens*, which, although it has been cabined, remains the governing federal precedent.

[91] In *Jo-Dan, Ltd v Detroit Bd of Ed*, unpublished per curiam opinion of the Court of Appeals, issued July 14, 2000 (Docket No. 201406), p 16, the Court of Appeals held, "If the finder of fact in the trial court determines that a plaintiff sustained his, her, or its burden of proving that the defendant violated the fair and just treatment clause, the full panoply of remedies are available. Those remedies include, but are not limited to, monetary damages when 'appropriate' according to *Smith* . . . ." But there, the Detroit Board of Education did not argue that monetary damages were inappropriate. *Id*. at 16 n 13. And, of course, the decision is unpublished, and therefore it is not precedentially binding. MCR 7.215(C)(1).

The Court of Appeals has repeatedly noted *Smith*'s holding that there may be an implied cause of action for damages for state constitutional violations. In most cases, findings that there was no constitutional violation, or that the violation did not occur as a result of a custom or policy, have precluded the Court of Appeals from recognizing such a cause of action. See, e.g., *Champion's Auto Ferry, Inc v Pub Serv Comm*, 231 Mich App 699, 717; 588 NW2d 153 (1998) (citing *Smith* in support of the conclusion that "[i]f and when [the plaintiff] can establish that its authorized rates are in fact confiscatory, it may sue in the Court of Claims for just compensation on a theory of constitutional tort," but also stating that the plaintiff "ha[d] failed to establish that any . . . taking has occurred"); see also *Marlin v Detroit*, 177 Mich App 108; 441 NW2d 45 (1989); *Johnson v Wayne Co*, 213 Mich App 143; 540 NW2d 66 (1995);

For these reasons, I believe that like *Bivens*, *Smith*'s holding that there may be an implied claim for damages arising from a state constitutional violation raises serious separation-of-powers concerns. Additionally, given the United States Supreme Court's recent refusal to imply causes of action in the statutory context, *Bivens*'s holding that such causes of action may be implied in the constitutional context rests on shaky ground. Consequently, and particularly in light of our Court's similar trend, so does *Smith*'s. As a result, I question whether *Smith* was correctly decided on this point, and I would be willing to reconsider *Smith* in an appropriate future case. At a minimum, I believe that the Court should carefully weigh these points before extending *Smith* to any further constitutional violations.[92]

Carlton v Dep't of Corrections, 215 Mich App 490; 546 NW2d 671 (1996); *Jones v Powell*, 227 Mich App 662; 577 NW2d 130 (1998), aff'd 462 Mich 329 (2000); *Reid v Michigan*, 239 Mich App 621; 609 NW2d 215 (2000); *LM v Michigan*, 307 Mich App 685; 862 NW2d 246 (2014). Before *Smith* was decided, the Court of Appeals also relied on *Bivens* in *Kewin v Melvindale Northern Allen Park Pub Sch Bd of Ed*, 65 Mich App 472; 237 NW2d 514 (1975), in which it recognized a damages award for a violation of the Fourteenth Amendment. Though this decision is published, it was issued prior to November 1, 1990, so it is not precedential. MCR 7.215(J)(1).

Other states remain split on whether to recognize a *Bivens*-style remedy for state constitutional violations. See 74 Am Jur 2d, Torts (May 2020 update), § 44 (recounting that some states allow an implied cause of action for unconstitutional searches, while others do not). However, in recent years, state courts have recognized fewer *Bivens*-style remedies. 75 ALR5th 619 lists 25 cases in which an implied cause of action was recognized under an analogy to *Bivens* and 61 cases in which the cause of action was not recognized. Every case decided after 2000 declined to recognize a *Bivens*-style remedy.

[92] To be clear, limiting *Smith* to the due-process and equal-protection claims at issue in that case would mean declining to recognize a claim for monetary damages under Const 1963, art 1, § 11, our state Constitution's parallel provision to the Fourth Amendment, even though that would be similar to the type of claim recognized in *Bivens* itself.

III. CONCLUSION

I would reverse the Court of Appeals' ruling on plaintiffs' substantive due-process claim for a violation of bodily integrity and would instead grant summary disposition in favor of defendants. The right that plaintiffs claim—a right not to be exposed to contaminated water—is not deeply rooted in our nation's history and tradition, and plaintiffs have not alleged conduct on behalf of defendants that shocks the conscience. Even if plaintiffs had alleged a substantive due-process claim for a violation of bodily integrity, under *Smith* there would be no damages remedy. Moreover, I have serious doubts as to whether *Smith* was correct in holding that "[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases."[93] For this reason, I would be willing to reconsider *Smith* in an appropriate future case. At a minimum, I believe the Court should carefully weigh the above points before extending *Smith* to any further constitutional violations.

MARKMAN, J. (*dissenting*). In response to the Flint water crisis, plaintiffs filed this putative class-action lawsuit against former Governor Rick Snyder, the state of Michigan, the Michigan Department of Environmental Quality (MDEQ), the Michigan Department of Health and Human Services, and former Flint emergency managers Darnell Earley and Jerry Ambrose. The complaint alleged a violation of Const 1963, art 1, § 17 (substantive due-process right to bodily integrity) and a violation of Const 1963, art 10, § 2 (inverse condemnation). The state defendants and the former

[93] *Smith*, 428 Mich at 544.

emergency managers separately moved for summary disposition. The Court of Claims denied defendants' motions for summary disposition on those two claims, and in a published and split decision, the Court of Appeals affirmed. *Mays v Governor*, 323 Mich App 1; 916 NW2d 227 (2018). This Court subsequently granted leave to appeal, *Mays v Governor*, 503 Mich 1030 (2019), and heard oral argument on March 4, 2020. A majority of this Court now affirms the Court of Appeals' conclusion with regard to plaintiffs' inverse-condemnation claim but affirms only by equal division with regard to plaintiffs' violation-of-bodily-integrity claim. Because I conclude that plaintiffs failed to comply with MCL 600.6431(3), the notice provision of the Court of Claims Act, MCL 600.6401 *et seq*., I would reverse the Court of Appeals and remand to the Court of Claims for entry of an order disposing of all of plaintiffs' claims and dismissing the case.[1]

I. ANALYSIS

A. LEGAL BACKGROUND

MCL 600.6452 provides, in pertinent part:

> (1) Every claim against the state, cognizable by the court of claims, shall be forever barred unless the claim is filed with the clerk of the court or suit instituted thereon in federal court as authorized in section 6440, within 3 years after the claim first accrues.

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[1] Justice BERNSTEIN is certainly correct that what occurred to the people of Flint was appalling. But he is, with all respect, incorrect in his characterization of the instant analysis as "highly legalistic." Relevant law *requires* plaintiffs to "file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action," MCL 600.6431(3), and plaintiffs did not do this. Mine is a wholly legal, not a "legalistic," analysis.

(2) Except as modified by this section, the provisions of [Revised Judicature Act (RJA)] chapter 58, relative to the limitation of actions, shall also be applicable to the limitation prescribed in this section.

MCL 600.6431 provides, in pertinent part:

(1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

* * *

(3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

And MCL 600.5855 of the RJA, MCL 600.101 *et seq*., provides:

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Furthermore, MCL 600.5827 provides, in pertinent part, that "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." "The wrong is done when the plaintiff is harmed rather than when the defendant acted." *Boyle v Gen Motors Corp*, 468 Mich 226, 231 n 5; 661 NW2d 557 (2003). In other words, "the 'wrong' in MCL 600.5827 is the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which defendant breached his duty." *Frank v Linkner*, 500 Mich 133, 147; 894 NW2d 574 (2017) (quotation marks and citation omitted). "The relevant 'harms' for that purpose are the actionable harms alleged in plaintiff's cause of action." *Id*. at 150. "Additional damages resulting from the same harm do not reset the accrual date or give rise to a new cause of action." *Id*. at 155.

In *Trentadue*, 479 Mich at 391-392, this Court held that "courts may not employ an extrastatutory discovery rule to toll accrual in avoidance of the plain language of MCL 600.5827 . . . ." That is, *Trentadue* abrogated the common-law discovery rule, which had "allow[ed] tolling of the statutory period of limitations when a plaintiff could not have reasonably discovered the elements of a cause of action within the limitations period . . . ." *Id*. at 382. Therefore, in the absence of an applicable statutory discovery rule, an action accrues not when the plaintiff discovers the cause of action, but when the defendant's breach harmed the plaintiff. In other words, the period of limitations begins to run when a plaintiff suffers harm, not when a plaintiff first learns of that harm. *Trentadue* declined the plaintiff's request to make an "equitable" exception on her behalf, explaining:

> [I]f courts are free to cast aside a plain statute in the name of equity, even in such a tragic case as this, then

> immeasurable damage will be caused to the separation of powers mandated by our Constitution. Statutes lose their meaning if an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity. Significantly, such unrestrained use of equity also undermines consistency and predictability for plaintiffs and defendants alike. [*Id*. at 406-407 (quotation marks and citations omitted).]

In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 200, 213; 731 NW2d 41 (2007), this Court further held that failure to comply with the notice provision applicable to the defective-highway exception to governmental immunity gives rise to a bar to claims filed pursuant to the defective-highway exception, regardless of whether the governmental agency suffered actual prejudice, because this Court lacks the authority to incorporate an actual-prejudice requirement into the statute.

Similarly, in *McCahan v Brennan*, 492 Mich 730, 733; 822 NW2d 747 (2012), we held that the notice provision of the Court of Claims Act, MCL 600.6431, "must be interpreted and enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate." More specifically, we held that "when the Legislature conditions the ability to pursue a claim against the state on a plaintiff's having filed specific statutory notice, the courts may not engraft an 'actual prejudice' component onto the statute as a precondition to enforcing the legislative prohibition." *Id*. at 732-733. We further held that

> MCL 600.6431(1) details the notice requirements that must be met in order to pursue a claim against the state, including a general deadline of one year after accrual of the claim. MCL 600.6431(3) then modifies only the deadline requirement for a specific class of claims—those

> involving personal injury or property damage—replacing the one-year deadline with a six-month deadline. Thus, subsections (1) and (3) together provide that in all actions for personal injuries, "[n]o claim may be maintained against the state" unless the claimant files with the Clerk of the Court of Claims the required notice of intent to file a claim or the claim itself within six months. [*Id*. at 744-745.]

That is, "the only substantive change effectuated in subsection (3) is a reduction in the timing requirement for specifically designated cases." *Id*. at 741.

In *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 173; 931 NW2d 539 (2019), this Court held that under MCL 600.6431(3), "the 'happening of the event giving rise to the cause of action' for a claim seeking monetary relief is when the claim accrues . . . ." We also held that "there is no meaningful distinction between 'the happening of the event giving rise to [a] cause of action' seeking monetary relief under MCL 600.6431(3) and when such a claim accrues under MCL 600.5827." *Id*. at 184.[2]

In *Rusha v Dep't of Corrections*, 307 Mich App 300; 859 NW2d 735 (2014), the Court of Appeals rejected

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[2] This Court noted that "[b]ecause the issue is uncontested, we presume, without deciding, that the definition of 'accrual' in MCL 600.5827 applies equivalently to MCL 600.6431." *Id*. at 183 n 8. We also noted that even if we were to apply the common-law definition of "accrual," the outcome would not be any different. *Id*. "Under the common law, a claim generally accrues 'when all of the elements of the cause of action have occurred and can be alleged in a proper complaint.' " *Id*., quoting *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 150; 200 NW2d 70 (1972). Similarly, in the instant case, because the issue is uncontested, I presume, without deciding, that the definition of "accrual" in MCL 600.5827 applies equivalently to MCL 600.6431. In addition, as discussed in more detail later, application of the common-law definition of "accrual" would not alter my conclusion that plaintiffs' complaint was not timely filed.

the defendant's argument that MCL 600.6431 does not apply to constitutional torts. The Court of Appeals held that the Legislature possesses the authority to enact procedural rules governing constitutional claims as long as the rules do not place an undue burden on a constitutional right. *Id*. at 307-308. In other words, the rules cannot be "so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right." *Id*. at 311 (quotation marks and citation omitted). See also *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 125-126; 537 NW2d 596 (1995) ("The one-year limitation is not in the class of limitation periods that are 'so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right.' "), quoting *Forest v Parmalee*, 402 Mich 348, 359; 262 NW2d 653 (1978). The Court of Appeals held that MCL 600.6431 places a "reasonable, albeit minimal, burden on a plaintiff to advise the state of potential claims." *Rusha*, 307 Mich App at 313. This Court denied leave to appeal in *Rusha*. *Rusha v Dep't of Corrections*, 498 Mich 860 (2015).

B. TIMELINESS

Plaintiffs here failed to file a notice of intention to file a claim. They filed their complaint on January 21, 2016, and thus the event giving rise to the cause of action must have happened on or after July 21, 2015, in order for plaintiffs' action to have been filed in a timely manner. Accordingly, if the event giving rise to the cause of action was the switching of the water supply on April 25, 2014, plaintiffs' action is untimely.

The Court of Appeals held that "genuine issues of material fact still exist regarding whether plaintiffs satisfied the statutory notice requirements of MCL 600.6431." *Mays*, 323 Mich App at 25. It also held that "the harsh-and-unreasonable-consequences exception relieves plaintiffs from the statutory notice requirements and . . . the fraudulent-concealment exception of MCL 600.5855 may provide an alternative basis to affirm the court's denial of summary disposition." *Id*. I respectfully disagree with each of these conclusions.

1. ACCRUAL

In an action against the state for property damage or personal injuries, the "claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action." MCL 600.6431(3). This Court recently held that "there is no meaningful distinction between 'the happening of the event giving rise to [a] cause of action' seeking monetary relief under MCL 600.6431(3) and when such a claim accrues under MCL 600.5827." *Bauserman*, 503 Mich at 184.[3] A claim accrues under MCL 600.5827 "at the time the wrong upon which the

[3] The Court of Appeals opinion in the instant case preceded this Court's opinion in *Bauserman*. The Court of Appeals dissent concluded that the common-law definition of accrual was applicable, including the common-law discovery rule. *Mays*, 323 Mich App at 98 (RIORDAN, J., dissenting). Nevertheless, the dissent concluded that the action was not timely filed because plaintiffs knew or should have known of their cause of action significantly longer than six months before they filed this cause of action. *Id*. at 99. Assuming for the sake of argument that the common-law definition of accrual, including the common-law discovery rule, *does* apply here, I agree with the dissenting judge that the action was not timely filed because plaintiffs knew or should have known of their cause of action more than six months before they filed the cause of action, as will be discussed in greater detail later.

claim is based was done regardless of the time when damage results." "We have explained that the date of the 'wrong' referred to in MCL 600.5827 is the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which defendant breached his duty," *Bauserman*, 503 Mich at 183 (quotation marks and citation omitted), or the date on which the plaintiff discovered the harm, *Trentadue*, 479 Mich at 391-392. "The relevant 'harms' for that purpose are the actionable harms alleged in plaintiff's cause of action." *Frank*, 500 Mich at 150. "Additional damages resulting from the same harm do not reset the accrual date or give rise to a new cause of action." *Id*. at 155.

Accordingly, "we are called upon to 'determine the date on which plaintiffs first incurred the harms they assert' by looking to the 'actionable harms' alleged in plaintiffs' complaint." *Bauserman*, 503 Mich at 184-185, quoting *Frank*, 500 Mich at 150. Plaintiff's original complaint alleges the following:

- Plaintiffs "from April 25, 2014 to the present, have experienced and will continue to experience serious personal injury and property damage caused by Defendants' deliberately indifferent decision to expose them to the extreme toxicity of water pumped from the Flint River into their homes, schools, hospitals, correctional facilities, workplaces and public places."
- Defendants "deprived Plaintiffs of life, liberty and property without due process of law when they knowingly took from Plaintiffs safe drinking water and replaced it with what they knew to be a highly toxic alternative solely for fiscal purposes."
- Plaintiffs "since April 25, 2014, were and continue to be exposed to highly dangerous conditions created, caused and knowingly prolonged by Defen-

dants' deliberately indifferent and shocking decision to replace safe drinking water supplied by the City of Detroit's water system with extremely toxic water pumped from the Flint River[.]"

- "Within days after the switch, Defendant State, through its Defendant agencies, departments and/or officials, began receiving complaints from water users, including Plaintiffs and/or Plaintiff Class members, that the water was cloudy and foul in appearance, taste and odor."
- "By August, 2014, Flint water tested positive for *E. coli.* and several 'boil water' advisories were issued by the City of Flint through September, 2014."
- "During the next eight (8) months, Flint water users, including Plaintiffs and/or Plaintiff Class members, expressed their concerns about water quality in multiple ways, including letters, emails and telephone calls to Flint and MDEQ officials, the media and through well publicized demonstrations on the streets of Flint."
- "On January 20, 2015, citizen protests mounted fueled in part by encouragement from environmental activist Erin Brockovich and her associate, water expert Bob Bowcock."
- "On February 17, 2015, Flint water users staged public demonstrations demanding that Flint reconnect with Detroit."
- "This action is brought by the named Plaintiffs on behalf of individuals who from April 25, 2014 to present were exposed to toxic Flint water and experienced an injury to their person and/or property and/or who in the future will be so injured."

Plaintiffs' amended complaint alleges the following:

- "This constitutional tort class action is pursued on behalf of Flint water users and property owners from April 25, 2014 to the present, which include but are not limited to, tens of thousands of individuals and businesses, who have experienced and will continue to experience serious personal injury and property damage caused by Defendants' deliberately indifferent decision to expose them to the extreme toxicity of water pumped from the Flint River into their homes, schools, hospitals, businesses, correctional facilities, workplaces and public places . . . ."
- Plaintiffs "since April 25, 2014, were and continue to be injured in person and property because they were exposed to highly dangerous conditions created, caused and knowingly prolonged by Defendants' conduct . . . ."
- "In June 2014, citizen complaints about contaminated water continued without the State doing anything to address these complaints. Many Flint water users reported that the water was making them ill."
- "The Governor's office received citizen complaints and was well aware of numerous press stories about water quality problems as early as May 2014 and continuing throughout 2015."
- "On February 17, 2015, Flint water users staged public demonstrations demanding that Flint reconnect with [the Detroit Water and Sewerage Department]."

The actionable harm alleged in plaintiffs' two complaints consists of the exposure to the toxic water from the Flint River, which began on April 25, 2014. Simply

put, plaintiffs did not file a notice of intention to file a claim or the claim itself within six months of that date; therefore, their claim is barred by MCL 600.6431(3).

In an order in *Henry v Dow Chem Co*, 501 Mich 965, 965 (2018), this Court held that the action therein accrued when the dioxins reached the plaintiffs' property, not when the plaintiffs first became aware of the damage to their property nor when they became aware of the extent of the damage to their property. Our order was issued the day before the Court of Appeals issued its opinion in the instant case, in which the Court of Appeals cited its very decision in *Henry*, which this Court had just reversed. The Court of Appeals' holding in this case that "the date on which defendants acted to switch the water is not necessarily the date on which plaintiffs suffered the harm giving rise to their causes of action," *Mays*, 323 Mich App at 28, and the lead opinion's not dissimilar conclusion are both inconsistent with our holding in *Henry* that plaintiffs in that case were allegedly harmed once the dioxins reached their property. Just as the plaintiffs were allegedly harmed once the dioxins reached their property in *Henry*, plaintiffs in this case were allegedly harmed once the Flint River water reached their property.[4]

[4] The lead opinion concludes that *Henry* is distinguishable because plaintiffs in the instant case "do not allege that their claimed harms resulted *at the time* Flint's water source was switched." However, plaintiffs' original complaint alleges that plaintiffs "*from April 25, 2014* to the present, have experienced and will continue to experience serious personal injury and property damage caused by Defendants' deliberately indifferent decision to expose them to the extreme toxicity of water pumped from the Flint River into their homes, schools, hospitals, correctional facilities, workplaces and public places." (Emphasis added.) Similarly, plaintiffs' amended complaint alleges that plaintiffs "*since April 25, 2014*, were and continue to be injured in person and property because they were exposed to highly dangerous conditions created, caused and knowingly prolonged by Defendants' conduct . . . ." (Emphasis added.)

The lead opinion concludes that "questions of fact remain as to when plaintiffs suffered injury to person and property . . . ." However, plaintiffs' complaint and amended complaint very clearly allege that plaintiffs were harmed beginning on April 25, 2014, when they were first exposed to the contaminated water of the Flint River. Although plaintiffs claim that they *continued* over time to be harmed by such exposure, "[a]dditional damages resulting from the same harm do not reset the accrual date or give rise to a new cause of action." *Frank*, 500 Mich at 155. See also *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151; 200 NW2d 70 (1972) ("Once all of the elements of an action for personal injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run. Later damages may result, but they give rise to no new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred.").[5]

Plaintiffs rely on *Hart v Detroit*, 416 Mich 488; 331 NW2d 438 (1982), to argue in particular that their inverse-condemnation claim was timely filed. *Hart* held:

> The time of "taking" in an inverse condemnation action is not necessarily coincidental with the time plaintiff's cause of action accrues. . . . It is common for such actions to involve a continuous wrong by the condemnor rather than a single act. In an inverse condemnation action such

[5] The lead opinion states that "[p]laintiffs have also alleged injuries that might include plaintiffs who suffered in vitro exposure to toxic water" and therefore "[i]t would simply be illogical to foreclose a plaintiff's suit if the plaintiff had been exposed to the Flint water in the womb and thus suffered harm but had not yet been born as of April 2014." However, plaintiffs' complaints do not say anything at all concerning in vitro exposure to toxic water; therefore, that issue is simply not before this Court.

> as the present one, in which plaintiffs claim a continuous wrong by the condemnor, it is well-settled that the statute of limitations does not begin to run until the consequences of the condemnor's actions have stabilized. [*Id*. at 503-504.]

However, *Hart* is no longer good law because this Court in *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263; 696 NW2d 646 (2005), later abolished the "continuing violations" doctrine because it was inconsistent with the language of the statute of limitations. As this Court explained:

> [T]he statute simply states that a plaintiff "shall not" bring a claim for injuries outside the limitations period. Nothing in these provisions permits a plaintiff to recover for injuries outside the limitations period when they are susceptible to being characterized as "continuing violations." To allow recovery for such claims is simply to extend the limitations period beyond that which was expressly established by the Legislature. [*Id*. at 282.]

The same proposition is true here. MCL 600.6431 provides that "[n]o claim may be maintained against the state . . . for property damage or personal injuries [unless the] claimant . . . file[s] with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action."[6] As

[6] The lead opinion is correct that *Hart* involved an inverse-condemnation claim, while *Garg* involved a discrimination claim. However, the issue in both those cases was essentially the same: whether the statute of limitations permits a plaintiff to recover for injuries suffered outside the limitations period where those injuries are susceptible to being characterized as "continuing violations." *Garg*, the later-in-time decision, answered that question in the negative, and I see no logical reason why its reasoning would not apply in other contexts, including, in particular, in the context of an inverse-condemnation claim. Although this Court did not expressly overrule *Hart* in *Garg*, I do not see how the reasoning of *Hart* conceivably could survive the reasoning of *Garg*.

discussed earlier, the event giving rise to the cause of action at issue here was the exposure to the toxic water, which initially occurred on April 25, 2014.[7] Plaintiffs did not file a notice of intention to file a claim or the claim itself within six months of April 25, 2014,

[7] Although *Henry* did not involve an inverse-condemnation claim, it did involve a similar claim of contamination that allegedly resulted in a diminution of property value. And this Court held that the claim accrued when the dioxin reached the plaintiffs' property, "regardless of whether it was possible at that time to calculate the level of monetary damage." *Henry v Dow Chem Co,* 319 Mich App 704, 736; 905 NW2d 422 (2017) (GADOLA, P.J., dissenting); *Henry*, 501 Mich at 965 (reversing part of the opinion of the Court of Appeals "for the reasons stated in the Court of Appeals dissenting opinion").

The lead opinion concludes that "[t]he economic damage plaintiffs allege from the diminution of their properties' value could not have occurred on the date the water source was switched." Instead, it asserts, "[p]laintiffs' property diminished in value at a later date, yet to be determined, when a buyer or bank had the requisite information to be disinclined to buy or finance the purchase of property in Flint." But this Court rejected a similar argument in *Henry* when it adopted Judge GADOLA's dissent. In *Henry*, the Court of Appeals held that the plaintiffs' action did not accrue until the MDEQ revealed to the public that elevated dioxin concentrations were pervasive in the Tittabawassee river floodplain and restricted the property owners' rights to use their property. Judge GADOLA concluded that the plaintiffs' action accrued when the dioxins reached the plaintiffs' property, explaining that "[i]t may be true that the value of plaintiffs' property changed when the MDEQ published its 2002 bulletin, but plaintiffs' discovery in 2002 that their damages were greater than originally supposed when the dioxin was deposited on their properties, possibly as early as the 1970s, did not create a new accrual date for plaintiffs' claims. Such reasoning overlooks the clear directive of MCL 600.5827 that 'the claim accrues at the time the wrong upon which the claim is based was done *regardless of the time when damage results*.' (Emphasis added.)" *Henry*, 319 Mich App at 735 (GADOLA, P.J., dissenting). As already noted, this Court reversed the Court of Appeals in *Henry* "for the reasons stated in the Court of Appeals dissenting opinion." *Henry*, 501 Mich at 965. As a result, pursuant to *Henry*, plaintiffs' action here accrued when the Flint River water reached plaintiffs' property, without regard to when "a buyer or bank had the requisite information to be disinclined to buy or finance the purchase of property in Flint."

and therefore their claims are barred. Once again, "[a]dditional damages resulting from the same harm do not reset the accrual date or give rise to a new cause of action." *Frank*, 500 Mich at 155.[8]

2. HARSH & UNREASONABLE CONSEQUENCES

The Court of Appeals also held that "the harsh-and-unreasonable-consequences exception relieves plain-

[8] Moreover, I question whether plaintiffs have even adequately alleged a claim of inverse condemnation. "The right to just compensation, in the context of an inverse condemnation suit for diminution in value . . . , exists only where the landowner can allege a unique or special injury, that is, an injury that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated." *Spiek v Dep't of Transp*, 456 Mich 331, 348; 572 NW2d 201 (1998). As we have explained:

> 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 . . . . Only where the harm is peculiar or unique in this context does the judicial remedy become appropriate. [*Id*. at 349.]

Concerning the meaning of "similarly situated," the lead opinion is correct that *Spiek* compared the plaintiffs to other persons who "reside near *a* public highway," rather than the specific highway that the plaintiffs resided near. *Id*. at 350 (emphasis added). However, in discussing this requirement in general, *Spiek* expressly indicated that a plaintiff's alleged damage must not be "common to all property in the neighborhood" or "common [to] all lands in the vicinity." *Id*. at 346, 348 n 14 (quotation marks and citation omitted). In addition, contrary to the approach of the majority, this Court in *Hill v State Hwy Comm*, 382 Mich 398; 170 NW2d 18 (1969), compared the plaintiffs in that case with those whose property was also affected by the specific construction at issue. See *id*. at 404 ("[P]laintiffs make no showing that they are differently treated from other members of the traveling public or property owners whose use of these streets has been restricted by the construction of the limited access expressway."). Accordingly, I question whether the majority is correct in holding that the pertinent inquiry is whether plaintiffs are similarly situated to municipal water users generally rather than with other Flint water users.

Assuming that the latter defines the pertinent inquiry, plaintiffs have not alleged that they have suffered a unique or special injury that

tiffs from the statutory notice requirements," *Mays*, 323 Mich App at 25, and Justice BERNSTEIN agrees.[9]

is any different in kind from the harm suffered by all persons similarly situated. Indeed, plaintiffs claim to represent all the Flint water users that suffered personal injuries and property damage from the water. That is, plaintiffs claim to represent all persons similarly situated. Therefore, arguably by *definition*, plaintiffs have not alleged an injury that is any different in kind from those suffered by all persons similarly situated. Because the harm that plaintiffs alleged is shared in common by many members of the public, the appropriate remedy arguably lies with the legislative branch and the regulatory bodies created thereby. That is, it is not necessarily that there is no remedy available to persons injured but that the remedy is more properly fashioned by a different agency of government. However, given that I conclude that plaintiffs here failed to comply with the notice provision of the Court of Claims Act, it is unnecessary for me to decide whether plaintiffs have adequately alleged a claim of inverse condemnation. Similarly, it is unnecessary for me to address the merits of plaintiffs' substantive due-process claim, so I will merely observe that I find Justice VIVIANO's opinion to be highly estimable and share a good many of his concerns.

[9] The Court of Claims also relied on the harsh-and-unreasonable-consequences exception to deny defendants' motions for summary disposition. The Court of Appeals dissent concluded that the harsh-and-unreasonable-consequences exception was abrogated by *McCahan* and *Rowland* because in those cases this Court held that no judicially created savings construction is permitted to avoid a clear statutory mandate. However, those cases involved statutory claims, and we held that because the Legislature could completely abolish those claims, it could obviously place restrictions on such claims. The instant case involves constitutional claims that the Legislature lacks the authority to completely abolish (at least with regard to inverse condemnation), and this Court has long held that the Legislature cannot enact limitation periods that "are so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right." *Forest*, 402 Mich at 359. For example, the Legislature could not enact a statute that requires a claimant to file a takings action within one day of the alleged taking. The Court of Appeals dissent also concluded that application of the notice provision would not be harsh or unreasonable given that plaintiffs had numerous indications that they were suffering harm within six months of the water-source switch and so could have reasonably filed their notice of intent in a timely fashion. I fully agree with this conclusion.

However, that conclusion is simply inconsistent with the Court of Appeals' decision in *Rusha*, 307 Mich App at 310, that the "six-month filing deadline" is a "minimal imposition, especially considering that § 6431 allows the filing of statutory notice in lieu of filing an entire claim." MCL 600.6431(3) "merely . . . place[s] a reasonable, albeit minimal, burden on a plaintiff to advise the state of potential claims." *Id*. at 313. Therefore, "the statutory notice requirement of § 6431(3) is reasonable and [does] not . . . deprive [a] plaintiff of any substantive, constitutional right." *Id*. Requiring parties who wish to sue the state for alleged constitutional violations to file a notice of intention to file a claim within six months following the happening of the event giving rise to the cause of action does not place an undue burden on such parties. They do not have to actually file a complaint within six months but simply have to file a *notice* of an intention to file a claim. As the Court of Appeals itself recognized, "[A] claimant requires only minimal information to file a notice of intent and . . . the knowledge required distinguishes a notice of intent from a legal complaint." *Mays*, 323 Mich App at 42 n 10. And once a claimant files a notice of intent, the claimant has three years after the claim has accrued to file a complaint. MCL 600.6452(1).

With regard to this particular case, it would not have been at all difficult for plaintiffs to comply with the six-month notice provision because, based on their *own* complaints, it is clear that plaintiffs were well aware of their possible cause of action within six months of the event giving rise to their cause of action. As discussed earlier, this event was the actual exposure to the toxic water, which began on April 25, 2014. Within days after this event, plaintiffs complained that the water was cloudy and foul in appearance, taste, and odor. By May 2014, there had been numerous press accounts about the water-quality problems in

Flint. By June 2014, many Flint water users reported that the water was making them ill. And by August 2014, several boil-water advisories had been issued. Plaintiffs had been presented with numerous indications that they were suffering harm within six months of the water-source switch and so could have easily filed their notice of intent in a timely manner.

Moreover, plaintiffs were certainly well aware of their possible cause of action more than six months before they filed suit on January 21, 2016, given that on January 20, 2015, citizen protests mounted about the water and on February 17, 2015, there were public demonstrations demanding that Flint reconnect with the Detroit Water and Sewerage Department. Indeed, plaintiff Melissa Mays actually filed two complaints based on the very same set of facts as in the instant case—one in Genesee Circuit Court on June 5, 2015, and the other in the United States District Court for the Eastern District of Michigan on July 6, 2015—well before the instant complaint was filed. Plaintiffs did not even file their complaint in the instant case within six months of filing those complaints.

For these reasons, I conclude that the harsh-and-unreasonable-consequences exception does not relieve plaintiffs from the statutory notice requirements.

3. FRAUDULENT CONCEALMENT

The Court of Appeals also held that "the fraudulent-concealment exception of MCL 600.5855 may provide an alternative basis to affirm the court's denial of [defendants' motions for] summary disposition," *Mays*, 323 Mich App at 25, and Justice BERNSTEIN agrees.[10]

[10] The Court of Claims rejected plaintiffs' argument that the fraudulent-concealment statute should be applied in this case. The Court of Appeals dissent also concluded that the fraudulent-concealment statute does not apply.

Again, I respectfully disagree. The fraudulent-concealment statute only constitutes an exception to *statutes of limitations* and does not constitute an exception to the statutory notice provision at issue here.[11] The fraudulent-concealment statute itself asserts that it allows an action to be brought under certain circumstances "although the action would otherwise be barred by the period of limitations," MCL 600.5855; it does not state that an action can be brought although the action would otherwise be barred by the statutory notice provision. Therefore, the fraudulent-concealment statute simply does not pertain in the present context. See *Zelek v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued October 16, 2012 (Docket No. 305191), p 2 ("The Court of Claims notice provision has no effect on the limitation period and is not subject to the tolling provisions of MCL 600.5855."); *Brewer v Central Mich Univ Bd of Trustees*, unpublished per curiam opinion of the Court of Appeals, issued November 21, 2013 (Docket No. 312374), p 2 ("[P]laintiff's arguments are premised on exceptions to the statute of limitations. . . . Yet, the notice requirement of MCL 600.6431(3) is not a statute of limitations, a savings provision, or a tolling provision. Instead, it is a condition precedent to sue the state.") (quotation marks and citation omitted).

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[11] The fraudulent-concealment statute, MCL 600.5855, provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

This is further evidenced by the fact that the Legislature incorporated the fraudulent-concealment exception into the statute-of-limitations provision of the Court of Claims Act, but not into its statutory notice provision. MCL 600.6452(1) of the Court of Claims Act provides that the statute of limitations is three years in an action against the state. MCL 600.6452(2) of the Court of Claims Act provides that "[e]xcept as modified by this section, the provisions of RJA chapter 58, relative to the limitation of actions, shall also be applicable to the limitation prescribed in this section." The fraudulent-concealment statute, MCL 600.5855, is a "provision[] of RJA chapter 58, relative to the limitation of actions," and thus is applicable to the statute-of-limitations provision of the Court of Claims Act. On the other hand, the statutory notice provision of the Court of Claims Act does not similarly incorporate the fraudulent-concealment statute. Given that the Legislature chose to incorporate the fraudulent-concealment statute into the statute of limitations but not into the statutory notice provision, we should presume absent evidence to the contrary that this was purposeful and should not summarily incorporate the fraudulent-concealment statute where it has not been placed by the lawmaking body of our state government.[12]

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[12] Justice BERNSTEIN recognizes that "[t]he Legislature did not create a fraudulent-concealment exception for the statutory *notice* provision in the [Court of Claims Act]." Yet, he reads such an exception into the statutory notice provision of the Court of Claims Act because its absence there is "not reconcilable with the Legislature's intent to provide claimants with two years from the date of discovery to bring suit for harm that was fraudulently concealed, as expressed in MCL 600.6452(2)." However, this is simply inconsistent with the plainest expression of the Legislature's actual intention, i.e., the law enacted. See *Mayor of Lansing v Pub Serv Comm*, 470 Mich 154, 161; 680 NW2d 840 (2004).

Furthermore, even assuming that the fraudulent-concealment statute *does* apply to MCL 600.6431(3), for the same reasons that I conclude that the harsh-and-unreasonable-consequences exception does not relieve plaintiffs from the statutory notice requirements, I conclude that the fraudulent-concealment statute also does not relieve plaintiffs from the statutory notice requirements—namely, it is clear that plaintiffs were well aware of their possible cause of action well within six months of the event giving rise to their cause of action and thus the existence of their cause of action was not fraudulently concealed from them. Once again, they could have easily filed the required notice of intent within six months of the event giving rise to their cause of action.

For these reasons, I conclude that the fraudulent-concealment exception of MCL 600.5855 does not provide a basis to affirm the trial court's denial of summary disposition.

II. CONCLUSION

Because plaintiffs did not file a notice of intent to file a claim or the claim itself within six months following the happening of the event giving rise to the cause of

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Justice BERNSTEIN also asserts that failing to read a fraudulent-concealment exception into the statutory notice provision "would result in reading out MCL 600.6452(2) entirely, because plaintiffs would never be able to utilize the fraudulent-concealment exception." I respectfully disagree. MCL 600.6452(2) does more than incorporate the fraudulent-concealment statute into the statute-of-limitations provision of the Court of Claims Act; rather, it incorporates *all* the "provisions of RJA chapter 58, relative to the limitation of actions" into the statute-of-limitations provision of the Court of Claims Act. Therefore, failing to read a fraudulent-concealment exception into the statutory notice provision of the Court of Claims Act would not "entirely" result in reading out MCL 600.6452(2).

action, this Court should reverse the Court of Appeals and remand this case to the Court of Claims for it to enter an order granting defendants' motions for summary disposition.

ZAHRA, J., concurred with MARKMAN, J.

Justice CLEMENT did not participate because of her prior involvement as chief legal counsel for Governor Rick Snyder.

MEEMIC INSURANCE COMPANY v FORTSON

Docket No. 158302. Argued November 6, 2019 (Calendar No. 2). Decided July 29, 2020.

Meemic Insurance Company brought an action in the Berrien Circuit Court against Louise M. Fortson and Richard A. Fortson, individually and as conservator of their son, Justin Fortson, alleging that Richard and Louise had fraudulently obtained payment for attendant-care services they did not provide to Justin. Richard and Louise were named insureds on a no-fault insurance policy issued by Meemic. Justin was considered an insured person under the policy because he was a "resident relative" as defined by the policy and because under MCL 500.3114(1) of the no-fault act, MCL 500.3101 *et seq*., he was a relative domiciled in the same house as a named insured. The policy contained an antifraud provision stating that the policy was void if any insured person intentionally concealed or misrepresented any material fact or circumstance relating to the insurance, the application for it, or any claim made under it. In 2009, Justin was injured when he fell from the hood of a motor vehicle, necessitating constant supervision and long-term care. Richard and Louise opted to provide attendant care to Justin in their home on a full-time basis. Justin received benefits under his parents' no-fault policy with Meemic, and from 2009 until 2014, Louise submitted payment requests to Meemic for the attendant-care services she and her husband provided, asserting that they provided full-time supervision; Meemic routinely paid the benefits. In 2013, Meemic investigated Richard and Louise's supervision of Justin and discovered that they had not provided him with daily direct supervision; in fact, Justin had been periodically jailed for traffic and drug offenses and had spent time at an inpatient substance-abuse rehabilitation facility at times when Richard and Louise stated they were providing full-time supervision. Meemic terminated Justin's no-fault benefits and filed suit, asserting claims of breach of contract, fraud, common-law statutory conversion, and unjust enrichment. Meemic alleged that Louise and Richard had fraudulently represented the attendant-care services they claimed to have provided and sought to void the policy under its contractual antifraud provision,

terminate any future liability for benefits, and require Louise and Richard to reimburse Meemic for the fraudulent attendant-care statements. Louise and Richard counterclaimed, arguing that Meemic breached the insurance contract by terminating Justin's benefits and refusing to pay for attendant-care services. Meemic moved for summary disposition, and the court, John M. Donahue, J., initially denied the motion, reasoning that under the innocent-third-party rule, Meemic could not rescind the policy on the basis of fraud to avoid liability for benefits owed to Justin, an innocent third party. Meemic moved for reconsideration of that decision after the Court of Appeals later concluded in *Bazzi v Sentinel Ins Co*, 315 Mich App 763 (2016),[1] that the innocent-third-party rule was no longer good law. On reconsideration, the trial court granted summary disposition in favor of Meemic. Louise and Richard appealed. The Court of Appeals, MARKEY, P.J., and M. J. KELLY, J. (CAMERON, J., dissenting), reversed, first reasoning that *Bazzi* did not apply because the fraud in this case did not occur in the procurement of the policy and did not affect the validity of the contract. The Court concluded, however, that the policy's anti-fraud provision was invalid because it would enable Meemic to avoid the payment of personal protection insurance (PIP) benefits mandated by MCL 500.3105. Judge CAMERON, dissenting, would have affirmed the trial court's grant of summary disposition to Meemic because the policy permitted rescission on the basis of fraud and fraud had occurred. 324 Mich App 467 (2018). The Supreme Court granted Meemic's application for leave to appeal. 503 Mich 1031 (2019).

In an opinion by Justice VIVIANO, joined by Chief Justice MCCORMACK and Justices MARKMAN, BERNSTEIN, and CAVANAGH, the Supreme Court *held*:

A no-fault insurance policy may contain contractual defenses to benefits mandated by the no-fault act if the defense is provided by the act or the contractual defense is based on a common-law defense that has not been abrogated by the act; a policy provision may not go beyond either statutory or common-law defenses to limit mandatory coverages to a greater extent than either the act or the common law. Meemic did not assert one of the statutory defenses allowed by the no-fault act, and the contract-based fraud defense was not the type of common-law fraud defense that would allow for rescission, the remedy most analogous to that sought under the antifraud provision. Accordingly, the antifraud provision was unenforceable.

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[1] Aff'd in part and rev'd in part 502 Mich 390 (2018).

1. With regard to motor vehicle insurance policies, the no-fault act governs the coverages that are mandated by the act. Because MCL 500.3105 provides that PIP benefits are mandatory, the act controls any questions regarding the award of those benefits. In contrast, coverages that are not required by the no-fault act (that is, optional coverages) are controlled by the language of the insurance policy. With regard to optional coverage, a court must construe and apply unambiguous contract provisions as written unless the provision violates a law or one of the traditional defenses to the enforceability of a contract applies; that is, unambiguous insurance policies are not open to judicial construction and must be enforced according to their unambiguous terms unless doing so would violate law or public policy. Common-law defenses that have not been abrogated by the no-fault act are available against claims for coverage mandated by the act. Accordingly, a contractual defense to mandatory benefits under the no-fault act is valid and enforceable when the defense is provided by the act itself or when the contractual defense is based on a common-law defense that has not been abrogated by the act; thus, an insurer may include common-law defenses that have not been abrogated by the act in an insurance policy. However, an insurance policy may not go beyond either statutory or common-law defenses to limit mandatory coverage to a greater extent than either the act or the common law; to hold otherwise would improperly reduce the scope of mandatory coverage required by the no-fault act. Therefore, a provision in an insurance policy that purports to set forth a defense to a claim for mandatory coverage is valid and enforceable only to the extent it contains a defense available under the no-fault act or a common-law defense that has not been abrogated.

2. If a contract is obtained as a result of fraud or misrepresentation, a party may be entitled to a legal or equitable remedy. At common law, the defrauded party could only seek to rescind the contract, that is, avoid the transaction, if the fraud related to the inducement or inception of the contract. While a contractual provision that rescinds a contract because of postprocurement fraud is not invalid in all circumstances—specifically, the clause would be valid as applied to a party's failure to perform a substantial part of the contract or one of its essential terms—in general, the mere breach of a contract would not entitle the injured party to avoid the contract at common law.

3. In this case, because Meemic did not assert one of the statutory defenses allowed by the no-fault act, the question was whether its contract defense, the antifraud provision, provided

for relief that would have been available under an unabrogated common-law defense; the now-abrogated innocent-third-party rule was, therefore, not relevant with regard to resolving the case. The antifraud provision provided that Meemic could terminate benefit payments to Justin on the basis of the fraudulent activity of anyone who happened to be in or out of the car and entitled to claim under the policy, and the activity could occur years after the policy was entered and relate to any claim or simply to the insurance. The common-law remedy of rescission was the closest analogue to Meemic's contract-based defense. Applying the law of rescission, the allegedly fraudulent claims did not induce Meemic to enter into the policy or deceive Meemic as to the policy's content, and there was no argument or evidence that Richard and Louise's misrepresentations regarding attendant care constituted a failure to perform a substantial part of the contract or an essential term such that Meemic could have sought rescission instead of bringing an action for damages. Meemic's contract-based fraud defense thus failed because it was not the type of common-law fraud defense that would allow for rescission, and the contract-based defense was, therefore, unenforceable. The concurrence's reliance on MCL 500.3220 is misplaced because (1) Meemic did not seek to cancel the policy under that statute and the statute did not apply to the facts of the case, (2) Meemic did not seek to cancel the policy but, instead, to void coverage and stop paying Justin's PIP benefits, and (3) MCL 500.3220 does not abrogate common-law rescission in the context of this case. The concurrence's theory also directly conflicts with *Titan Ins Co v Hyten*, 491 Mich 547 (2012), which rejected the assertion that MCL 500.3220 abrogated the common-law defense of rescission. And the concurrence's analysis does not consider *Bazzi v Sentinel Ins Co*, 502 Mich 390 (2018), and *Marquis Hartford Accident & Indemnity (After Remand)*, 444 Mich 638 (1994), which held that fraud and other common-law defenses have not been abrogated by the no-fault act. In addition, the concurrence also misreads 500.3148(2) and offers no support of its apparent inference that the provision's lack of express permission to void the policy constitutes an affirmative prohibition on voiding policies based on fraud.

Court of Appeals judgment affirmed in result only, Court of Appeals opinion vacated, and case remanded to the trial court for further proceedings.

Justice ZAHRA, joined by Justice CLEMENT, concurring, agreed with the majority that the antifraud provision was unenforceable in this case but wrote separately to express disagreement with

the majority's analysis, specifically, with its conclusion that the state's common law had to be analyzed to arrive at the same result. The majority improperly suggests that Michigan's common law and the no-fault act are the only authorities that may be employed to determine the validity of a provision in a no-fault policy. Instead, the approach set forth in *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588 (2002)—that no-fault policy provisions are allowed if they facilitate the goals of the act and are harmonious with the Legislature's no-fault insurance regime—is the correct framework to address the issue in this case and should be reaffirmed. MCL 500.3220 limits the ability of a licensed insurer to cancel automobile coverage after a policy has been in effect for at least 55 days. Because Meemic did not do so, the statute plainly prohibited Meemic from thereafter canceling the policy, including by operation of the antifraud provision. The no-fault act also grants insurers a limited right to challenge claims for PIP benefits because they must only pay those claims that are reasonably necessary; by definition, fraudulent charges are neither reasonable nor necessary. MCL 500.3148(2), the only provision in the no-fault act that addresses a claimant's fraudulent proofs of loss for PIP benefits, suggests that an insured remains entitled to PIP benefits even after the insured has filed a fraudulent charge. Under the *Cruz* approach, because the no-fault act provides a remedy for fraudulent proofs of loss and contemplates that PIP benefits continue even when prior fraud is proved, the antifraud provision in this case contradicts the no-fault act and is unenforceable. Moreover, the provision thwarts the goal of the no-fault act to provide motor vehicle crash victims with assured, adequate, and prompt reparation for certain economic loss. The majority's holding is overly broad, and its approach for determining whether contract language in a no-fault policy is viable may place unwarranted constraints on the right to contract. Its approach erodes the scheme set forth in *Cruz* because it only considers whether the antifraud provision is expressly permitted under the no-fault act or the common law, leaving no room for the policy language to do any work. The majority's approach also ignores that insurers may insert provisions into a no-fault policy that are not rooted in the common law or referred to in the no-fault act. Even if the majority were correct that the antifraud provision was a contract-based fraud defense that contemplates the remedy of rescission, MCL 500.3220 would prevent Meemic from canceling, let alone rescinding the policy; the statute provides a limited path for an insurer to cancel a policy, and Meemic failed to follow that path. The antifraud provision would improperly allow Meemic to expand that path by

allowing it to void or cancel the policy in a way not expressly provided by the statute. Moreover, Meemic did not seek to rescind the contract, and the majority's holding is, therefore, incorrectly premised on an analysis of the right of rescission. Regardless, the no-fault act expressly prohibited Meemic from exercising the provision to cancel the policy, let alone from seeking a greater remedy than allowed by the act. Moreover, the term "void" in the antifraud provision is insufficiently similar to rescission given that the meaning of rescission is distinct from the meaning of "void" and rescission encompasses a broader range of contractual remedies. Justice ZAHRA would have applied the approach set forth in *Cruz* and held that the antifraud provision was inconsistent with the no-fault act because it attempted to expand the limited path for cancellation set forth in MCL 500.3220 and the provision was, therefore, void as against public policy.

INSURANCE — CONTRACTS — CONTRACTUAL DEFENSES — NO-FAULT ACT — DEFENSES TO MANDATORY BENEFITS UNDER THE NO-FAULT ACT.

A no-fault insurance policy may contain contractual defenses to benefits mandated by the no-fault act if the defense is provided by the act or the contractual defense is based on a common-law defense that has not been abrogated by the act; a policy provision may not go beyond either statutory or common-law defenses to limit mandatory coverages to a greater extent than either the act or the common law (MCL 500.3101 *et seq*.).

Kreis, Enderle, Hudgins & Borsos, PC (by *Mark E. Kreter* and *Robb S. Krueger*) and *James G. Gross, PLC* (by *James G. Gross*) for plaintiff.

Chasnis, Dogger & Grierson, PC (by *Robert J. Chasnis*) and *Law Office of Joseph S. Harrison* (by *Joseph S. Harrison*) for defendants.

Amici Curiae:

Willingham & Coté, PC (by *Kimberlee A. Hillock*) for the Insurance Alliance of Michigan.

Donald M. Fulkerson and *Law Offices of Robert June, PC* (by *Robert B. June*) for the Michigan Association for Justice.

VIVIANO, J. In this action, Meemic Insurance Company seeks to void its policy with defendants Louise and Richard Fortson and stop paying no-fault benefits to their son. Although the benefits are mandated by statute, Meemic seeks to avoid its statutory obligations by enforcing the antifraud provision in the policy. The issue before the Court is the extent to which a contractual defense like the one here is valid and enforceable when applied to coverage mandated by the no-fault act, MCL 500.3101 *et seq*. We hold that such contractual provisions are valid when based on a defense to mandatory coverage provided in the no-fault act itself or on a common-law defense that has not been abrogated by the act. Because Meemic's fraud defense is grounded on neither the no-fault act nor the common law, it is invalid and unenforceable. Accordingly, we affirm the Court of Appeals on different grounds and remand the case to the trial court for further proceedings consistent with this opinion.[1]

I. FACTS

In September 2009, defendant Justin Fortson suffered serious injuries when he fell from the hood of a moving automobile. Most significantly, brain damage left him in need of constant supervision. Doctors prescribed long-term care. Rather than sending Justin to a brain-injury rehabilitation center, Justin's parents, codefendants Richard and Louise Fortson, opted to provide 24-hour-a-day attendant care themselves.

At the time of the accident, Meemic provided no-fault coverage to Justin and his parents. Richard and Louise were the named insureds in the policy. But

[1] Given our disposition of this case, we need not reach the remaining issues raised by Meemic.

Justin was also an "insured person" under the policy's "resident relatives" provision and under MCL 500.3114(1).[2] Meemic agreed to pay the parents $11 an hour to provide attendant-care services to Justin and requested that the Fortsons send Meemic monthly bills documenting actual hours spent providing care. From October 2009 to October 2014, Justin's parents submitted bills for attendant care, and Meemic paid them. In May 2013, however, the insurance company began a formal investigation. The investigation revealed that between September 2012 and July 2014, Justin had been in jail for 233 days and in drug rehabilitation for another 78 days. During this period, Justin's parents had continued to bill Meemic for attendant care.

Meemic's current suit against Richard, Louise, and Justin seeks to void the policy pursuant to the policy's antifraud provision so that Meemic is no longer required to pay Justin's claim.[3] The antifraud provision provides:

> This entire policy is void if any **insured person** has intentionally concealed or misrepresented any material fact or circumstance relating to:

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[2] MCL 500.3114(1) provides:

> 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 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.

[3] In 2010, Meemic canceled the insurance policy for unrelated reasons. Because the cancellation was prospective, it had no effect on Justin's claim regarding his accident, which had occurred before the cancellation. See *Meemic Ins Co v Fortson*, 324 Mich App 467, 479-481; 922 NW2d 154 (2018), citing *Stine v Continental Cas Co*, 419 Mich 89, 98; 349 NW2d 127 (1984). Meemic's amended complaint included a claim of unjust enrichment, seeking restitution for payments made on the basis of the Fortsons' fraud. That issue was not raised by the Fortsons in this appeal, and our opinion does not address the matter.

A. This insurance;

B. The Application for it;

C. Or any claim made under it.

For the no-fault coverages, "Insured Person(s)" is defined under the policy to include the named insureds, who were Louise and Richard; any "resident relative," which included Justin; and "any other person occupying the Insured motor vehicle, or any person, subject to the priorities set forth in the [no-fault act], injured as a result of an accident involving the Insured motor vehicle while not occupying any motor vehicle." (Emphasis omitted.) The complaint claims breach of contract, fraud, common-law and statutory conversion, and unjust enrichment. Meemic sought damages and a determination that defendants' actions voided the insurance policy. The Fortsons filed a counterclaim for the past and future attendant-care benefits that Meemic was refusing to pay.

Meemic moved for summary disposition, asking the trial court to enter an order that would void the insurance policy under the policy's antifraud provision, terminate any future liability, and require the Fortsons to reimburse Meemic for the fraudulent attendant-care statements. The trial court initially denied the summary disposition motion on the basis of the innocent-third-party rule, under which an insurer could not rescind a contract on the basis of fraud to avoid liability for benefits owed to innocent third parties. But Meemic moved for reconsideration after the Court of Appeals issued its opinion in *Bazzi v Sentinel Ins Co*, 315 Mich App 763; 891 NW2d 13 (2016), aff'd in part and rev'd in part 502 Mich 390 (2018), which concluded that the innocent-third-party rule was no longer good law. The trial court subsequently granted Meemic's motion for summary disposition.

The Court of Appeals reversed, concluding that its decision in *Bazzi* was inapplicable because the fraud here did not occur in the procurement of the policy—it did not, in other words, induce Meemic to enter into the contract with the Fortsons—and thus the fraud did not affect the validity of the contract. *Meemic Ins Co v Fortson*, 324 Mich App 467, 475-476 & 476 n 1; 922 NW2d 154 (2018). The Court held that the policy's antifraud provision was invalid because it would enable Meemic to circumvent the payment of statutorily mandated benefits. *Id*. at 477-479. It went on to conclude that even if the antifraud provision were valid, at the time they committed fraud, Richard and Louise were no longer "insured persons" under the policy, so the antifraud provision did not apply. *Id*. at 479-484. Judge CAMERON dissented, arguing that the majority had impermissibly resurrected the innocent-third-party rule. *Id*. at 485-487 (CAMERON, J., dissenting). Because the policy permitted rescission on the basis of fraud and fraud occurred here, Judge CAMERON would have affirmed the trial court's grant of summary disposition to Meemic. *Id*. at 489-493.

We granted Meemic's application for leave to appeal. *Meemic Ins Co v Fortson*, 503 Mich 1031 (2019).

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366; 817 NW2d 504 (2012). In addition, statutory interpretation is an issue of law, which we also review de novo. *Cardinal Mooney High Sch v Mich High Sch Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). To the extent this case involves the interpretation of an insurance policy, insurance policies are interpreted like any other con-

tract. See *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999) ("The principles of construction governing other contracts apply to insurance policies. Where no ambiguity exists, this Court enforces the contract as written.") (citation omitted). Like with other contracts, "[a]ny clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy." *Id*. at 568 (quotation marks and citation omitted).

III. ANALYSIS

We have described the utopian aims of Michigan's no-fault act as follows:

> The Michigan No-Fault Insurance Act, which became law on October 1, 1973, was offered as an 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. The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. The Legislature believed this goal could be most effectively achieved through a system of *compulsory* insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state. Under this system, victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common-law remedy in tort. [*Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978).]

Whether the no-fault act has lived up to its billing is the subject of an ongoing and vigorous policy debate.[4] But one thing that is not open to debate is that the act

[4] The Legislature passed major changes to the no-fault act in 2019. The act took immediate effect, but certain provisions did not become operative until later dates. See Public Acts 21 and 22 of 2019. The

governs the coverages it mandates, and the insurance policy controls coverages that are optional (i.e., not required by the act):

> [Personal protection insurance (PIP)] benefits are mandated by statute under the no-fault act, MCL 500.3105; MSA 24.13105, and, therefore, the statute is the "rule book" for deciding the issues involved in questions regarding awarding those benefits. On the other hand, the insurance policy itself, which is the contract between the insurer and the insured, controls the interpretation of its own provisions providing benefits not required by statute. [*Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525; 502 NW2d 310 (1993).][5]

In a footnote in *Rohlman*, we explained why the no-fault act governs the coverages mandated by the act:

> The policy and the statutes relating thereto must be read and construed together as though the statutes were a part of the contract, for 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 out its purpose.

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changes are not pertinent to this action, and all references in this opinion are to the version of the no-fault act in effect before the amendments.

[5] See also *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 531; 620 NW2d 840 (2001) ("The Legislature requires a Michigan motorist to maintain a no-fault policy that includes certain elements mandated by law. Those required coverages are the bedrock of the no-fault system and, as we have held on many occasions, are not subject to removal by policy language that conflicts with the statute."); *Husted v Auto-Owners Ins Co*, 459 Mich 500, 512; 591 NW2d 642 (1999) ("This Court has indicated that a policy exclusion that conflicts with the mandatory coverage requirements of the no-fault act is void as contrary to public policy."), citing *Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225, 232; 531 NW2d 138 (1995).

> A policy of insurance must be construed to satisfy the provisions of the law by which it was required, particularly when the policy specifies that it was issued to conform to the statutory requirement; and where an insurance policy has been issued in pursuance of the requirement of a statute which forbids the operation of a motor vehicle until good and sufficient security has been given, the court should construe this statute and the policy together in the light of the legislative purpose. [12A Couch, Insurance, 2d (rev ed), § 45:694, pp 331-332.]
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> The definition[s] in an automobile liability insurance policy required by statute, of the motor vehicles covered by it, [are] to be construed with reference to statutes with which it was intended to comply . . . . [*Id*., § 45:695, p 333.]
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> We think the same would hold true for no-fault policies. [*Rohlman*, 442 Mich at 525 n 3 (alterations in original)].

In *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005), an optional-coverage case involving a claim for uninsured motorist benefits, we held that "unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." In particular, we held "that an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy . . . [and that a] mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions." *Id*. at 470. We noted that "[e]xamples of traditional defenses include duress, waiver, estoppel, fraud, or unconscionability." *Id*. at 470 n 23; see also *Titan Ins Co v Hyten*, 491 Mich 547, 554; 817 NW2d 562 (2012) ("[B]ecause insurance policies are contracts, common-law defenses may be

invoked to avoid enforcement of an insurance policy, unless those defenses are prohibited by statute.").

In the context of mandatory benefits, the Court has also addressed whether common-law defenses remain available. In *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 652; 513 NW2d 799 (1994), we held "that the common-law rule requiring an injured party in a contract or tort action to mitigate damages applies in suits for work-loss benefits under the no-fault act." And in *Bazzi v Sentinel Ins Co*, 502 Mich 390, 400-401; 919 NW2d 20 (2018), this Court held that a common-law fraudulent-procurement defense may be raised to a claim for coverage mandated by the no-fault act.[6] Thus, we have stated that to the extent that common-law defenses remain in force and effect, they may apply in certain circumstances to claims for mandatory coverage.[7]

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[6] In *Bazzi*, because the plaintiff was a relative domiciled in the same household as the policyholder, he was entitled to no-fault benefits under MCL 500.3114(1).

[7] The extent to which the no-fault act abrogated common-law defenses to claims for mandatory benefits remains something of an open question. In *Titan*, 491 Mich at 554, this Court noted that these defenses apply unless they are "prohibited by statute." That makes sense in cases like *Titan* that involve claims for optional coverage (i.e., coverage above the minimum liability amount required by the no-fault act). *Id.* at 552 n 2. In those cases, we have said that the policy is "construed without reference to the no-fault act . . . ." *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 533; 676 NW2d 616 (2004); see also *Rory*, 473 Mich at 466 ("[T]he rights and limitations of such coverage are purely contractual and are construed without reference to the no-fault act."). Accordingly, "the insurance policy itself, which is the contract between the insurer and the insured, controls the interpretation of its own provisions providing benefits not required by statute." *Rohlman*, 442 Mich at 525. Thus, like with other contracts, "[a]ny clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy." *Farm Bureau Mut Ins Co of Mich*, 460 Mich at 568 (quotation marks and citation omitted); see also *Cruz v State Farm Mut Auto Ins Co*, 466 Mich

In this case, by contrast, we are confronted with a contractual fraud defense to a claim for coverage

588, 594; 648 NW2d 591 (2002) ("[W]here contract language is neither ambiguous, nor contrary to the no-fault statute, the will of the parties, as reflected in their agreement, is to be carried out, and thus the contract is enforced as written."). So a more precise statement of our rule is that when optional coverage is involved, the policy is construed without reference to the no-fault act, except that a court may look to see if the contract language contravenes the no-fault act or other sources of public policy in determining whether the contract language is enforceable.

Bazzi, 502 Mich at 400-401, was a mandatory-benefits case, and it thus addressed the separate question of whether a no-fault insurer could raise the common-law defense of fraud in the procurement of the policy to a claim for coverage mandated by the no-fault act or whether the Legislature abrogated that defense when it enacted the no-fault act. *Bazzi* cited *Titan* to support its analysis of this issue, even though *Titan* did not involve the issue of whether the common-law defense of fraud was abrogated by the mandatory coverage provisions of the no-fault act (and logically could not have involved that issue because it did not involve a claim for such benefits). *Id*. at 400, citing *Titan*, 491 Mich at 554-555. *Bazzi* also cited a more common approach for deciding this issue, asking whether the Legislature clearly sought to abrogate the common law. See *Bazzi*, 502 Mich at 400 ("When the Legislature intends to limit the common-law remedies available to an insurer for misrepresentation or fraud, that intent is clearly reflected in the language employed in the statute."); see also *People v Moreno*, 491 Mich 38, 41; 814 NW2d 624 (2012) ("While the Legislature has the authority to modify the common law, it must do so by speaking in 'no uncertain terms.' ") (citation omitted). Elsewhere, however, we have noted that "[w]hether or not a statutory scheme preempts the common law" depends on legislative intent, and when that intent is manifested in "comprehensive legislation prescrib[ing] in detail a course of conduct to pursue and the parties and things affected, and designat[ing] 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." *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987).

We have never addressed the apparent tension between these standards in the no-fault context or directly addressed the broader claim of whether the no-fault act is sufficiently comprehensive for us to conclude that the Legislature intended it to supersede and replace all of the common law as it relates to mandatory benefits. Because the issue was not raised by the parties, however, we need not address it in the present case.

mandated by the no-fault act. The caselaw discussed above establishes that contractual terms are governed by the no-fault act, yet at the same time we have held that common-law defenses not abrogated by the no-fault act remain available in claims for mandatory coverage. The upshot is that insurers can avail themselves of both statutory defenses and common-law defenses that the no-fault act has not displaced.

It would make little sense to say that an insurer can invoke common-law defenses when sued but cannot place those defenses in its contract. By the same token, we have never indicated that an insurer's contract can go beyond either the statutory or common-law defenses and thereby limit mandatory coverage to a greater extent than either the statute or the common law. To allow such provisions would reduce the scope of the mandatory coverage required by the no-fault act, as supplemented by the common law. It would, in short, vitiate the act. This result is plainly prohibited by our longstanding caselaw that forbids parties from contracting to vitiate an insured's duty to promptly pay benefits as required by the no-fault act. See, e.g., *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 598; 648 NW2d 591 (2002) (holding that when a contractual provision "contravenes the requirements of the no-fault act by imposing some greater obligation upon one or another of the parties, [it] is, to that extent, invalid").[8] For these reasons, a provision in an insurance policy purporting to set forth defenses to mandatory coverage is only valid and enforceable to the extent it

[8] The concurrence's preoccupation with *Cruz* is a bit odd. In the concurrence's telling, our opinion is "an unwarranted departure" from something it calls "the *Cruz* standard." But our opinion does not depart from *Cruz*—to the contrary, it is the first from our Court to apply *Cruz*'s substantive holding.

contains statutory defenses or common-law defenses that have not been abrogated.

The question we are left with is whether Meemic's contract-based fraud defense is available under the no-fault act or whether it is a common-law defense that has not been abrogated. If the contractual defense is properly derived from either source, it is valid; if not, then it goes beyond what Meemic can assert to avoid mandatory coverage and is invalid and unenforceable.

IV. APPLICATION

First, Meemic does not assert a statutory defense. The no-fault act permits an insurer to avoid coverage of PIP benefits under certain enumerated circumstances. MCL 500.3113 lists several of these circumstances, including, for example, when a person willingly operates an unlawfully taken vehicle and when a person was operating a vehicle as to which he or she was an excluded operator.[9] The no-fault act, however, does not

[9] MCL 500.3113 provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully.
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.
>
> (c) The person was not a resident of this state, was an occupant of a motor vehicle or motorcycle not registered in this state, and the motor vehicle or motorcycle was not insured by an insurer that has filed a certification in compliance with section 3163.
>
> (d) The person was operating a motor vehicle or motorcycle as to which he or she was named as an excluded operator as allowed under section 3009(2).

provide a fraud defense to PIP coverage, so Meemic's antifraud defense is not statutory.[10]

Second, we must consider whether Meemic's fraud defense is available at common law.[11] As we explained in *Titan*, 491 Mich at 555, "Michigan's contract law recognizes several interrelated but distinct common-

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(e) The person was the owner or operator of a motor vehicle for which coverage was excluded under a policy exclusion authorized under section 3017.

MCL 500.3017(1)(b) also provides that an insurer may exclude PIP coverage for any injury that occurs while a transportation network driver is providing a prearranged ride.

[10] That is not to say that the no-fault act leaves insurers without recourse. An insurer can reject fraudulent claims without rescinding the entire policy. See generally *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 655; 899 NW2d 744 (2017). In addition, an insurer may receive attorney fees "in defending against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation." MCL 500.3148(2). And, in certain narrow circumstances, an insurer can seek to cancel the policy under MCL 500.3220. For the reasons discussed later in this opinion, however, neither of those statutes is relevant or applicable to this case.

[11] It must be emphasized that this analysis is not about whether any common-law defense may be available to Meemic. Rather, we are assessing Meemic's defense through the lens of the antifraud provision in the policy. But as explained, our caselaw limits contract defenses to those available under the no-fault act or the common law. Thus, contractual language in an insurance policy might very well mean something different than the common law—but, as discussed, if it purports to provide the insurer a new or more robust defense outside the range of available statutory and common-law defenses it would circumvent the statute as read in light of the common law and would be, "to that extent, invalid." *Cruz*, 466 Mich at 598.

For that reason, we agree with Meemic's assertion that it is not seeking equitable relief or bringing an independent rescission action; it is simply trying to enforce its contract defense. But because that contract is valid only if it provides for relief that would be available under an unabrogated common-law defense, we must examine its request to see whether it matches with those common-law defenses. Here, as discussed more below, rescission is the closest common-law analogue to Meemic's contract defense.

law doctrines—loosely aggregated under the rubric of 'fraud'—that may entitle a party to a legal or equitable remedy if a contract is obtained as a result of fraud or misrepresentation."[12] The key phrase is "if a contract *is obtained* as a result of fraud or misrepresentation." *Id*. (emphasis added). At common law, the defrauded party could only seek rescission, or avoidance of the transaction, if the fraud related to the inducement to or inception of the contract. Dobbs, Remedies (2d ed, abrg), § 9.5, p 716.[13] The rationale for this rule is that

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[12] The party asserting actionable fraud must set forth the following elements:

> (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. [*Titan*, 491 Mich at 555 (quotation marks and citation omitted).]

[13] The sources supporting this rule are numerous. See, e.g., *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 538 n 15; 872 NW2d 412 (2015) ("When a party fraudulently induces another party to enter into a contract, that contract is voidable at the option of the defrauded party . . . ."); *Berg v Hessey*, 268 Mich 599, 605; 256 NW 562 (1934) ("Rescission is not a vent for bad bargains unless induced by fraud . . . ."); *Cole v Oatman*, 234 Mich 128, 129-130; 207 NW 839 (1926) ("Where a vendee claims that he had been defrauded in the purchase of property by misrepresentations as to its condition or value, . . . [h]e may rescind the contract . . . ."); *Galloway v Holmes*, 1 Doug 330, 336-337 (Mich, 1844) ("I am aware that many of the cases, and of the elementary books, frequently apply the term *void* to the class of contracts to which the one under consideration belongs, but they oftener, perhaps, and certainly with more propriety, employ language which indicates their true character; as, that a party lured into a contract by the fraud of another, may *disregard*, may *disaffirm*, may *treat as void* the contract . . . ."); Geisler, *Proof of Fraudulent Inducement of a Contract and Entitlement to Remedies*, 48 Am Jur Proof of Facts 3d 329 (Mar 2020 update), § 1 ("Essentially, 'fraudulent inducement' occurs when a party to a contract was induced to enter into that contract by fraud of the other party. . . . 'Fraudulent inducement' relates to the accuracy and truthful-

"[o]ne who has been fraudulently induced to enter into a contract has not assented to the agreement since the

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ness of the discussions and negotiations of the parties prior to the contractual agreement and does not necessarily imply that a party has failed to perform its contractual duties.") (paragraph structure omitted); Dobbs, § 9.5, p 716 ("Fraud in inducing the *formation* of an agreement . . . warrants rescission or damages[.]"); 1 Restatement Contracts, 2d, § 164, comment *c*, p 446 ("No legal effect flows from either a non-fraudulent or a fraudulent misrepresentation unless it induces action by the recipient, that is, unless he manifests his assent to the contract in reliance on it."); Black, 1 Rescission of Contracts and Cancellation of Written Instruments (1916), § 20, p 37 ("It is a general rule that a party who has been induced to enter into any contract, obligation, or engagement by means of fraud, deceit, artifice, or trickery practised upon him by the opposite party, and who would not have placed himself in the situation in which he now is, if it had not been for the fraud or deceit, will be entitled to rescind the contract and demand a restoration of the status quo, and may have the aid of a court of equity to accomplish this purpose."); *id*. at § 24, pp 47-49 ("And further, it is necessary that the fraud, artifice, or representation should have been a material inducement to the contract. . . . Further, the fraud must have been inherent in, or at least contemporary with, the very transaction which is sought to be set aside. . . . [T]here must be fraud executed at the time of making the contract or relating to a state of affairs then existing.") (paragraph structure omitted); *id*. at § 36, pp 87-88 ("To be available as ground for the rescission of a contract or obligation, it is necessary that the fraud alleged to have been practised by one party upon the other should have been effective in deceiving or misleading him and also in inducing him to enter into the contract or assume the obligation.").

Both of the two relevant forms of common-law fraud focus on conduct or circumstances at the contract's inception. "Fraudulent inducement" generally requires misrepresentations that induce a party to enter a contract, Geisler, § 1, whereas "fraud in the factum" is "the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents," *Langley v Fed Deposit Ins Corp*, 484 US 86, 93; 108 S Ct 396; 98 L Ed 2d 340 (1987). See also *Black's Law Dictionary* (10th ed) (defining "fraud in the factum" as occurring when the contract "as actually executed differs from the one intended for execution by the person who executes it" or when it otherwise lacks "legal existence" and defining "fraud in the inducement" as "occurring when a misrepresentation leads another to enter into a transaction with a false impression of the risks, duties, or obligations involved"); Farnsworth, *Contracts* (4th ed), § 4.10, p 236 (explaining that fraud in the inducement "goes only to the 'inducement,' " such as a

fraudulent conduct precludes the requisite mutual assent" to form a contract. 26 Williston, Contracts (4th ed), § 69:1, p 497.[14] "Where mutual assent does not exist, a contract does not exist." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003).

This is not to suggest that a contractual provision that rescinds a contract because of postprocurement fraud is invalid in all circumstances. At common law, a contract might also be rescinded because of a party's failure to " 'perform a substantial part of the contract or one of its essential items[.]' " *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 510; 885 NW2d 861 (2016), quoting *Rosenthal v Triangle Dev Co*, 261 Mich 462, 463; 246 NW 182 (1933).[15] Thus, a postprocurement fraud

misrepresentation of the quality of goods, while fraud in the factum (or fraudulent execution) relates "to the very character of the proposed contract itself, as when one party induces the other to sign a document by falsely stating that it has no legal effect").

[14] This explanation is also reflected in the Restatement (Second) of Contracts, which states, "If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient." Restatement Contracts, § 164(1), p 445 (emphasis omitted). We have likewise relied on this line of reasoning. See *Otto Baedeker & Assoc, Inc v Hamtramck State Bank*, 257 Mich 435, 441; 241 NW 249 (1932) ("The testimony would also justify the jury in finding that . . . defendant was deceived by plaintiff's trick [i.e., fraud] into executing the instrument without reading it and, therefore, that the minds of the parties did not meet on a contract.").

[15] The Court of Appeals has upheld a fraud-exclusion provision when the fraud related to proof of loss on a claim rather than fraud in the procurement or execution of the policy. See *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 425; 864 NW2d 609 (2014); but see *Shelton*, 318 Mich App at 652-655 (limiting *Bahri* to when the claimant is an insured under the defendant's policy). A leading treatise has explained that "to avoid a policy on the ground of fraud or false swearing in the proof of loss, the statement in question must be material." 13A Couch, Insurance, 3d (2019 rev ed), § 197:18, pp 48-49. In this case, however, because there is

clause that rescinds a contract would be valid as applied to a party's failure to perform a substantial part of the contract or one of its essential terms. Generally, however, the mere breach of a contract would not entitle the injured party to avoid the contract at common law. See *Abbate v Shelden Land Co*, 303 Mich 657, 666; 7 NW2d 97 (1942) ("It is not every partial failure to comply with the terms of a contract by one party which will entitle the other party to abandon the contract at once.") (quotation marks and citations omitted). Rather, "facts which will ordinarily warrant the rescission of a contract must have existed at the time the contract was made." 1 Black, Rescission of Contracts and Cancellation of Written Instruments (1916), § 5, p 8.[16]

In this case, Meemic seeks to enforce a sweeping antifraud provision against the claim made by Justin,

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no allegation of fraud in relation to Justin's claim for benefits, the Court need not address the issue of whether and to what extent fraud related to proof of loss can justify voiding the policy. Moreover, because this case involves fraud by someone other than the claim beneficiary, the Court need not address whether a clause voiding a policy for postprocurement fraud would be valid as applied to fraud by an individual who is *both* a policyholder and the claim beneficiary.

[16] At common law, parties to a contract could specify the grounds for rescission, including fraud, and establish their scope in the contract. See, e.g., *Crane v O'Reiley*, 8 Mich 312, 315-316 (1860) (enforcing a provision in a contract that allowed one party to void the contract upon the default of the other). This freedom to define fraud is not, however, part of the common law that remains available to the insurer or the insured. If it were otherwise, the parties could contract around the statute itself, treating its mandatory provisions as negotiable. Our caselaw, as already explained, has ruled out such an approach. See, e.g., *Cruz*, 466 Mich at 598 (explaining that parties cannot, by contract, place greater requirements on the parties than those that are required by the statute). Nor do we believe that *Marquis* and *Bazzi*, by permitting certain common-law rules to remain in place, meant to introduce a Trojan horse that would enable the parties to reach agreements in contravention of the statute or the well-defined common-law defenses themselves.

who was neither a party to the insurance contract nor a beneficiary of the claim allegedly obtained by fraud. As noted, the provision purports to void the entire policy if any "insured person" misrepresents a material fact or circumstance "relating to" either the "insurance," the "[a]pplication," "[o]r any claim made under it." And "insured person" is defined broadly such that the fraudulent actor need not be the person receiving benefits under the policy—indeed an insured person can also be "any person" occupying the car or any other person injured as a result of an accident involving the insured motor vehicle while not occupying any motor vehicle who is entitled to coverage. This means that under the contract's terms, Meemic could terminate benefit payments to Justin on the basis of the fraudulent activity of anyone who happened to be in or out of the car and entitled to claim under the policy, and the activity could occur years after the policy was entered and relate to any claim or simply to the "insurance."

As the Court of Appeals recognized, the fraudulent activity at issue here did not relate to the inception of the contract. The fraudulent attendant-care bills submitted by Justin's parents neither induced Meemic to enter into the policy nor deceived Meemic as to the contents of the policy.[17] Meemic could not possibly have relied on any fraudulent misrepresentations when it

[17] Contrary to the fears expressed in Judge CAMERON's dissent, the correct framework for deciding this case has nothing to do with the now-abrogated innocent-third-party rule. See *Meemic Ins Co*, 324 Mich App at 485-487 (CAMERON, J., dissenting). The Court of Appeals decision here came before this Court's resolution of *Bazzi*, which, as explained, clarified that the criterion for the decision is whether the defense being claimed is available under the no-fault act or under common law that has not been displaced by that act. The dispositive question in this case turns upon the nature of the common-law fraud defense—specifically, that it must relate to the contract's inception—which is irrelevant to Justin's status as a third party.

agreed to insure the Fortsons in 2009 because, at the time, they had not yet made any of the alleged misrepresentations.[18] And there has been no argument or showing that the misrepresentations in this case constituted a failure to perform a substantial part of the contract or an essential term, such that Meemic could obtain rescission instead of bringing an action for damages. In short, Meemic's contract-based fraud defense fails because it is not the type of common-law fraud that would allow for rescission.[19]

V. RESPONSE TO THE CONCURRENCE

The concurrence produces more heat than light. As best we can tell, it sees this as a simple case that can be

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[18] Even assuming that fraud related to the proof of loss on a claim occurring after the contract was signed could justify rescission, none of the fraudulent acts here pertained to Justin's claim itself or any proof of loss on his part.

[19] Even if the common-law equitable remedy of rescission were available to Meemic, to the extent the policy purports to entitle Meemic to rescission as a matter of right (i.e., without balancing the equities), it would exceed the limits of the common law. To the extent a claim for rescission is "equitable in nature, it 'is not strictly a matter of right' but is granted only in 'the sound discretion of the court.' " *Bazzi*, 502 Mich at 409, quoting *Amster v Stratton*, 259 Mich 683, 686; 244 NW 201 (1932). Therefore, before granting rescission, a court must "balance the equities," including by considering the interests of third parties who did not commit the fraud. *Bazzi*, 502 Mich at 410-411 (quotation marks and citation omitted).

Before they were merged, proceedings in equity and law were distinct, with different rules and procedures in each. See Mich Const 1963, art 6, § 5. Although the distinctions have been erased for most purposes, *id*., the differences sometimes crop up in discussions of the common law. Such is the case here. Although equitable rescission was at issue in *Bazzi* and there was, accordingly, no need to differentiate common-law practices in equity and law, it is worth noting here that courts at law have also permitted rescission as a legal remedy. This form of relief was hedged with formalities, most notably that the plaintiff had to "tender to the other party, as a precondition of suit, specific restitution

resolved by reference to a statute about canceling insurance policies—MCL 500.3220—that no one has cited and that everyone would agree does not apply. If only our task were so easy! But contrary to the concurrence, we do not believe that MCL 500.3220 is relevant to this case for the following reasons.

First, Meemic does not seek cancellation of the policy under MCL 500.3220(a), which is not surprising because (1) by its terms, the statute does not permit cancellation on the facts of this case, as the concurrence recognizes,[20] and (2) as noted above, Meemic has already canceled the policy for unrelated reasons, see

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of everything received under the contract." 2 Restatement Restitution, 3d, § 54, comment *b*, p 268; see also *Chaffee v Raymond*, 241 Mich 392, 394-395; 217 NW 22 (1928) ("In an action at law, based on rescission, a tender is a prerequisite. . . . In equity, however, the rule is not so rigid, for there the bill must make profert of return of what has been received, and the decree will place the parties *in status quo*, as far as possible."); *Witte v Hobolth*, 224 Mich 286, 290; 195 NW 82 (1923) ("A bill in equity praying rescission proceeds on the theory that there has been no rescission, not on the theory that rescission has already been accomplished. Were plaintiff to sue at law for the money he paid defendant, he should, before suit, restore, or tender restoration of, the property he received, that by his own act he thus may have legal right and title to the money."). According to the Restatement, the formalities gave courts at law considerable discretion, almost akin to that wielded by equity courts. Restatement Restitution & Unjust Enrichment, § 54, comment *b*, p 268. In any event, Meemic's contract did not require presuit tender, nor is there any evidence that Meemic made such a tender here. Thus, Meemic has not invoked rescission at law, and any distinction between legal and equitable remedy is irrelevant to the outcome.

[20] Section 3220(a) provides, in pertinent part, "Subject to the following provisions no insurer licensed to write automobile liability coverage, after a policy has been in effect 55 days or if the policy is a renewal, effective immediately, shall cancel a policy of automobile liability insurance except for any 1 or more of the following reasons . . . [t]hat during the 55 days following the date of original issue thereof the risk is unacceptable to the insurer." (Paragraph structure omitted.) This provision clearly does not apply because it is undisputed that Meemic did not reassess the risk within the 55 days after the policy was issued. We also agree with the concurrence that MCL 500.3220(b), which provides

note 3 of this opinion. Second, apart from the statute, cancellation is not even the type of remedy Meemic is seeking. As the concurrence itself recognizes, cancellation applies only prospectively and thus leaves in place all claims that vested before the cancellation. See *post* at 325 n 22. See also *Titan*, 491 Mich at 567; 2 Couch, Insurance, 3d (2010 rev ed), § 30:25, pp 53-55. Here, Justin's rights vested when he suffered the injuries that left him in need of attendant care, and canceling the policy now would not relieve Meemic from liability. Rather, in the language of the antifraud provision, Meemic seeks to "void" coverage and cease payment of Justin's PIP benefits. In other words, Meemic wants to rescind the policy to the extent it requires Meemic pay on this claim, meaning it wants to void the relevant policy provisions at least from the time the claim arose, if not from the policy's inception.[21]

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for cancellation if the operator's license is suspended or revoked during the policy period, is plainly inapplicable to the fraud defense Meemic is raising now.

[21] Contrary to the concurrence, other courts, including the Court of Appeals below, have interpreted a contractual provision allowing a party to "void" a contract as providing for rescission. See *Meemic*, 324 Mich App at 477 n 1; see also *Great American Reserve Ins Co of Dallas v Strain*, 377 P2d 583, 586-587 (Okla, 1962) ("The word 'void' admits of more than one meaning. A contract may be void in the sense of being illegal; if so, the obligation, being prohibited by law, is a nullity in its contemplation; hence incapable of affirmance, ratification and enforcement. In some context the word void may be construed as meaning merely voidable; that is, the contract continues in force and effect until its timely repudiation or rescission by an affirmative act of the party entitled to avoid the obligation. It is the latter meaning of the term void that the law attaches to a policy clause such as that under consideration. . . . Non-compliance with, or breach of, a condition such as that which defendant invoked in its defense does not operate to extinguish the policy or render it ineffective and void. The law requires an affirmative act of rescission on the part of the insurer in order to avoid its liability.") (paragraph structure omitted).

Third, and finally, MCL 500.3220 does not abrogate common-law rescission in this context, a point the concurrence fails to grapple with or even acknowledge. In a stray line tucked in a footnote, the concurrence surmises that because MCL 500.3220 prevents Meemic from canceling the contract, it must also preclude it "from seeking a more robust remedy that would necessarily include cancellation, such as rescission." *Post* at 326 n 22. But we have already rejected this argument. In *Titan*, we noted that rescission "is conceptually different in its nature and in its breadth from [other contract remedies], and to interpret 'cancellation' as encompassing a broader range of contractual remedies is simply without basis in the [no-fault] statute." *Titan*, 491 Mich at 568. More generally, *Titan* explained:

> We agree with the Court of Appeals that MCL 500.3220(a) shows an intent to allow insurers only a limited period during which to reassess the risk after the formation of a policy and when the risk is deemed unacceptable to "cancel" the policy. However, we disagree that when an insurer elects *not* to reassess the risk and later uncovers fraud, it is somehow precluded from pursuing traditional legal and equitable remedies in response. [*Id*. at 566-567.]

In *Bazzi*, 502 Mich at 401, the Court applied this approach to a claim for mandatory PIP benefits ("In this case, however, the plain language of the no-fault

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It seems to us an unremarkable proposition that an insurer may seek to rescind a policy that is voidable on the basis of fraud. See, e.g., *Northland Radiology, Inc v USAA Cas Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued June 18, 2020 (Docket No. 346345), p 6 ("When an insurer is induced by fraud to issue a policy of insurance, the fraud renders the policy voidable at the option of the insurer. *Bazzi*, 502 Mich at 408. Thus, an insurer may rescind a policy on the basis of a material misrepresentation made in an application for no-fault insurance. *21st Century Premier* [*Ins Co v Zufelt*, 315 Mich App 437, 445; 889 NW2d 759 (2016)].").

act does not preclude or otherwise limit an insurer's ability to rescind a policy on the basis of fraud."), as it had done before in *Marquis*, 444 Mich at 652 (applying common-law defenses to mandatory work-loss benefits under the no-fault act).

The concurrence fails to recognize that its theory directly conflicts with *Titan*, which rejected the notion that MCL 500.3220 abrogated the common-law defense of rescission. Nor does the concurrence consider the broader line of caselaw, including *Bazzi* and *Marquis*, which has clearly held that fraud and other common-law defenses were not abrogated.[22] Also missing from the concurrence is any textual analysis to support its conclusion, which runs counter to the longstanding interpretive principle that legislative intent to abrogate the common law must be "clearly reflected in the language employed in the statute." *Bazzi*, 502 Mich at 400. See also *People v Moreno*, 491 Mich 38, 41; 814 NW2d 624 (2012) ("While the Legis-

[22] The concurrence notes that *Bazzi* and *Titan* addressed fraud in the procurement, rather than fraud in the proof of loss. *Post* at 328 n 27. But the concurrence fails to explain why this distinction helps answer whether the common law has been abrogated. Nothing in the analysis or logic of those cases suggested they applied only to procurement fraud. Even so, the concurrence's distinction does not account for *Marquis*, 444 Mich at 650-655, which applied a common-law defense (mitigation of damages) to postprocurement events. By disregarding the full scope of these opinions, particularly *Bazzi* and *Marquis*, the concurrence overlooks why we must consider whether Meemic's antifraud provision invokes an unabrogated common-law defense. Those cases clearly establish that even in the context of a case involving mandatory no-fault benefits, such defenses remain available to insurers. Thus, if under the common law Meemic could rescind the contract on the basis of fraud, *Bazzi* and *Marquis* require us to allow that defense here (whether raised as an independent common-law defense or as a contract-based defense). The only way to avoid this conclusion is to conclude, contrary to *Bazzi* and *Marquis*, that the no-fault act abrogated these fraud-based common-law defenses. The concurrence's approach would overrule these cases *sub silentio*.

lature has the authority to modify the common law, it must do so by speaking in 'no uncertain terms.' ") (citation omitted).[23]

The upshot of the concurrence's approach is that with the possible exception of the procurement fraud in *Bazzi*, all other common-law defenses to fraud in this context would have been supplanted by statute.[24] As we noted earlier in this opinion, the no-fault act's abrogation of the common law might merit reexamination, but the concurrence does not offer such an analysis, nor would it be appropriate to do so in this case. In the end, we can only conclude that the concurrence's theory is a departure from a number of our binding precedents in this area.[25]

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[23] The concurrence also misreads MCL 500.3148(2), as enacted by 1972 PA 294, which stated (and still states, in the current version) that an insurer "may" be awarded attorney fees incurred defending against a claim that "was in some respect fraudulent or . . . excessive" and that those fees can be offset against any PIP benefits "[t]o the extent" such benefits are owed. The concurrence notes that this provision does not expressly permit an insurer to void the policy. But the concurrence offers nothing to support its apparent inference that the lack of express permission is tantamount to an affirmative prohibition on voiding policies based on fraud. Nothing in the statute's qualified and conditional language suggests that a defrauded insurer is limited only to compensatory attorney fees and only if it decides to contest a fraudulent claim. And, as with MCL 500.3220, the concurrence makes no effort to analyze whether MCL 500.3148 has abrogated any relevant common-law defenses against fraud. But for the reasons just stated, this provision does not contradict (but merely supplements) a fraud defense.

[24] The effect would be to drastically limit the common-law remedies for fraud. For example, a common-law defense of rescission for a substantial breach would be unavailable to an insurer in cases like the present. All that an insurer could hope for, even if it canceled the contract, would be to offset attorney fees from its payments of benefits *if* it disputed the fraudulent claim.

[25] We agree with the concurrence that the parties' briefing in this Court ranged across various topics, some of which are not pertinent to the resolution of this case. The parties also, however, raised critical

VI. CONCLUSION

For the reasons set forth in this opinion, we hold that Meemic's contractual antifraud provision is invalid and unenforceable because it is not based on a statutory or unabrogated common-law defense. Therefore, we affirm the Court of Appeals in result only, vacate its opinion, and remand the case to the trial court for further proceedings consistent with this opinion.

MCCORMACK, C.J., and MARKMAN, BERNSTEIN, and CAVANAGH, JJ., concurred with VIVIANO, J.

ZAHRA, J. (*concurring in the judgment*). The majority reaches the correct result in this case. I write separately because the majority's opinion improperly suggests that our common law[1] and the no-fault

issues that are squarely within the scope of our analysis, including the basis for the antifraud provision, i.e., whether it was an equitable remedy. More importantly, the overarching issue in this case is the enforceability of the antifraud provision in the policy. That is the issue we address, and we do so by analyzing the caselaw and authorities presented by the parties and discussed by the Court of Appeals. In contrast, the concurrence resolves the case by reference to a statute, MCL 500.3220, that neither the parties nor the Court of Appeals thought relevant. And, as explained, its approach would cause us to overrule or disregard our binding caselaw—hardly the "narrow and limited" opinion it purports to set forth.

[1] The majority's noted reliance on this state's "closest common-law analogue" to the contract defense raised by Meemic—that is, rescission—is itself a telling admission that our common law does not control the disposition of this case. More telling is that the majority's alleged support for concluding that an insurance provision purporting to "void" an insurance policy actually means the common-law remedy of "rescission" of that insurance policy consists of the Court of Appeals' split decision in this very case and a 58-year-old Oklahoma case stating that "[t]he word 'void' admits of more than one meaning." *Great American Reserve Ins Co of Dallas v Strain*, 377 P2d 583, 586-587 (Okla,

act[2] represent the *exclusive* authorities employed to determine the validity of a provision in a no-fault policy. In my view, this approach is an unwarranted departure from our accepted and proven approach in like cases, which is "to construe contracts that are potentially in conflict with a statute, and thus void as against public policy, [and] where reasonably possible, to harmonize them with the statute" (the *Cruz* standard).[3] I would reaffirm the *Cruz* standard, which allows courts to defer to duly approved no-fault policy provisions that facilitate the goals of the act and are harmonious with the Legislature's no-fault insurance regime. The majority's suggested departure from the *Cruz* standard unnecessarily creates a dichotomy within our established precedent that may chill insurers from submitting reasonable and necessary provi-

1962). And in fact, the Oklahoma court held that a provision seeking to "void" a policy, if valid, would only render the policy "merely voidable," which, of course, would preclude the remedy of rescission. *Id*. at 587. The parties in this case agree there is a valid contract, and Meemic is not seeking to restore the parties to their precontractual positions, which would be the result of rescission.

[2] MCL 500.3101 *et seq*.

[3] *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 599; 648 NW2d 591 (2002). The majority questions my "preoccupation" with *Cruz* but then immediately claims its opinion "is the first from our Court to apply *Cruz*'s substantive holding." I admit to my "preoccupation" with the law of this state. So also does every member of the Court. I also confess that my preoccupation is often pronounced when the law involves an opinion from this Court, which has been oft-cited in our caselaw and by leading insurance treatises (interstate and intrastate alike), the most recent pointedly recognizing that "*Cruz v State Farm Mutual Auto Insurance Company* is commonly the main case used to argue that a contract clause conflicts with a statute." Hijazi, *A Survey of Michigan Assignment Law as it Relates to No-Fault Insurance Contracts: Post-Covenant*, 64 Wayne L Rev 817, 837 (2019). If the majority does actually embrace *Cruz*'s substantive holding as it claims, which I think it clearly does not, it would be the first time that *Cruz* was (mis)applied without addressing whether a contract clause conflicts with a statute.

sions to the executive agency to which the Legislature has delegated the authority to approve all no-fault insurance policies issued within the state. Many of these provisions are not mentioned by the no-fault act or recognized by the common law of this state. I reach the same result as the majority without relying on the majority's analysis of the state's common law. I would instead apply the *Cruz* standard and hold that the fraud-exclusion provision at issue here is inconsistent with the no-fault act and, therefore, void as against Michigan public policy.

I. FACTS AND PROCEDURAL HISTORY

In 2014, Meemic brought the instant action in the Berrien Circuit Court, seeking a declaration that it was contractually entitled to void the no-fault insurance policy it had issued to Richard and Louise Fortson. This policy was in full force and effect in September 2009 when their son, Justin, who resided with them, was involved in a serious automobile accident. As a result of the accident, Justin needed full-time attendant-care services for which he claimed benefits under the no-fault insurance policy issued by Meemic to his parents. Meemic paid for these services, which were performed by Justin's mother, a named insured under the policy. At some point, Louise allegedly sought to be paid for services she did not provide to Justin; Meemic filed the instant suit, seeking to void the policy on the basis of the following policy provision:

> **22. CONCEALMENT OR FRAUD**
>
> This entire Policy is void if any **insured person** has intentionally concealed or misrepresented any material fact or circumstance relating to:
>
> A. This insurance;

B. The Application for it;

C. Or any claim made under it.

The trial court initially denied Meemic's motion for summary disposition, citing the "innocent-third-party rule, which precludes an insurer from rescinding an insurance policy procured through fraud when there is a claim involving an innocent third party."[4] Meemic moved for reconsideration after the Court of Appeals issued its decision in *Bazzi v Sentinel Ins Co*,[5] which held that the innocent-third-party rule had been abolished by our decision in *Titan Ins Co v Hyten*.[6] The trial court agreed with Meemic's argument that because the innocent-third-party rule had been abolished, Meemic was not precluded from raising a fraud defense at any point in time regardless of whether Justin was an innocent third party. On March 14, 2017, the trial court entered an order granting summary disposition in favor of Meemic.

The Fortsons appealed, arguing, in part, that the trial court erred by relying on the Court of Appeals decision in *Bazzi* because the factual basis for the claim of fraud in *Bazzi* related to an insured's fraudulent procurement of the insurance policy.[7] In contrast, the insurance policy in this case was properly procured and was valid when Justin filed his claim. At this point, the Fortsons maintained, the no-fault act controls and mandates that Meemic provide Justin with statutory no-fault benefits.

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[4] *Bazzi v Sentinel Ins Co*, 502 Mich 390, 396; 919 NW2d 20 (2018).

[5] *Bazzi v Sentinel Ins Co*, 315 Mich App 763, 767-768, 771; 891 NW2d 13 (2016), aff'd in part and rev'd in part 502 Mich 390 (2018).

[6] *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012).

[7] *Bazzi*, 315 Mich App at 768.

In a published opinion, the Court of Appeals reversed the trial court's order granting summary disposition to Meemic.[8] In so doing, the Court of Appeals considered but found inapplicable its decision in *Bazzi*, reasoning that the fraud defense was not available to void or rescind the no-fault policy at issue here because, unlike in *Bazzi*,[9] the Fortsons' alleged fraud did not arise in the procurement of the policy.[10] The Court of Appeals next considered the fraud-exclusion provision in Meemic's policy that purports to void the entire policy if any insured person has intentionally concealed or misrepresented any material fact or circumstance relating to, in pertinent part, "[t]his insurance" or "any claim made under it."[11] The Court of Appeals held that "[b]ecause MCL 500.3114(1) mandates coverage for a resident relative domiciled with a policyholder, the fraud-exclusion provision, as applied to Justin's claim, is invalid because it conflicts with Justin's statutory right to receive benefits under MCL 500.3114(1)."[12]

Meemic filed an application for leave to appeal in this Court, asking us to decide, among other things,[13]

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[8] *Meemic Ins Co v Fortson*, 324 Mich App 467, 471, 484; 922 NW2d 154 (2018).

[9] *Bazzi*, 315 Mich App 763.

[10] *Fortson*, 324 Mich App at 475-476.

[11] *Id*. at 477-478.

[12] *Id*. at 478-479. The Court of Appeals held that under the plain language of the policy, "Louise and Richard were not insured persons under the policy when they committed fraud, so the fraud-exclusion clause is inapplicable and cannot be used to void the policy and deny Justin's claim." *Id*. at 484. I find the Court of Appeals' alternative conclusion that Richard and Louise were no longer "insured parties" under the policy to be questionable. Nonetheless, I would not address this argument given the result reached in this case.

[13] The application for leave to appeal also asked this Court to determine (1) whether a person's status as an insured person under a

whether the innocent-third-party rule remains viable when the fraud occurs in the claim for benefits, as opposed to in the application for insurance. We granted the application,[14] presumably to answer this question.[15]

II. ANALYSIS

The majority opinion "hold[s] that such [fraud-exclusion] provisions are valid when based on a defense to mandatory coverage provided in the no-fault act itself or on a common-law defense that has not been

policy may be ignored in order to avoid the application of a fraud-exclusion provision and (2) whether the cancellation of a no-fault policy after a loss occurs nullifies the policy's terms and conditions applicable to the loss. Because I would render unenforceable the fraud-exclusion provision of the policy upon which the above two issues are premised, Meemic cannot prevail on the remaining issues.

[14] *Meemic Ins Co v Fortson*, 503 Mich 1031 (2019).

[15] Although Meemic's application for leave to appeal asks us to declare that "the innocent third party rule does not exempt Justin from the effect of the [fraud-exclusion] provision of the policy under which he claims benefits," nothing in the Court of Appeals opinion reversing the trial court even remotely suggests that it was relying on this now-abolished equitable doctrine. (Formatting altered.) Meemic has presented us with a straw-man argument. Accordingly, leave to appeal was improvidently granted in this case, and an order dismissing this appeal or a peremptory order would be appropriate. At the least, the Court could order supplemental briefing. Nonetheless, the majority chooses to answer a question that has nothing to do with the innocent-third-party rule. Rather, the Court decides today that the fraud-exclusion provision in Meemic's no-fault insurance policy cannot be applied to void statutory obligations owed under the validly procured insurance contract issued in this case because the provision has no basis in statute or the common law. Neither the oral arguments nor the briefs presented by the litigants addressed the basis on which the majority opinion is premised. To the extent the Court answers questions that are not briefed or argued by the parties, the Court's opinion should be narrow and limited to the unique facts of the case. This is best accomplished in the instant case by simply relying on *Cruz* and concluding that the provision under review is void as against Michigan public policy.

abrogated by the act. Because Meemic's fraud defense is grounded on neither the no-fault act nor the common law, it is invalid and unenforceable." This holding is overly broad. The scheme adopted by the majority for determining the viability of contract language in a no-fault insurance policy may place unwarranted constraints on the fundamental right to contract. The majority opinion gives little or no weight to the way in which we have traditionally interpreted no-fault insurance contracts. Ordinarily, we would apply the *Cruz* standard, which is to say that we are "to construe contracts that are potentially in conflict with a statute, . . . where reasonably possible, [in such a way as] to harmonize them with the statute."[16] The majority opinion implicitly emasculates the *Cruz* standard by only asking whether the provision at issue is expressly permitted under the no-fault act or the common law.

The majority opinion also states that "one thing that is not open to debate is that the act governs the coverages it mandates, and the insurance policy controls coverages that are optional . . . ." The apparent implication of this dichotomy is that the common law and the no-fault act represent the *exclusive* authorities used to determine the validity of a provision in a no-fault policy, with no room for the policy language to do any work.[17]

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[16] *Cruz*, 466 Mich at 599.

[17] The provisions of an insurance policy are not arbitrary but intended to allow a lay person to read and understand the policy. See MCL 500.2236(3). As an example, in the wake of the statutory overhaul of the no-fault act, see 2019 PA 20 and 2019 PA 21, the Director of the Department of Insurance and Financial Services recently issued Order No. 19-048-M, concluding that "[i]mplementation of statutory amendments that affect the scope of coverage required to be provided under an insurance policy through reliance on a 'conformity to law clause' would violate . . . MCL 500.2236(5), as reliance upon an insurance policy

But this Court has clearly held that insurers may insert provisions into a no-fault policy that are not rooted in the common law or referred to in the no-fault act. For instance, in *Cruz*,[18] this Court considered the insertion of an examination under oath (EUO) provision into an insurance policy. The Court of Appeals "found that EUOs were precluded in the automobile no-fault insurance context because they were not men-

provision that 'unreasonably and deceptively affect[s] the risk purported to be assumed in the general coverage of the policy.' " Department of Insurance and Financial Services, *In re Requirements to File Forms and Rates Prior to Implementing Public Acts 21 and 22*, Order No. 19-048-M (September 20, 2019), p 3 (second alteration in original). While the new amendments are not applicable to this case, the point remains that the language in a no-fault policy that conforms to the act is not surplusage and cannot simply be swapped out with a "conformity to the law" clause. "[T]he Legislature has assigned the responsibility of evaluating the 'reasonableness' of an insurance contract to the person within the executive branch charged with reviewing and approving insurance policies: the Commissioner of Insurance." *Rory v Continental Ins Co*, 473 Mich 457, 475; 703 NW2d 23 (2005). The commissioner, who is now referred to as the Director of the Department of Insurance and Financial Services, see 2014 PA 140, is obligated under MCL 500.2236(1) to determine that no-fault insurance policies conform with the act's requirements. MCL 500.2236(1) forbids the issuance of any insurance policy or indorsement "until a copy of the form is filed with the department of insurance and financial services and approved by the director of the department of insurance and financial services as conforming with the requirements of this act and not inconsistent with the law." As the *Cruz* Court noted, the director presumably undertakes this statutory obligation by "harmonizing agreed-upon contract terms with statutory requirements . . . ." *Cruz*, 466 Mich at 599 n 15. Moreover, it is highly unlikely that the language in a no-fault policy will ever mirror the language of the no-fault act. The language in a no-fault policy is subject to a "readability score" and various additional measures intended to allow a lay person to read and understand the policy. See MCL 500.2236(3). The director's decisions are subject to judicial review under MCL 500.244. The role of the director in approving policy language is also emasculated by the majority opinion, which relegates the approved policy language to the standard suggested in the majority opinion.

[18] *Cruz*, 466 Mich 588.

tioned in the act."[19] This Court disagreed and approved the insertion of EUOs "when used to facilitate the goals of the act and when they are harmonious with the Legislature's no-fault insurance regime[.]"[20]

In my view, this Court need not delve into whether the no-fault act expressly permits the fraud-exclusion provision at issue in this case or whether this provision is drawn from common-law remedies and the extent to which, if at all, these remedies are abrogated by the common law to resolve this case. Indeed, even if the fraud-exclusion provision was accepted as a "contract-based fraud defense" that contemplates the remedy of "rescission" as the majority surmises, MCL 500.3220 would prohibit Meemic from canceling, let alone rescinding, the policy in this case.[21] MCL 500.3220(b) is plainly not applicable, and Meemic has not argued, let alone proved, that an unacceptable risk had arisen

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[19] *Id*. at 598, discussing the Court of Appeals' decision in *Cruz v State Farm Mut Auto Ins Co*, 241 Mich App 159; 614 NW2d 689 (2000).

[20] *Cruz*, 466 Mich at 598. To demonstrate the flexibility of the *Cruz* standard, I note that while the *Cruz* Court generally approved provisions regarding EUOs, the Court also determined under the facts of that case that the insurer's attempt to require the insured to submit to an EUO *as a condition precedent* to payment of no-fault personal protection insurance (PIP) benefits was impermissible under the *Cruz* standard because that application would vitiate the insurer's duty to pay benefits in a timely fashion as required by the statute. *Id*. at 600.

[21] MCL 500.3220 provides:

> Subject to the following provisions no insurer licensed to write automobile liability coverage, after a policy has been in effect 55 days or if the policy is a renewal, effective immediately, shall cancel a policy of automobile liability insurance except for any 1 or more of the following reasons:
>
> (a) That during the 55 days following the date of original issue thereof the risk is unacceptable to the insurer.
>
> (b) That the named insured or any other operator, either resident of the same household or who customarily operates an

within 55 days from the day the policy issued, which would have allowed it to cancel the policy under MCL 500.3220(a).[22] The majority clearly misunderstands

> automobile insured under the policy has had his operator's license suspended during the policy period and the revocation or suspension has become final.

[22] The majority's holding is premised on an analysis of the right of rescission, the correctness and applicability of which I question. It is not immediately apparent to me that this case presents a question of rescission. Meemic most assuredly wants to void its contractual obligations under the policy, but it has never sought to rescind the policy. And in this Court, Meemic has plainly and unequivocally stated both in its application for leave to appeal and in its brief that it is not seeking to rescind the policy.

The Restatement of Contracts, in noting the distinctions between various ways of putting an end to a contractual relationship, observes:

> Sometimes the parties to a contract that is at least partly executory on each side make an agreement under which each party agrees to discharge all of the other party's duties of performance. Such an agreement is called an "agreement of rescission" in this Restatement. . . . The term "agreement of rescission" is used in this Restatement to avoid confusion with the word "rescission," which courts sometimes use to refer to the exercise by one party of a power of avoidance. . . . An agreement of rescission differs from a "termination," which "occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach" and from a "cancellation," which "occurs when either party puts an end to the contract for breach by the other." [2 Restatement Contracts, 2d, § 283, comment *a*, p 390 (citation omitted).]

Other treatises offer somewhat different arrangements of these terms. One leading treatise explains:

> A rescission avoids the [policy] ab initio whereas a cancellation merely terminates the policy as of the time when the cancellation becomes effective. In other words, cancellation of a policy operates prospectively while rescission, in effect, operates retroactively to the very time that the policy came into existence[.] [2 Couch, Insurance, 3d (rev ed), § 30:3, p 10.]

In this case, all indications suggest that Meemic seeks to " 'put[] an end to the contract,' " not " 'for its breach' " but rather " 'pursuant to a power created by agreement' "—i.e., the fraud-exclusion language. Re-

the relevance of MCL 500.3220 in this case. Of course Meemic cannot now rely on this statute to cancel the policy. The statute provides a limited path to allow an insurer to cancel an insurance policy. Meemic failed to take advantage of this statutory path and instead now seeks to expand that limited path through a sweeping fraud exclusion. Because the no-fault act provides a very defined and limited path to canceling a policy, the fraud-exclusion provision in this case that permits Meemic to "void" or "cancel" the policy without following the limited statutory path to cancellation is inconsistent with MCL 500.3220, and unenforceable.[23]

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statement, § 283, comment *a*, p 390 (citation omitted). If so, that would be a " 'termination.' " And as the Restatement notes, "if under the terms of the contract the occurrence of an event is to terminate an obligor's duty of immediate performance . . . , that duty is discharged if the event occurs." Restatement, § 230(1), p 189 (formatting altered). Further, Meemic does not truly seek to void the policy *ab initio* such as a party seeking rescission would. After all, Meemic asks to be reimbursed for PIP benefits made in connection with fraudulent proofs of loss and to terminate future liability, but it does not seek reimbursement for all the PIP benefits it has paid retroactive to the very time that the policy came into existence.

And regardless of whether the fraud-exclusion provision is characterized as allowing for "rescission" or "cancellation," the no-fault act expressly prevents Meemic from exercising this provision to cancel the policy, let alone from seeking a more robust remedy that would necessarily include cancellation, such as rescission. As we recognized in *Bazzi*:

> When the Legislature intends to limit the common-law remedies available to an insurer for misrepresentation or fraud, that intent is clearly reflected in the language employed in the statute. For example, MCL 500.3220—part of the no-fault act—"limits the ability of a licensed insurer to 'cancel' automobile coverage after a policy has been in effect for at least 55 days." [*Bazzi*, 502 Mich at 400-401 (citation omitted).]

Here, as earlier explained, there is simply no question that Meemic did not "cancel" the policy within 55 days of it being issued, and MCL 500.3220 plainly prohibits Meemic from canceling the policy thereafter. This result is reasonably drawn from the plain language of the no-fault act.

[23] Meemic's later cancellation of the policy for unrelated reasons shortly after the Fortsons had renewed the policy is simply not relevant.

And of course I appreciate that cancellation applies only prospectively and that canceling the policy now would not relieve Meemic from liability. That is precisely why Meemic's attempt to expand its ability to cancel the policy under the fraud-exclusion provision is inconsistent with MCL 500.3220 and, thus, impermissible. There can be no real dispute that the cancellation of a policy does not entail the rescission of that policy, nor that the rescission of a policy does entail the cancellation of that policy. In sum, the majority's reliance on rescission is misplaced. In *Titan*, this Court expressed agreement with a Court of Appeals decision holding that "[r]escission is insufficiently similar to *cancellation* to support the conclusion that the Legislature's enactment of a statute controlling cancellation of an automobile insurance policy *without mentioning rescission demonstrates the Legislature's intent to preclude rescission*."[24] Consistently with this understanding, and as explained in note 22 of this opinion, I believe that the word "void" as used in the fraud-exclusion provision is likewise "insufficiently similar to" "rescission" given that the meaning of "rescission" is distinct from the meaning of "void" because rescission "encompass[es] a broader range of contractual remedies . . . ."[25]

Last, I am not suggesting that "when an insurer elects *not* to reassess the risk and later uncovers fraud, it is somehow precluded from pursuing traditional legal and equitable remedies in response."[26] I am only

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[24] *Titan*, 491 Mich at 568 n 10, quoting *United Security Ins Co v Ins Comm'r*, 133 Mich App 38, 42; 348 NW2d 34 (1984) (quotation marks omitted; emphasis added; alteration in original).

[25] *Titan*, 491 Mich at 568 & n 10, quoting *United Security Ins Co*, 133 Mich App at 42 (quotation marks omitted).

[26] *Titan*, 491 Mich at 566-567.

saying that these legal and equitable remedies are not available if they are in conflict with a statute and cannot be reasonably harmonized with the statute.

Accordingly, we need only follow this Court's decision in *Cruz* and hold that because the contractual fraud-exclusion provision conflicts with the no-fault act, it is against public policy and, therefore, unenforceable.[27]

As mentioned, in *Cruz*, this Court addressed "whether the inclusion of an [EUO] provision in an automobile no-fault insurance policy is permitted under the Michigan no-fault insurance act."[28] The insurer took the "position that the parties could agree in their contract of insurance, notwithstanding the requirements of the statute regarding prompt payment of benefits, to condition the payment of benefits on the submission by [the insured] to an EUO."[29] The insured refused repeated requests to submit to the EUO, and because of this, the insurer denied, in relevant part, the insured's claims for personal protection insurance (PIP) benefits mandated under the no-fault act.[30]

The *Cruz* Court noted that "the no-fault act contains no reference either allowing or prohibiting examinations under oath."[31] The Court phrased the relevant

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[27] I agree with the Court of Appeals that "because the fraud in this case was not fraud in the procurement of the policy and instead arose after the policy was issued," *Fortson*, 324 Mich App at 475-476, neither the Court of Appeals' decision in *Bazzi*, 315 Mich App 763, nor this Court's decision in *Titan*, 491 Mich 547, is controlling. For the same reason, this Court's subsequent decision on appeal in *Bazzi*, 502 Mich 390, is likewise not controlling.

[28] *Cruz*, 466 Mich at 590.

[29] *Id*. at 591.

[30] *Id*.

[31] *Id*. at 594.

legal question as "whether, given this silence, the inclusion of examination under oath provisions in no-fault automobile insurance policies is allowed."[32] The Court emphasized its duty "to construe contracts that are potentially in conflict with a statute, and thus void as against public policy, . . . [so as] to harmonize them with the statute [where reasonably possible]."[33] The Court applied this rule as follows:

> [The insurer] and its insured could not contract to vitiate [the insurer]'s duty to pay benefits in a timely fashion as required by the statute. Once "reasonable proof of the fact and of the amount of loss sustained" was received by [the insurer], it had to pay benefits or be subject to the penalties. Because it is acknowledged that such proof was received, [the insurer's] duty to pay benefits to its insured began thirty days thereafter. To the degree that the contract is in conflict with the statute, it is contrary to public policy and, therefore, invalid.[34]

In my view, the *Cruz* standard presents the proper framework to address the question posed in this case. The fraud-exclusion provision purports to void all of Meemic's statutory duties with respect to Justin without any express or implied justification to do so under the no-fault act. The act clearly provides that an insurer is only responsible for those PIP benefits that are "reasonably necessary,"[35] and I would submit that a fraudulent charge is *ipso facto* neither reasonable nor necessary. Given that the Legislature expressly provided an insurer a limited right to challenge particular charges, there appears no reasonable basis on which the insurer can challenge *all* previous and future valid charges on the basis of a single fraudulent charge.

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[32] *Id*.

[33] *Id*. at 599.

[34] *Id*. at 600-601.

[35] See MCL 500.3107, as amended by 2012 PA 542, effective January 2, 2013.

In addition, the language of the no-fault act suggests that an insured remains entitled to PIP benefits even after the insured has filed a fraudulent charge. Former MCL 500.3148(2) stated:

> An insurer may be allowed by a court an award of a reasonable sum against a claimant as an attorney's fee for the insurer's attorney in defense against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation. To the extent that personal or property protection insurance benefits are then due *or thereafter come due to the claimant because of loss resulting from the injury on which the claim is based*, such a fee may be treated as an offset against such benefits; also, judgment may be entered against the claimant for any amount of a fee awarded against him and not offset in this way or otherwise paid. [MCL 500.3148(2), as enacted by 1972 PA 294 (emphasis added).]

This is the only provision in the no-fault act that addresses a claimant's fraudulent proof of loss for PIP benefits. And far from permitting an insurer to void the policy at this point, former MCL 500.3148(2) expressly contemplates that an insurer will continue to provide PIP benefits due "thereafter" "because of loss resulting from the injury on which the claim is based[.]" And to make clear that this claim is not an independent cause of action, former MCL 500.3148(2) also provides that the "fee may be treated as an offset against such benefits[.]" Because the no-fault act provides a remedy for fraudulent proofs of loss and contemplates the continuation of PIP benefits even though prior fraud has been proved, the fraud-exclusion provision in this case that would "void" a policy for that very reason contradicts the no-fault act and is unenforceable.

Moreover, the fraud-exclusion provision, which only inures to the benefit of an insurer, by no means facilitates the goal of the no-fault insurance system—

" 'to provide victims of motor vehicle accidents with assured, adequate, and prompt reparation for certain economic losses.' "[36] In my opinion, the instant fraud-exclusion provision in many respects thwarts the goal of the no-fault act. Indeed, the specter of having one's unlimited lifetime PIP benefits terminated because of fraudulent activity by anyone entitled to make a claim under the policy at any point in the future provides no meaningful assurance of reparation at all.

III. CONCLUSION

I concur in the result reached by the majority that the instant fraud-exclusion provision is unenforceable. But unlike the majority, I would affirm the Court of Appeals decision on the basis of the *Cruz* standard and would hold that the fraud-exclusion provision is inconsistent with the no-fault act and, therefore, void as against public policy.

CLEMENT, J., concurred with ZAHRA, J.

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[36] *Cruz*, 466 Mich at 595, quoting *Shavers v Attorney General*, 402 Mich 554, 579; 267 NW2d 72 (1978).

In re CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
(MIDWEST INSTITUTE OF HEALTH, PLLC v GOVERNOR)

Docket No. 161492. Argued on request to answer certified questions September 9, 2020. Decided October 2, 2020.

Midwest Institute of Health, PLLC; Wellston Medical Center, PLLC; Primary Health Services, PC; and Jeffery Gulick brought an action in the United States District Court for the Western District of Michigan against the Governor of Michigan, the Michigan Attorney General, and the Michigan Department of Health and Human Services Director, challenging the Governor's Executive Order (EO) No. 2020-17, which prohibited healthcare providers from performing nonessential procedures. The order was issued by Governor Gretchen Whitmer as part of a series of executive orders issued in response to the COVID-19 pandemic. On March 10, 2020, the Governor issued EO 2020-04, declaring a "state of emergency" under the Emergency Powers of the Governor Act of 1945 (the EPGA), MCL 10.31 *et seq*., and the Emergency Management Act of 1976 (the EMA), MCL 30.401 *et seq*. On April 1, 2020, she issued EO 2020-33, which declared a "state of emergency" under the EPGA and a "state of emergency" and "state of disaster" under the EMA. She then requested that the Legislature extend the state-of-emergency and state-of-disaster declarations by 70 days. In response, the Legislature adopted Senate Concurrent Resolution 2020-24, extending the state of emergency and state of disaster through April 30, 2020. On April 30, 2020, the Governor issued EO 2020-66, which terminated the declaration of a state of emergency and state of disaster under the EMA. But, immediately thereafter, she issued EO 2020-67, which indicated that a state of emergency remained declared under the EPGA. At the same time, she issued EO 2020-68, which redeclared a state of emergency and state of disaster under the EMA. Plaintiffs in the underlying federal case are healthcare providers that were prohibited from performing nonessential procedures while EO 2020-17 was in effect and a patient who was unable to undergo a knee-replacement surgery that had been scheduled for the end of March. Although EO 2020-17 has been rescinded, the federal district court

held that the case is not moot because subsequent executive orders have continued to impose restrictions on healthcare providers. The federal court further determined that certain issues raised in the case involved unsettled areas of state law such that certification of those questions to the Michigan Supreme Court was appropriate. The federal district court certified the following questions to the Michigan Supreme Court:

> 1. Whether, under the Emergency Powers of the Governor Act, MCL § 10.31, *et seq*., or the Emergency Management Act, MCL § 30.401, *et seq*., Governor Whitmer has the authority after April 30, 2020 to issue or renew any executive orders related to the COVID-19 pandemic.
>
> 2. Whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.

The Michigan Supreme Court ordered and heard oral argument on the certified questions. 505 Mich 1159 (2020).

The Michigan Supreme Court, in opinions by Justice MARKMAN, Chief Justice MCCORMACK, Justice VIVIANO, and Justice BERNSTEIN, unanimously *held*:

The first certified question is partially answered in the negative: The Governor did not have authority after April 30, 2020, to issue or renew any executive orders related to the COVID-19 pandemic under the EMA.

The Michigan Supreme Court, in an opinion by Justice MARKMAN joined in full by Justices ZAHRA and CLEMENT and joined as to Parts III(A), (B), (C)(2), and IV by Justice VIVIANO, further *held*:

The second certified question is partially answered in the affirmative: The Governor did not possess the authority to exercise emergency powers under the EPGA because the act unlawfully delegates legislative power to the executive branch in violation of the Michigan Constitution.

Justice MARKMAN, joined by Justices ZAHRA and CLEMENT, concluded that the Governor lacked the authority to declare a "state of emergency" or a "state of disaster" under the EMA after April 30, 2020, on the basis of the COVID-19 pandemic and that the EPGA violated the Michigan Constitution because it delegated to the executive branch the legislative powers of state government and allowed the executive branch to exercise those powers indefinitely. First, under the EMA, the Governor only possessed the authority or obligation to declare a state of emergency or state of disaster

once and then had to terminate that declaration when the Legislature did not authorize an extension; the Governor possessed no authority to redeclare the same state of emergency or state of disaster and thereby avoid the Legislature's limitation on her authority. Second, regarding the statutory language of the EPGA, plaintiffs' argument that an emergency must be short-lived and the Legislature's argument that the EPGA was only intended to address local emergencies were textually unconvincing. And while the EPGA only allows the Governor to declare a state of emergency when public safety is imperiled, public-health emergencies such as the COVID-19 pandemic can be said to imperil public safety. Third, as the scope of the powers conferred upon the Governor by the Legislature becomes increasingly broad, in regard to both the subject matter and their duration, the standards imposed upon the Governor's discretion by the Legislature must correspondingly become more detailed and precise. MCL 10.31(1) of the EPGA delegated broad powers to the Governor to enter orders "to protect life and property or to bring the emergency situation within the affected area under control," and under MCL 10.31(2), the Governor could exercise those powers until a "declaration by the governor that the emergency no longer exists." Thus, the Governor's emergency powers were of indefinite duration, and the only standards governing the Governor's exercise of emergency powers were the words "reasonable" and "necessary," neither of which supplied genuine guidance to the Governor as to how to exercise the delegated authority or constrained the Governor's actions in any meaningful manner. Accordingly, the EPGA constituted an unlawful delegation of legislative power to the executive and was unconstitutional under Const 1963, art 3, § 2, which prohibits exercise of the legislative power by the executive branch. Finally, the unlawful delegation of power was not severable from the EPGA as a whole because the EPGA is inoperative when the power to "protect life and property" is severed from the remainder of the EPGA. Accordingly, the EPGA was unconstitutional in its entirety.

Justice VIVIANO, concurring in part and dissenting in part, joined Justice MARKMAN's opinion to the extent that it concluded that the certified questions should be answered, held that the Governor's executive orders issued after April 30, 2020, were not valid under the EMA, and held that the EPGA, as construed by the majority in Justice MARKMAN's opinion, constituted an unconstitutional delegation of legislative power. Justice VIVIANO would have concluded that the EPGA, which only allows the Governor to declare a state of emergency when public safety is imperiled, does not allow for declarations of emergency to confront public-health events like pandemics because "public health" and "public safety"

are not synonymous and, in light of this conclusion resolving the issue on statutory grounds, would not have decided the constitutional question whether the EPGA violates the separation of powers. However, because the rest of the Court interpreted the statute more broadly, Justice VIVIANO addressed the constitutional issue and joined Justice MARKMAN's holding that the EPGA is an unconstitutional delegation of legislative power. Justice VIVIANO also indicated that in an appropriate future case, he would consider adopting the approach to nondelegation advocated by Justice Gorsuch in *Gundy v United States*, 588 US ___, ___; 139 S Ct 2116, 2131 (2019) (Gorsuch, J., dissenting).

Chief Justice MCCORMACK, joined by Justices BERNSTEIN and CAVANAGH, concurring in part and dissenting in part, concurred with Justice MARKMAN's opinion to the extent that it concluded that the certified questions should be answered; held that the Governor's executive orders issued after April 30, 2020, were not valid under the EMA; and rejected plaintiffs' statutory arguments that the EPGA did not authorize the Governor's executive orders. However, Chief Justice MCCORMACK dissented from the majority's constitutional ruling striking down the EPGA. The United States Supreme Court and the Michigan Supreme Court have struck down statutes under the nondelegation doctrine only when the statutes contain *no* standards to guide the decision-maker's discretion, and the delegation in the EPGA had standards—for the Governor to invoke the EPGA, her actions must be "reasonable" and "necessary," they must "protect life and property" or "bring the emergency situation . . . under control," and they may be taken only at a time of "public emergency" or "reasonable apprehension of immediate danger" when "public safety is imperiled." Those standards were as reasonably precise as the statute's subject matter permitted. Accordingly, the delegation in the EPGA did not violate the nondelegation doctrine.

Justice BERNSTEIN, concurring in part and dissenting in part, disagreed with the majority's conclusion that the EPGA is unconstitutional. An examination of caselaw from both the Michigan Supreme Court and the United States Supreme Court supported the conclusion that, under current law, the grant of power in the EPGA does not offend the separation of powers. Justice BERNSTEIN would continue to apply the "standards" test that the Michigan Supreme Court has consistently used to analyze nondelegation challenges, would leave the decision whether to revisit the nondelegation doctrine to the United States Supreme Court, and would leave to the people of Michigan the right to mount challenges to individual orders issued under the EPGA.

Miller Johnson (by *James R. Peterson*, *Stephen J. van Stempvoort*, and *Amy E. Murphy*) and the Mackinac Center Legal Foundation (by *Patrick J. Wright*) for Midwest Institute of Health, PLLC; Wellston Medical Center, PLLC; Primary Health Services, PC, and Jeffery Gulick.

B. Eric Restuccia, Deputy Solicitor General, *Christopher M. Allen*, Assistant Solicitor General, and *Joseph T. Froehlich*, *Joshua Booth*, *John Fedynsky*, and *Kyla Barranco*, Assistant Attorneys General, for the Governor and the Department of Health and Human Services Director.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Ann M. Sherman*, Deputy Solicitor General, and *Rebecca A. Berels*, Assistant Attorney General, for the Attorney General.

Amici Curiae:

Pentiuk, Couvreur & Kobiljak, PC (by *Kerry L. Morgan* and *Randall A. Pentiuk*) and *Gerald R. Thompson* for the LONANG Institute.

Katherine L. Henry for Restore Freedom, PC.

Samuel R. Bagenstos and *Nathan Triplett* for the House Democratic Leader and the House Democratic Caucus.

Fagan McManus, PC (by *Jennifer L. McManus*) and *Kaplan Hecker & Fink LLP* (by *Joshua Matz*, *Raymond P. Tolentino*, *Jonathan R. Kay*, and *Mahrah M. Taufique*) for Michigan Epidemiologists.

Richard Primus *in propria persona*.

Barris, Sott, Denn & Driker, PLLC (by *Todd R. Mendel* and *Eugene Driker*) and *Patterson Belknap Webb and Tyler LLP* (by *Steven A. Zalesin* and *Ryan J. Sheehan*) for the Michigan Nurses Association.

Lipson Neilson PC (by *C. Thomas Ludden*), *Jonathon P. Hauenschild*, and *Bartlett D. Cleland* for the American Legislative Exchange Council.

Rhoades McKee PC (by *Ian A. Northon*) for the Election Integrity Fund.

MARKMAN, J. This case concerns the nature and scope of our state's public response to one of the most threatening public-health crises of modern times. In response to a global, national, and state outbreak of the severe acute respiratory disease named COVID-19, Michigan's Governor has issued a succession of executive orders over the past six months limiting public and private gatherings, closing and imposing restrictions upon certain businesses, and regulating a broad variety of other aspects of the day-to-day lives of our state's citizens in an effort to contain the spread of this contagious and sometimes deadly disease.

The ongoing validity of these executive orders has been the subject of much public debate as well as litigation in both state and federal courts. In the interest of comity, the United States District Court for the Western District of Michigan has asked this Court to resolve critical questions concerning the constitutional and legal authority of the Governor to issue such orders. We hereby respond to the federal court in the affirmative by choosing to answer the questions the federal court has certified, concluding as follows: first, the Governor did not possess the authority under the Emergency Management Act of 1976 (the EMA),

MCL 30.401 *et seq*., to declare a "state of emergency" or "state of disaster" based on the COVID-19 pandemic after April 30, 2020; and second, the Governor does not possess the authority to exercise emergency powers under the Emergency Powers of the Governor Act of 1945 (the EPGA), MCL 10.31 *et seq*., because that act is an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution. Accordingly, the executive orders issued by the Governor in response to the COVID-19 pandemic now lack any basis under Michigan law.[1]

I. FACTS & HISTORY

The coronavirus (COVID-19) is a respiratory disease that can result, and has resulted, in significant numbers of persons suffering serious illness or death. In response to COVID-19, on March 10, 2020, one day before it was declared a pandemic by the World Health Organization, the Governor issued Executive Order (EO) No. 2020-04, declaring a "state of emergency" under the EPGA and the EMA. On March 20, 2020, the Governor issued EO 2020-17, which prohibited medical providers from performing nonessential procedures. On March 23, 2020, she issued EO 2020-21, which ordered all residents to stay at home with limited exceptions. On April 1, 2020, she issued EO 2020-33, which declared a "state of emergency" under the EPGA and a "state of emergency" and "state of disaster" under the EMA. She then requested that the Legisla-

[1] Our decision leaves open many avenues for the Governor and Legislature to work together to address this challenge and we hope that this will take place. See *Gundy v United States*, 588 US ___, ___; 139 S Ct 2116, 2145; 204 L Ed 2d 522 (2019) (Gorsuch, J., dissenting) ("Respecting the separation of powers forecloses no substantive outcomes. It only requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution.").

ture extend the state of emergency and state of disaster by 70 days, and a resolution was adopted, extending the state of emergency and state of disaster, but only through April 30, 2020. Senate Concurrent Resolution No. 2020-24.

On April 30, 2020, the Governor issued EO 2020-66, which terminated the declaration of a state of emergency and state of disaster under the EMA. But, immediately thereafter, she issued EO 2020-67, which provided that a state of emergency remained declared under the EPGA. At the same time, she issued EO 2020-68, which redeclared a state of emergency and state of disaster under the EMA.[2] Although the Governor subsequently lifted the ban on nonessential medical procedures, she then issued EO 2020-97, which imposed numerous obligations on healthcare providers, including specific waiting-room procedures, limitations on the number of patient appointments, adding special hours for highly vulnerable patients, and establishing enhanced telehealth and telemedicine procedures.[3]

Plaintiffs in the underlying federal case are healthcare providers that were prohibited from performing nonessential procedures while EO 2020-17 was in effect and a patient who was prohibited from undergoing knee-replacement surgery. Defendants are the Governor, the Attorney General, and the Director of the Michigan Department of Health and Human Services.

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[2] EOs 2020-67 and 2020-68 were later rescinded by orders that themselves were subsequently rescinded. Most recently, the Governor extended the state of emergency and state of disaster in EO 2020-186, relying on both the EPGA and the EMA.

[3] EO 2020-97 was later rescinded by an order that itself was subsequently rescinded. Most recently, the Governor issued EO 2020-184 which continues to impose a variety of restrictions on healthcare providers.

Although EO 2020-17 has been rescinded, the federal district court held that the case is not moot because at that time EO 2020-114 (now EO 2020-184) continued to impose restrictions on healthcare providers. After the federal district court decided to certify the questions to this Court, defendants moved for reconsideration, raising—for the first time—Eleventh Amendment immunity. The federal district court denied this motion and held that defendants had waived such immunity by not timely raising it in either the principal briefs of their motions to dismiss or in their initial responses to the court's invitation to brief the propriety of certification to this Court. Defendants appealed that ruling, and the matter remains pending in the United States Court of Appeals for the Sixth Circuit.

The federal district court has asked this Court to address two certified questions: (1) whether, under the EMA or the EPGA, the Governor had the authority after April 30, 2020, to issue or renew any executive orders related to the COVID-19 pandemic; and (2) whether the EPGA and/or the EMA violate the Separation of Powers and/or the Nondelegation Clauses of the Michigan Constitution. We heard oral argument on these questions on September 9, 2020.

II. STANDARD OF REVIEW

"Matters of constitutional and statutory interpretation are reviewed de novo." *People v Skinner*, 502 Mich 89, 99; 917 NW2d 292 (2018). " '[S]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.' " *Id*. at 100, quoting *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014), in turn citing *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003).

III. ANALYSIS

A. CERTIFIED QUESTIONS

MCR 7.308(A)(2)(a) provides:

> When a federal court, another state's appellate court, or a tribal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify the question to the Court.

MCR 7.308(A)(5) provides:

> The Supreme Court may deny the request for a certified question by order, issue a peremptory order, or render a decision in the ordinary form of an opinion to be published with other opinions of the Court. The clerk shall send a paper copy or provide electronic notice of the Court's decision to the certifying court.

Defendants argue that we should not answer the certified questions, both because the case is moot[4] and because defendants are entitled to Eleventh Amendment immunity.[5] The federal district court held that

[4] Defendants argue that the case is moot because plaintiffs originally challenged the prohibition against nonessential medical procedures established by EO 2020-17 and EO 2020-17 as well as the challenged prohibition itself have since been lifted.

[5] The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Bd of Trustees of Univ of Alabama v Garrett*, 531 US 356, 363; 121 S Ct 955; 148 L Ed 2d 866 (2001). Suits brought against state officials in their official capacities are equivalent to suits against the state itself. *Kentucky v Graham*, 473 US 159, 166; 105 S Ct 3099; 87 L Ed 2d 114 (1985). However, a state may waive its Eleventh Amendment immunity through its conduct in federal court. *Lapides v Bd of Regents*

the case is not moot because although nonessential medical procedures are no longer prohibited, plaintiffs remain subject to many restrictions, including in particular those pertaining to the number of appointments they can schedule on a daily basis. The federal district court also held that defendants had waived Eleventh Amendment immunity by waiting to raise this issue until their motion for reconsideration.

We agree with plaintiffs that this Court should not address—much less second-guess—the federal district court's decision to certify certain questions to this Court and not to certify others. Both mootness and Eleventh Amendment immunity are matters that fall within the jurisdiction of the federal courts, and neither matter is included within the federal court's certified questions. And those matters this Court is best equipped to answer are precisely those the federal court has certified. Therefore, those are the questions we will answer herein.

B. THE EMA

The first question before this Court is whether the Governor possessed the authority under the EMA to renew her declaration of a state of emergency and state

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of the Univ Sys of Georgia, 535 US 613, 618; 122 S Ct 1640; 152 L Ed 2d 806 (2002). The doctrine of waiver prevents states from selectively invoking immunity "to achieve unfair tactical advantages." *Id*. at 621. Here, in response to plaintiffs' motion for a preliminary injunction, defendants filed 107 pages of briefing with no mention of Eleventh Amendment immunity. Subsequently, defendants filed lengthy motions to dismiss with only passing reference to the Eleventh Amendment to assert that plaintiffs are not entitled to monetary damages. Finally, defendants filed briefs—and oral arguments were held—regarding the certification of the issues to this Court, and never once was Eleventh Amendment immunity raised. Defendants did not raise this matter until they filed their motion for reconsideration after the federal district court indicated that it was going to certify the questions to this Court.

of disaster based on the COVID-19 pandemic after April 30, 2020.[6] MCL 30.403 of the EMA provides, in pertinent part:

> (3) The governor shall, by executive order or proclamation, declare a state of disaster if he or she finds a disaster has occurred or the threat of a disaster exists. The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. *After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature*. . . .
>
> (4) The governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists. The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. *After 28*

[6] The parties do not dispute that the Governor possessed the authority under the EMA to issue executive orders concerning the COVID-19 pandemic prior to April 30, 2020. Moreover, as a general proposition, it cannot be denied that executive orders may be given the force of law if authorized by a statute that constitutionally delegates power to the executive or, indeed, as a function of any other constitutional authority, including that inherent within the executive power. *Cunningham v Neagle*, 135 US 1; 10 S Ct 658; 34 L Ed 55 (1890). However, not only has no such "other" or "inherent" constitutional authority been argued, but it cannot readily be imagined that such a basis of authority would exist in support of a broad and general exercise of legislative authority by the executive branch. We specifically reject the argument offered by amicus Restore Freedom that the Governor's authority to issue executive orders is restricted to the circumstances contemplated by Const 1963, art 5, § 2, which provides that the Governor "may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration."

> *days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature*. [Emphasis added.]

Critically, MCL 30.403(3) and (4) provide that "[a]fter 28 days, the governor shall issue an executive order or proclamation declaring the state of [disaster/emergency] terminated, unless a request by the governor for an extension of the state of [disaster/emergency] for a specific number of days is approved by resolution of both houses of the legislature." Because the Legislature here did not approve an extension of the "state of emergency" or "state of disaster" beyond April 30, 2020, the Governor was required to issue an executive order declaring these to be terminated. While the Governor did so, she acted immediately thereafter to issue another executive order, again declaring a "state of emergency" and "state of disaster" under the EMA for the identical reasons as the declarations that had just been terminated—the public-health crisis created by COVID-19. Given that MCL 30.403(3) and (4) required the Governor to terminate a declaration of a state of emergency or state of disaster after 28 days in the absence of a legislatively authorized extension, we do not believe that the Legislature intended to allow the Governor to redeclare under the EMA the identical state of emergency and state of disaster under these circumstances. To allow such a redeclaration would effectively render the 28-day limitation a nullity.

The Governor argues that because MCL 30.403(3) and (4) provide that "[t]he governor shall, by executive order or proclamation, declare a state of [disaster/emergency] if he or she finds [a disaster/an emergency] has occurred or the threat of [a disaster/an emergency]

exists," the Governor had no choice here but to redeclare a state of emergency and state of disaster. However, when the cited language is read in reasonable conjunction with the language imposing the 28-day limitation, it is clear that the Governor only possesses the authority or obligation to declare a state of emergency or state of disaster once and then must terminate that declaration after 28 days if the Legislature has not authorized an extension. The Governor possesses no authority—much less obligation—to *redeclare* the same state of emergency or state of disaster and thereby avoid the Legislature's limitation on her authority under the EMA. As the Court of Claims correctly stated in *Mich House of Representatives v Governor*,[7] unpublished

[7] In that case, the Michigan House of Representatives and Senate filed their own cause of action against the Governor, arguing that she lacked the authority under the EMA or the EPGA to renew her declaration of a state of emergency or state of disaster based on the COVID-19 pandemic after April 30, 2020, and that, if those statutes did grant her such authority, they are unconstitutional. The Court of Claims held that the Governor lacked the authority under the EMA to renew a declaration of a state of emergency or state of disaster after April 30, 2020, based on the COVID-19 pandemic. However, the Court of Claims held that she did possess the authority under the EPGA to renew her declaration of a state of emergency after April 30, 2020, based on the COVID-19 pandemic and that the EPGA is constitutionally valid. The Court of Appeals subsequently held in a divided opinion that "the Governor's declaration of a state of emergency, her extension of the state of emergency, and her issuance of related executive orders fell within the scope of the Governor's authority under the EPGA" and that "the EPGA is constitutionally sound." *House of Representatives v Governor*, 333 Mich App 325, 329-330; 960 NW2d 125 (2020). The Court of Appeals "decline[d] to address whether the Governor was additionally authorized to take those same measures under the EMA . . . ." *Id*. at 330. Judge TUKEL, in dissent, concluded that with regard to the EPGA, "at least in a case such as this involving an 'epidemic,' . . . the EMA's 28-day time limit controls"; "the Governor's actions violate the EMA"; and "the Governor's actions violate the Separation of Powers Clause . . . ." *Id*. at 369-370 (TUKEL, J., concurring in part and dissenting in part). The Legislature's application for leave to appeal remains pending in this Court.

opinion of the Court of Claims, issued May 21, 2020 (Docket No. 20-000079-MZ), pp 23-24:

> [A]t the end of the 28 days, the EMA contemplates only two outcomes: (1) the state of emergency and/or disaster is terminated by order of the Governor; or (2) the state of emergency/disaster continues *with legislative approval*. The only qualifier on the "shall terminate" language is an affirmative grant of an extension from the Legislature. There is no third option for the Governor to continue the state of emergency and/or disaster on her own, absent legislative approval. . . . To adopt the Governor's interpretation of the statute would render nugatory the express 28-day limit and it would require the Court to ignore the plain statutory language.

Furthermore, and contrary to the Governor's argument, the 28-day limitation in the EMA does not amount to an impermissible "legislative veto."[8] Once again, MCL 30.403(3) and (4) provide that "[a]fter 28 days, the governor shall issue an executive order or proclamation declaring the state of [emergency/disaster] terminated, unless a request by the governor for an extension of the state of [emergency/disaster] for a specific number of days is approved by resolution of both houses of the legislature." These provisions im-

[8] In *Immigration & Naturalization Serv v Chadha*, 462 US 919; 103 S Ct 2764; 77 L Ed 2d 317 (1983), the United States Supreme Court concluded that a provision of the Immigration and Nationality Act that authorized "one House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General of the United States, to allow a particular deportable alien to remain in the United States" was unconstitutional. *Id*. at 923, citing 8 USC 1254(c)(2). And in *Blank v Dep't of Corrections*, 462 Mich 103, 113; 611 NW2d 530 (2000) (opinion by KELLY, J.), a plurality of this Court applied the reasoning of *Chadha* to conclude that statutes purporting to "retain [in the Legislature] the right to approve or disapprove rules proposed by executive branch agencies" were unconstitutional. The statutes at issue in *Chadha* and *Blank* were described as imposing "legislative vetoes."

pose nothing more than a durational limitation on the Governor's authority. The Governor's declaration of a state of emergency or state of disaster may only endure for 28 days absent legislative approval of an extension. So, if the Legislature does nothing, as it did here, the Governor is obligated to terminate the state of emergency or state of disaster after 28 days. A durational limitation is not the equivalent of a veto.

As the Court of Claims again correctly explained in *Mich House of Representatives v Governor*, unpublished opinion of the Court of Claims, issued May 21, 2020 (Docket No. 20-000079-MZ), p 25, "The Legislature has not 'vetoed' or negated any action by the executive branch by imposing a temporal limit on the Governor's authority; instead, it limited the amount of time the Governor can act independently of the Legislature in response to a particular emergent matter." Indeed, *Immigration & Naturalization Serv v Chadha*, 462 US 919, 955 n 19; 103 S Ct 2764; 77 L Ed 2d 317 (1983), itself expressly recognized that "durational limits on authorizations . . . lie well within Congress' constitutional power." That is exactly what the 28-day limitation establishes—a durational limitation on an authorization. Nothing prohibits the Legislature from placing such a limitation on authority delegated to the Governor, and such a limitation does not render illusory in any way the delegation itself.

For these reasons, we conclude that the Governor did not possess the authority under the EMA to renew her declaration of a state of emergency or state of disaster based on the COVID-19 pandemic after April 30, 2020.[9]

[9] Given that we conclude that the Governor did not possess the authority under the EMA to renew her declaration of a state of emergency or state of disaster based on the COVID-19 pandemic after April 30, 2020,

C. THE EPGA

The second question before this Court is whether the Governor possessed the authority under the EPGA to proclaim a state of emergency based on the COVID-19 pandemic after April 30, 2020.

1. STATUTORY INTERPRETATION

MCL 10.31(1) of the EPGA sets forth the circumstances in which the Governor may proclaim a state of emergency and the authorized subject matter of his or her emergency powers:

> During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control. Those orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation, within the area or any section of the area; designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated; control of places of amusement and assembly and of persons on public streets and thoroughfares; establishment of a curfew; control of the sale, transportation, and use of alcoholic beverages and liquors; and control of the storage, use, and transportation

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it is unnecessary for us to decide whether the EMA violates the Michigan Constitution, a question also certified to this Court.

> of explosives or inflammable materials or liquids deemed to be dangerous to public safety.

MCL 10.31(2) of the EPGA sets forth the effectiveness of the emergency powers, including the time at which those powers are no longer in effect:

> The orders, rules, and regulations promulgated under subsection (1) are effective from the date and in the manner prescribed in the orders, rules, and regulations and shall be made public as provided in the orders, rules, and regulations. The orders, rules, and regulations may be amended, modified, or rescinded, in the manner in which they were promulgated, from time to time by the governor during the pendency of the emergency, but shall cease to be in effect upon declaration by the governor that the emergency no longer exists.

MCL 10.32 explains the legislative intentions of the EPGA:

> It is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this act shall be broadly construed to effectuate this purpose.[10]

Plaintiffs argue that a genuine emergency must necessarily be short-lived and that because our state has been dealing with COVID-19 for more than six months, it is no longer an emergency. We respectfully disagree. "Emergency" is defined as "an urgent need for assistance or relief." *Merriam-Webster's Collegiate Diction-*

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[10] The EPGA includes two other provisions, neither of which is relevant here. MCL 10.31(3) provides that "Subsection (1) does not authorize the seizure, taking, or confiscation of lawfully possessed firearms, ammunition, or other weapons," and MCL 10.33 provides that "[t]he violation of any such orders, rules and regulations made in conformity with this act shall be punishable as a misdemeanor, where such order, rule or regulation states that the violation thereof shall constitute a misdemeanor."

ary (11th ed). Simply because something has been ongoing for some extended period of time does not signify that there is no longer an "urgent need for assistance or relief." That a fire, for example, has been burning for months does not mean that there is no longer an "urgent need for assistance or relief," and the same is obviously true of an epidemic. In short, an emergency is an emergency for as long as it persists as an emergency.

Furthermore, the Legislature argues that the EPGA only encompasses local—not statewide—emergencies. It relies on the fact that the EPGA refers to a public emergency "within the state," MCL 10.31(1), and contends that a statewide emergency is not "within" the state. Again, we disagree and believe that such a reading does not constitute a reasonable understanding of the language of the statute. "Within" simply means "the inside of." *Merriam-Webster's Collegiate Dictionary* (11th ed). A statewide emergency is an emergency "within the inside of the state," with the entirety of Michigan's counties, cities, and townships fairly described as being located "within the inside of the state."

The Legislature also argues that the EPGA's references to the "area involved," the "affected area," "any section of the area," and "specific zones within the area" signify that the EPGA was only intended to apply to local emergencies. Again, we disagree and do not find this to be a reasonable understanding of the EPGA. "Area" is defined as "a geographic region." *Merriam-Webster's Collegiate Dictionary* (11th ed). The "area involved" or the "affected area" may comprise the entire state, or it may comprise some more localized geographical part of the state. Indeed, the EMA, which all agree is applicable to statewide emergencies such as the present pandemic, also refers repeatedly to the "threat-

ened area." See MCL 30.403(3) and (4); MCL 30.405(1)(e) and (g). And that the Governor may promulgate rules that pertain to the "affected area," to a "section" of the affected area, or to a "specific zone" within the affected area does not indicate that the Governor cannot declare a statewide emergency. It simply means that once the Governor has declared a statewide emergency, she is not obligated to treat the entire state in an identical manner.[11]

Additionally, both plaintiffs and the Legislature argue that the historical context of the EPGA, enacted in 1945 in response to riots in Detroit in 1943, suggests that it was intended to apply only to local emergencies. However, even if an undisputed or a principal purpose of the EPGA was to enable the Governor to respond to a local emergency such as a riot, that does not indicate that enabling the Governor to respond to a local emergency was the EPGA's *exclusive* purpose. "[T]he remedy [of a legal provision] often extends beyond the particular act or mischief which first suggested the necessity of the law." *Dist of Columbia v Heller*, 554 US 570, 578; 128 S Ct 2783; 171 L Ed 2d 637 (2008) (quotation marks and citations omitted). That is, historical context and rationale, while often helpful in giving reasonable meaning to a statute, cannot ultimately take priority over its actual language. What is dispositive here is that the actual terms of the EPGA do not preclude the Governor from proclaiming a state of emergency in response to a statewide emergency.

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[11] Plaintiffs also argue that because the EPGA empowers certain *local* officials to seek an emergency declaration, the concerns of the statute are primarily local in nature. However, the EPGA also empowers the commissioner of the Michigan state police to request such a declaration, and of course, it allows the Governor herself to proclaim a state of emergency upon her own volition.

In *House of Representatives v Governor*, 333 Mich App 325, 369; 960 NW2d 125 (2020) (TUKEL, J., concurring in part and dissenting in part), Judge TUKEL concluded in a thoughtful dissent that "at least in a case such as this involving an 'epidemic,' . . . the EMA's 28-day time limit controls." He relied on the fact that the definition of "disaster" within the EMA includes an "epidemic" while the EPGA does not include that term. However, the definition of "disaster" within the EMA includes a variety of examples of types of disasters, and if all of those types of disasters were excluded from the EPGA using Judge TUKEL's reasoning, the EPGA would be effectively rendered a nullity,[12] running afoul of the interpretive maxim that "a court should avoid a construction that would render any part of the statute surplusage or nugatory." *In re MCI Telecom Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999). Such an understanding of the EPGA would also run afoul of the EMA, which provides, in pertinent part:

> This act shall not be construed to do any of the following:

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[12] The EMA defines "disaster" as "an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, fire, flood, snowstorm, ice storm, tornado, windstorm, wave action, oil spill, water contamination, utility failure, hazardous peacetime radiological incident, major transportation accident, hazardous materials incident, epidemic, air contamination, blight, drought, infestation, explosion, or hostile military action or paramilitary action, or similar occurrences resulting from terrorist activities, riots, or civil disorders." MCL 30.402(e). If the EPGA does not apply to emergencies arising from one of the above circumstances, we are uncertain as to what type of emergencies the EPGA would apply. Judge TUKEL opined that the Legislature could not have intended for both the EPGA and the EMA to apply to epidemics. However, both the EPGA and the EMA explicitly state that they apply to riots. Accordingly, the Legislature obviously intended for there to be some level of overlap between the two acts.

* * *

> (d) Limit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to [the EPGA] or exercise any other powers vested in him or her under the state constitution of 1963, statutes, or common law of this state independent of, or in conjunction with, this act. [MCL 30.417.]

To rely on the inclusion of the word "epidemic" within the EMA to conclude that the EPGA does not apply, or that the 28-day limitation of the EMA does apply to the EPGA, would, in our judgment, be to construe the EMA to "[l]imit, modify, or abridge the authority of the governor" under the EPGA, which is prohibited by MCL 30.417.[13]

Finally, Justice VIVIANO concludes after a thorough and considered analysis that the EPGA does not apply "in the sphere of public health generally or to an epidemic like COVID-19 in particular" because the EPGA only allows the Governor to declare a state of emergency "when public safety is imperiled," MCL 10.31(1), and "public safety" does not encompass "public health." Although we agree with Justice VIVIANO that the EPGA only allows the Governor to declare a state of emergency "when public safety is imperiled," we respectfully disagree that public-health emergencies such as the COVID-19 pandemic cannot be said to imperil "public safety." "Public" is defined as "relating to people in general," *Merriam-Webster's Collegiate Dictionary* (11th ed), and "safety" is defined as "the condition of being safe from undergoing or causing hurt, injury, or loss," *id*. Given that COVID-19 has resulted in the deaths of many thousands in Michigan

[13] Similarly, reading the 28-day time limitation of the EMA into the EPGA on the basis that these two statutes stand *in pari materia*, as argued by plaintiffs, is also, in our judgment, precluded by MCL 30.417.

and hundreds of thousands across the country,[14] COVID-19, in our judgment, can reasonably be said to imperil "public safety."

The people of this state, as well as their public officials, deserve to be able to read and to comprehend their own laws. See, e.g., *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 284 n 10; 696 NW2d 646 (2005) ("[L]aws are also made more accessible to the people when each of them is able to read the law and thereby understand his or her rights and responsibilities. When the words of the law bear little or no relationship to what courts say the law means . . . , then the law increasingly becomes the exclusive province of lawyers and judges."); *Robinson v Detroit*, 462 Mich 439, 467; 613 NW2d 307 (2000) ("[I]f the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts."). As Justice COOLEY once explained:

> [Courts] may give a sensible and reasonable interpretation to legislative expressions which are obscure, but they have no right to distort those which are clear and intelligible. The fair and natural import of the terms employed, in view of the subject matter of the law, is what should govern[.] [*People ex rel Twitchell v Blodgett*, 13 Mich 127, 167-168 (1865).]

See also MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language; but 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

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[14] See Centers for Disease Control and Prevention, *Provisional Death Counts for Coronavirus Disease 2019 (COVID-19)* <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm> (accessed October 1, 2020) [https://perma.cc/6UPD-RHZ3].

and appropriate meaning."). We disagree with Justice VIVIANO that "public safety" constitutes a legal term of art. There is nothing "obscure," "peculiar," or "technical" about the phrase "public safety." Rather, this phrase is reasonably "clear," "intelligible," and "common"—so much so that prior to Justice VIVIANO first asserting his analysis at oral argument, nobody had argued on their own accord in either this case or in *House of Representatives v Governor* that COVID-19 did not imperil "public safety."[15] Moreover, it is telling that not one of the sources cited by Justice VIVIANO asserts, as does he, that a public-health emergency such as COVID-19 does not, reasonably understood, imperil "public safety." Indeed, both the United States Supreme Court and this Court have long recognized to the contrary. See, e.g., *Jacobson v Massachusetts*, 197 US 11, 37; 25 S Ct 358; 49 L Ed 643 (1905) ("It seems to the court that an affirmative answer to these questions [in *Jacobson*] would practically strip the legislative department of its function to care for the public health and the *public safety* when endangered by *epidemics* of disease.") (emphasis added); *People ex rel Hill v Lansing Bd of Ed*, 224 Mich 388, 391; 195 NW 95 (1923) ("[A] community has the right to protect itself against an *epidemic* of disease which threatens the *safety* of its members.") (quotation marks and citation omitted; emphasis added).

Once again, "[t]his Court 'must presume a statute is constitutional and construe it as such, unless the only

[15] Indeed, before Justice VIVIANO presented his analysis at oral argument, plaintiffs themselves effectively conceded that COVID-19 imperiled "public safety." See Plaintiffs' Reply Brief (August 20, 2020) at 1 ("Plaintiffs acknowledge that for 51 days following the Governor's first declaration of a state of emergency based on COVID-19, the Governor acted within the bounds of the enabling statutes and the Michigan Constitution."); *id*. at 3 ("The Governor acted within the limits of her authority for 51 days.").

proper construction renders the statute unconstitutional.' " *Grebner v State*, 480 Mich 939, 940 (2007) (citation omitted). Accordingly, "assuming that there are two *reasonable* ways of interpreting [a statute]—one that renders the statute unconstitutional and one that renders it constitutional—we should choose the interpretation that renders the statute constitutional." *Skinner*, 502 Mich at 110-111 (emphasis added). However, we are not prepared to rewrite the EPGA or to construe it in an overly narrow or strained manner to avoid rendering it unconstitutional under the nondelegation doctrine or any other constitutional doctrine.[16] To do so would read the EPGA in a way that does not reflect the genuine intentions of the statute's framers, an approach that would be in ironic conflict with the fundamental premise of the nondelegation doctrine itself, which is that the laws of our state are to be determined by the Legislature. For these reasons, we conclude that there is one predominant and reasonable construction of the EPGA—the construction given to it by the Governor. This is not to say, however, that the construction advanced by the Governor and the other defendants renders the EPGA a constitutionally permissible delegation of legislative power to the executive. To the contrary, while the EPGA purports to grant the Governor the power to proclaim a state of emer-

[16] In addressing the constitutionality of a statute, this Court itself must be regardful of the separation of powers. We are not empowered to add, subtract, or modify a statute out of judicial preference. Rather, it is the province of the Legislature to make the law through the process of bicameral passage and presentment to the executive, and it is our duty only to state, to the best of our judgment, what that law requires. By the same token, it is also the responsibility of this Court in recognizing the separation of powers to ensure that the Legislature does not exceed its constitutional authority in "making the law" either by encroaching upon the powers of another branch or by relinquishing its own powers to another branch.

gency based on the COVID-19 pandemic, and accordingly to exercise broad emergency powers, the EPGA by that very construction stands in violation of the Michigan Constitution.

2. NONDELEGATION DOCTRINE

Const 1963, art 3, § 2 summarizes the separation-of-powers principle in Michigan as follows:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

"[T]he principal function of the separation of powers . . . is to . . . protect individual liberty[.]" *Clinton v City of New York*, 524 US 417, 482; 118 S Ct 2091; 141 L Ed 2d 393 (1998) (Breyer, J., dissenting). " '[T]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.' " *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 141; 719 NW2d 553 (2006), quoting The Federalist No. 47 (Madison) (Rossiter ed, 1961), p 301. And as Montesquieu explained, "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Baron de Montesquieu, *The Spirit of the Laws* (London: J. Nourse and P. Vaillant, 1758), Book XI, ch 6, p 216.

Const 1963, art 4, § 1 provides that "the legislative power of the State of Michigan is vested in a senate and a house of representatives." "The 'legislative

power' has been defined as the power 'to regulate public concerns, and to make law for the benefit and welfare of the state.' " *46th Circuit Trial Court*, 476 Mich at 141, quoting Cooley, Constitutional Limitations (1886), p 92. "The power of the *Legislative* being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make *Laws*, and not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands." Locke, *Two Treatises of Government* (New York: New American Library, Laslett ed, 1963), pp 408-409. Accordingly, "[o]ne of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority." Cooley, Constitutional Limitations (1886), pp 116-117.

"Strictly speaking, there is *no* acceptable delegation of legislative power." *Mistretta v United States*, 488 US 361, 419; 109 S Ct 647; 102 L Ed 2d 714 (1989) (Scalia, J., dissenting). "The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Marshall Field & Co v Clark*, 143 US 649, 693-694; 12 S Ct 495; 36 L Ed 294 (1892) (quotation marks and citation omitted). "[A] certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action . . . ." *Mistretta*, 488 US at 417 (Scalia, J., dissenting). "The focus of controversy . . . has been whether the *degree* of generality contained in the authorization for exercise of executive

or judicial powers in a particular field is so unacceptably high as to *amount* to a delegation of legislative powers." *Id*. at 419.

We have explained that "[c]hallenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency's or individual's exercise of the delegated power." *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 51; 367 NW2d 1 (1985). "The preciseness required of the standards will depend on the complexity of the subject." *Id*. "In making this determination whether the statute contains sufficient limits or standards we must be mindful of the fact that such standards must be sufficiently broad to permit efficient administration in order to properly carry out the policy of the Legislature but not so broad as to leave the people unprotected from uncontrolled, arbitrary power in the hands of administrative officials." *Dep't of Natural Resources v Seaman*, 396 Mich 299, 308-309; 240 NW2d 206 (1976). "[T]he standards prescribed for guidance [must be] as reasonably precise as the subject-matter requires or permits." *Osius v St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25 (1956).

The United States Supreme Court[17] has explained that "[s]o long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power.' " *Mistretta*, 488 US at 372, quoting *J W Hampton, Jr & Co v United States*, 276 US 394, 409; 48 S Ct 348; 72 L Ed 624

[17] In *Taylor*, 468 Mich at 10, we observed that our nondelegation caselaw is "similar to the federally developed" nondelegation caselaw.

(1928) (brackets omitted).[18] That is, "[t]he constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." *Gundy v United States*, 588 US ___, ___; 139 S Ct 2116, 2123; 204 L Ed 2d 522 (2019) (opinion by Kagan, J.). "[T]he answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides." *Id*.

The scope of the delegation is also relevant when assessing the sufficiency of the standards. "[T]he degree of agency discretion that is acceptable varies according to the scope of the power . . . conferred." *Whitman v American Trucking Associations, Inc*, 531 US 457, 475; 121 S Ct 903; 149 L Ed 2d 1 (2001). Consequently, "the ultimate judgment regarding the constitutionality of a delegation must be made not on the basis of the scope of the power alone, but on the basis of its scope *plus* the specificity of the standards governing its exercise. When the scope increases to immense proportions . . . the standards must be corre-

[18] The "intelligible principle" test has been subject to growing criticism by some members of the United States Supreme Court in recent years for failing to sufficiently protect the separation of powers. See, e.g., *Dep't of Transp v Ass'n of American Railroads*, 575 US 43, 77; 135 S Ct 1225; 191 L Ed 2d 153 (2015) (Thomas, J., concurring) ("Implicitly recognizing that the power to fashion legally binding rules is legislative, we have nevertheless classified rulemaking as executive (or judicial) power when the authorizing statute sets out 'an intelligible principle' to guide the rulemaker's discretion. . . . I would return to the original understanding of the federal legislative power and require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process."); *Gundy*, 588 US at ___; 139 S Ct at 2140 (Gorsuch, J., dissenting) (asserting that the "intelligible principle" test "has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional"). Nonetheless, the "intelligible principle" test remains as the dominant expression of what is required to sustain a constitutional delegation of powers.

spondingly more precise." *Synar v United States*, 626 F Supp 1374, 1386 (D DC, 1986). See also *Int'l Refugee Assistance Project v Trump*, 883 F3d 233, 293 (CA 4, 2018) (Gregory, C.J., concurring) ("When broad power is delegated with few or no constraints, the risk of an unconstitutional delegation is at its peak. . . . Therefore, whether a delegation is unconstitutional depends on two factors—the amount of discretion and the scope of authority."), vacated by *Trump v Int'l Refugee Assistance Project*, 585 US ___; 138 S Ct 2710 (2018). As the federal Court of Appeals for the District of Columbia Circuit has recognized in a series of cases, a critical component of the scope of the delegated "power" is the breadth of subjects to which the power can be applied:

> But petitioners have ignored a limit to the nondelegation doctrine that we relied on in *American Trucking* and even more emphatically in its immediate precursor, *International Union, UAW v. OSHA ("Lockout/Tagout I")*, 938 F.2d 1310 (D.C.Cir.1991). There we noted that the scope of the agency's "claimed power to roam" was "immense, encompassing all American enterprise." *Id*. at 1317. Quoting verbatim from *Synar v. United States*, 626 F.Supp. 1374, 1383 (D.D.C.1986) (three-judge panel), *aff'd sub nom*. *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986), we said, "When the scope increases to immense proportions, as in [*Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935)], the standards must be correspondingly more precise." *Lockout/Tagout I*, 938 F.2d at 1317. We noted that a mass of cases in courts had upheld delegations of effectively standardless discretion, and distinguished them precisely on the ground of the narrower scope within which the agencies could deploy that discretion. *Id*. [*Michigan v US Environmental Protection Agency*, 341 US App DC 306, 323; 213 F3d 663 (2000) (brackets in original).]

In other words, it is one thing if a statute confers a great degree of discretion, i.e., power, over a narrow

subject; it is quite another if that power can be brought to bear on something as "immense" as an entire economy. See *Schechter Poultry Corp v United States*, 295 US 495, 539; 55 S Ct 837; 79 L Ed 1570 (1935) (striking down a delegation to the President to approve trade standards when the "authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country"). Furthermore, "[t]he area of permissible indefiniteness narrows . . . when the regulation invokes criminal sanctions and potentially affects fundamental rights . . . ." *United States v Robel*, 389 US 258, 275; 88 S Ct 419; 19 L Ed 2d 508 (1967) (Brennan, J., concurring in the result).

Finally, the durational scope of the delegated power also has some relevant bearing, in our judgment, on whether the statute violates the nondelegation doctrine. Of course, an unconstitutional delegation is no less unconstitutional because it lasts for only two days. But it is also true, as common sense would suggest, that the conferral of indefinite authority accords a greater accumulation of power than does the grant of temporary authority. Courts have recognized this consideration, although they have also acknowledged that it is not often dispositive. In *Gundy*, for example, the plurality thought it relevant to the delegation analysis in that case that the statute accorded the executive "only temporary authority." *Gundy*, 588 US at ___; 139 S Ct at 2130; see also *United States v Touby*, 909 F2d 759, 767 (CA 3, 1990) ("[I]t was reasonable for Congress to broadly delegate special authority to the Attorney General, particularly when the delegation permits scheduling to be effective only for a limited period of time."); *United States v Emerson*, 846 F2d

541, 545 (CA 9, 1988) (upholding delegation because, in part, the delegated power was temporary); *Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v Connally*, 337 F Supp 737, 754 (D DC, 1971) ("It is also material, though not dispositive, to note the limited time frame established by Congress for the stabilization authority delegated to the President."); *Marran v Baird*, 635 A2d 1174, 1181 (RI, 1994) (upholding a delegation because, in part, the danger of "administrative abuse" was diminished given the limited duration of the delegated authority).

It is therefore impossible to ascertain whether the standards set forth in the EPGA that guide the Governor's discretionary exercise of her emergency powers satisfy the nondelegation doctrine without first assessing the precise scope of these powers. Simply put, as the scope of the powers conferred upon the Governor by the Legislature becomes increasingly broad, in regard to both the *subject matter* and their *duration*, the *standards* imposed upon the Governor's discretion by the Legislature must correspondingly become more detailed and precise.

a. SCOPE OF DELEGATED POWER

Concerning the subject matter of the emergency powers conferred by the EPGA, it is remarkably broad, authorizing the Governor to enter orders "to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). It is indisputable that such orders "to protect life and property" encompass a substantial part of the entire police power of the state. See *Connor v Herrick*, 349 Mich 201, 217; 84 NW2d 427 (1957) ("[T]here seems to be no doubt that [the police power] does extend to the protection of the *lives, health, and property of the*

citizens, and to the preservation of good order and public morals.") (emphasis added). And the police power is legislative in nature. See *Bolden v Grand Rapids Operating Corp*, 239 Mich 318, 321; 214 NW 241 (1927) ("The power we allude to is rather the police power, the power vested in the Legislature by the Constitution, to make, ordain and establish all manner of wholesome and reasonable laws . . . .") (quotation marks and citation omitted). The EPGA, "in effect, suspends normal civil government." *Walsh v River Rouge*, 385 Mich 623, 639; 189 NW2d 318 (1971). "The invocation of a curfew or restriction on the right to assemble or prohibiting the right to carry on businesses licensed by the State of Michigan involves the suspension of constitutional liberties of the people." *Id*.

To illustrate the breadth of the emergency powers contemplated by the EPGA, we note that during the COVID-19 pandemic the Governor has, by way of executive orders specifically issued under the EPGA, effected the following public policies: *requiring* all residents to stay home with limited exceptions; *requiring* all residents to wear face coverings in indoor public spaces and when outdoors if unable to consistently maintain a distance of six feet or more from individuals who are not members of their household, including requiring children to wear face coverings while playing sports; *requiring* all residents to remain at least six feet away from people outside one's household to the extent feasible under the circumstances; *requiring* businesses to comply with numerous workplace safeguards, including daily health screenings of employees; *closing* restaurants, food courts, cafes, coffeehouses, bars, taverns, brew pubs, breweries, microbreweries, distilleries, wineries, tasting rooms, clubs, hookah bars, cigar bars, vaping lounges, barbershops, hair salons, nail salons, tanning salons, tattoo parlors, schools, churches, the-

aters, cinemas, libraries, museums, gymnasiums, fitness centers, public swimming pools, recreation centers, indoor sports facilities, indoor exercise facilities, exercise studios, spas, casinos, and racetracks; *closing* places of public amusement, including arcades, bingo halls, bowling alleys, indoor climbing facilities, skating rinks, and trampoline parks; *prohibiting* nonessential travel, in-person work that is not necessary to sustain or protect life, and nonessential in-person business operations; *prohibiting* the sale of carpet, flooring, furniture, plants, and paint; *prohibiting* advertisements for nonessential goods, nonessential medical and dental procedures, and nonessential veterinary services; *prohibiting* visitors at healthcare facilities, residential care facilities, congregate care facilities, and juvenile justice facilities; and *prohibiting* boating, golfing, and public and private gatherings of persons not part of a single household. Each of these policies was putatively ordered "to protect life and property" and/or to "bring the emergency situation within the affected area under control." What is more, these policies exhibit a sweeping scope, both with regard to the subjects covered and the power exercised over those subjects. Indeed, they rest on an assertion of power to reorder social life and to limit, if not altogether displace, the livelihoods of residents across the state and throughout wide-ranging industries.

b. DURATION OF DELEGATED POWER

Concerning the duration of the emergency powers conferred by the EPGA, those powers may be exercised until a "declaration by the governor that the emergency no longer exists." MCL 10.31(2). Thus, the Governor's emergency powers are of indefinite duration. This, of course, is very much unlike the EMA, which

provides that "[t]he state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency *has been in effect for 28 days*." MCL 30.403(4) (emphasis added). And as the present circumstances illustrate, if the emergency is unresolved for a period of months or longer, the emergency powers under the EPGA may be exercised for a period of months or longer.[19] The fact that the EPGA authorizes indefinite exercise of emergency powers for perhaps months—or even years—considerably broadens the scope of authority conferred by that statute. See *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 652-653; 72 S Ct 863; 96 L Ed 1153 (1952) (Jackson, J., concurring) (explaining that "Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency" but that those "authorities" are perhaps best characterized as "temporary law"). Thus, under the EPGA, the state's legislative authority, including its police powers, may conceivably be delegated to the state's executive authority for an indefinite period.

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[19] When Justice BERNSTEIN questioned counsel for the Governor during oral argument concerning the ending point of the Governor's exercise of emergency powers under the EPGA, counsel replied:

> Regarding this pandemic in terms of timing, while I have no crystal ball, the reasonable prognostication is that we're talking about a matter of months. So we're looking at certain benchmarks: sufficient immunity, vaccination, therapeutic interventions, and a combination of those things. [Michigan Supreme Court, *Oral Arguments in In re Certified Questions* <https://www.youtube.com/watch?v=HyBanqtCLvo> at 1:44:20 to 1:44:38 (accessed September 29, 2020).]

c. STANDARDS OF DELEGATED POWER

It is against the above backdrop that the constitutionality of the standards, or legislative direction to the executive branch, set forth in the EPGA must be considered. What standards or legislative direction are sufficient to transform a delegation of power in which what is being delegated consists of pure legislative policymaking power into a delegation in which what is being delegated has been made an essentially executive "carrying-out of policy" power by virtue of the accompanying direction given by the Legislature to the executive in the delegation? When the scope of the power delegated "increases to immense proportions . . . the standards must be correspondingly more precise." *Synar*, 626 F Supp at 1386. Under the EPGA, the standards governing the Governor's exercise of emergency powers include only the words "reasonable" and "necessary." See MCL 10.31(1) ("After making the proclamation or declaration, the governor may promulgate *reasonable* orders, rules, and regulations as he or she considers *necessary* to protect life and property or to bring the emergency situation within the affected area under control.") (emphasis added).

Concerning the term "reasonableness," that word places a largely (if not entirely) illusory limitation upon the Governor's discretion because the Legislature is presumed not to delegate the authority to act unreasonably in the first place. In this regard, in *Mich Farm Bureau v Bureau of Workmen's Compensation*, 408 Mich 141; 289 NW2d 699 (1980), we explained that an administrative rule is valid " 'if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable. The requirement of reasonableness stems both from the idea of constitutional due process and from the idea of statutory interpretation

that legislative bodies are assumed to intend to avoid the delegation of power to act unreasonably.' " *Id*. at 149, quoting 1 Davis, Administrative Law, § 5.03, p 299. See also *American Radio Relay League, Inc v Fed Communications Comm*, 199 US App DC 293, 297; 617 F2d 875 (1980) ("We fail to find significance in the fact that Congress said 'reasonable regulations' instead of simply 'regulations.' . . . Here, the word 'reasonable' clearly is nothing more than surplusage, for we cannot assume that Congress would ever intend anything other than reasonable agency action."). Although those cases addressed delegated agency powers, we see no reason why the same principle would not apply to all powers delegated to the executive. Accordingly, the reference in MCL 10.31(1) to "reasonable orders, rules, and regulations" communicates little more than simply "orders, rules, and regulations." The word "reasonable"—far from imposing a significant or in any way meaningful standard upon the Governor—is essentially surplusage. It neither affords direction to the Governor for how to carry out the powers that have been delegated to her nor constrains her conduct in any realistic manner.

Concerning the term "necessary," that word means "absolutely needed: REQUIRED." *Merriam-Webster's Collegiate Dictionary* (11th ed). Given the exceptionally broad scope of the EPGA, which authorizes indefinite orders that are "necessary to protect life and property," we believe that such a standard is also insufficient to satisfy the nondelegation doctrine when considered both in isolation and alongside the word "reasonable." It is elementary that "life" and "property" may be threatened by a virtually unlimited array of conduct, circumstances, and serendipitous occurrences. A person driving on the road instead of staying inside at home, for example, may fairly be understood

as posing a threat to "life" and "property" because there is perpetual risk that he or she will be involved in an automobile accident. Thus, the Governor under the EPGA may find that an order prohibiting a person from driving is warranted merely on the basis of this rationale. The contagions, accidents, misfortunes, risks, and acts of God, ordinarily and inevitably associated with the human condition and with our everyday social experiences, are simply too various for this standard to supply any meaningful limitation upon the exercise of the delegated power. Simply put, the EPGA, in setting forth a "necessary" standard, just as in setting forth a "reasonable" standard, neither supplies genuine guidance to the Governor as to how to exercise the authority delegated to her by the EPGA nor constrains her actions in any meaningful manner.[20]

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[20] In *Touby v United States*, 500 US 160; 111 S Ct 1752; 114 L Ed 2d 219 (1991), the United States Supreme Court upheld as constitutional 21 USC 811(h) of the Controlled Substances Act, 21 USC 801 *et seq*., which provided that "the Attorney General can schedule a substance on a temporary basis when doing so is 'necessary to avoid an imminent hazard to the public safety.' " *Id*. at 163, quoting 21 USC 811(h). The Court explained that the statute satisfied the nondelegation doctrine because the surrounding statutes imposed other standards upon the Attorney General's discretion to temporarily schedule a substance:

> Although it features fewer procedural requirements than the permanent scheduling statute, § 201(h) meaningfully constrains the Attorney General's discretion to define criminal conduct. To schedule a drug temporarily, the Attorney General must find that doing so is "necessary to avoid an imminent hazard to the public safety." § 201(h)(1), 21 U.S.C. § 811(h)(1). In making this determination, he is "required to consider" three factors: the drug's "history and current pattern of abuse"; "[t]he scope, duration, and significance of abuse"; and "[w]hat, if any, risk there is to the public health." §§ 201(c)(4)-(6), 201(h)(3), 21 U.S.C. §§ 811(c)(4)-(6), 811(h)(3). Included within these factors are three other factors on which the statute places a special emphasis: "actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution." § 201(h)(3), 21 U.S.C.

In this regard, we also find illuminating an advisory opinion written in the midst of World War II by the Supreme Judicial Court of Massachusetts. *Opinion of the Justices*, 315 Mass 761; 52 NE2d 974 (1944). The statute at issue was a wartime measure allowing the governor to " 'have and . . . [to] exercise any and all authority over persons and property, necessary or expedient for meeting the supreme emergency of such a state of war,' " as consistent with the state constitution. *Id*. at 766, citing Mass Acts of 1942, ch 13, special session. The question posed was whether this statute allowed the governor to modify statutes establishing the date of state primaries so as to allow soldiers to vote. *Id*. at 765. The majority recognized that this statute would allow the governor "to render inoperative any law inconsistent with" his orders and to wield "all authority of every kind over persons or property which it could constitutionally confer upon him by specific enactments wherein the precise powers intended to be granted and the manner of their exercise should be particularly stated, subject only to the limitation that the action taken by the Governor shall be 'necessary or expedient for meeting the supreme emergency' of war." *Id*. at 767. The majority did not believe that the state constitution allowed the Legislature to confer upon the governor "a roving commission to repeal or amend by executive order unspecified provi-

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§ 811(h)(3). The Attorney General also must publish 30-day notice of the proposed scheduling in the Federal Register, transmit notice to the Secretary of HHS, and "take into consideration any comments submitted by the Secretary in response." §§ 201(h)(1), 201(h)(4), 21 U.S.C. §§ 811(h)(1), 811(h)(4). [*Id*. at 166 (brackets in original).]

As *Touby* illustrates, the word "necessary" may be a *part* of a sufficient standard imposed upon the executive branch, but we do not believe that it is *by itself* a sufficient standard, at least not in the context of the remarkably broad powers conferred by the EPGA.

sions included anywhere in the entire body of" state law. *Id*. The standard given in the statute—"necessary" and "expedient" for the war "emergency"—was "a limitation so elastic that it is impossible to imagine what might be done within its extent in almost every field of administration and of jurisprudence." *Id*. at 768. The statute thus surrendered legislative power to the executive by granting him "without specification or definition of means or ends all the powers which it could grant by specific enactment in all fields which may be affected by a factor so all pervasive as war." *Id*. The emergency—the war—did "not abrogate the Constitution." *Id*. See also *Home Bldg & Loan Ass'n v Blaisdell*, 290 US 398, 425; 54 S Ct 231; 78 L Ed 413 (1934) ("Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.").

The consequence of such illusory "non-standard" standards in this case is that the Governor possesses free rein to exercise a substantial part of our state and local legislative authority—including police powers—for an indefinite period of time. There is, in other words, nothing within either the "necessary" or "reasonable" standards that serves in any realistic way to transform an otherwise impermissible delegation of *legislative* power into a permissible delegation of *executive* power. This is particularly true in the specific context of the EPGA, a statute that delegates power of immense breadth and is devoid of all temporal limitations. These facets of the EPGA—its expansiveness, its indefinite duration, and its inadequate standards—are simply insufficient to sustain *this* delegation. While, in the context of a less-encompassing delegation, the standard might be sufficient to sustain the delegation, that is not the case the Court entertains today.

We accordingly conclude that the delegation of power to the Governor to "promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property," MCL 10.31(1), constitutes an unlawful delegation of legislative power to the executive and is therefore unconstitutional under Const 1963, art 3, § 2, which prohibits exercise of the legislative power by the executive branch. The powers conferred by the EPGA simply cannot be rendered constitutional by the standards "reasonable" and "necessary," either separately or in tandem.[21]

d. SEVERABILITY

Having reached this conclusion, we must then address whether the unlawful delegation is severable from the EPGA as a whole. MCL 8.5 provides as follows:

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[21] Although we disagree with the Chief Justice concerning the legal definition that has been set forth by the United States Supreme Court of the nondelegation doctrine, we acknowledge in accord with her and Justice BERNSTEIN that it has been exceedingly rare for a delegation of power to have been actually invalidated by the United States Supreme Court on the basis of that doctrine. The United States Supreme Court has "found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.' " *Whitman*, 531 US at 474, citing *Panama Refining Co v Ryan*, 293 US 388; 55 S Ct 241; 79 L Ed 446 (1935), and *Schechter Poultry Corp*, 295 US 495. Yet, just as the nondelegation doctrine constitutes an extraordinary doctrine, not routinely to be invoked, it is precisely our point that the delegation in the instant case is also extraordinary and justifies our constitutional objections. We are unaware of any other law of this state that has delegated such vast police power to the executive branch with such anemic "standards" imposed upon its discretion. If the Chief Justice and Justice BERNSTEIN would not invoke the nondelegation doctrine here, it is difficult to imagine when, if ever, they would invoke it. They would transform an admittedly rarely imposed doctrine, but one serving a critical purpose in upholding our system of separated powers, into an entirely obsolete and defunct doctrine.

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

"This Court has long recognized that '[i]t is the law of this State that if invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance be permitted to stand.' " *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 345; 806 NW2d 683 (2011), quoting *Eastwood Park Amusement Co v East Detroit Mayor*, 325 Mich 60, 72; 38 NW2d 77 (1949).

We are convinced that severing the unlawful delegation from the remainder of the EPGA would be "inconsistent with the manifest intent of the legislature." See MCL 8.5. Our task in discerning the manifest intent of the Legislature in this regard is rather straightforward. MCL 10.32 of the EPGA provides that "[i]t is hereby declared to be the legislative intent to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." Without conferring the power "to protect life and property," the EPGA *only* confers the power "to bring the emergency situation within the affected area under control." MCL 10.31(1). That is, if the unlawful

delegation is severed, the EPGA confers *no* power to "control . . . persons and conditions" unless that power is exercised to "bring the emergency situation within the affected area under control." *Id*. In our judgment, the EPGA is inoperative when we sever the power to "protect life and property" from the remainder of the EPGA; therefore, the EPGA is unconstitutional in its entirety.

IV. RESPONSE TO THE CHIEF JUSTICE

First, in her concurring and dissenting opinion, our Chief Justice is correct (or, at least, I hope she is) that "[e]very eighth-grade civics student learns about the separation of powers and checks and balances—design features of our government to prevent one branch from accumulating too much power." At the same time (again, I hope), every student also learns in that same classroom that these "design features" both define the distinctive authorities of the three branches of our government and empower each of these branches to "check and balance" the authorities of the others. And specifically relevant to the instant case is the authority of the judicial branch, in which the judiciary must identify whether the Constitution has been breached and undo such breaches, in order that the rights of the people may be upheld or that facets of our constitutional structure, including its separated powers and checks and balances that preserve and protect these same rights, may be upheld. These students will also learn that these "design features" have operated throughout our nation's history to maintain a stable, limited, and representative form of government. The nondelegation doctrine—the constitutional doctrine at issue in this case—sets forth a foundational principle of our system of separated powers and checks and

balances precisely because it acts in support of the logical proposition that just as no branch may act to breach the authority of another, so too may no branch act to breach its own authority by relinquishing it to another branch.[22] And despite what is suggested by the Chief Justice, separation-of-powers disputes do not invariably give rise to something akin to a "political question" to be avoided by the judiciary and resolved exclusively by the quarreling branches themselves. When President Nixon asserted his "executive privilege" to disregard a subpoena from a special prosecutor, it was no "political question"; when President Clinton asserted his authority to dismiss a lawsuit on "presidential immunity" grounds, it was no "political question"; when Congress asserted its authority to exercise a one-house legislative veto, it was no "political question"; and when Presidents have claimed the authority to issue executive orders, to impound appropriated funds, or to exercise line-item vetoes, these too did not invariably become "political questions."[23] Similarly, that the political process itself may afford potential relief to an aggrieved party does not, as the Chief Justice suggests, somehow relieve the judiciary of its obligation to expound upon the meaning of the law and the Constitution.

Second, the Chief Justice suggests that we have "announced" a new principle as part of the nondelega-

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[22] "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury v Madison*, 5 US (1 Cranch) 137, 176; 2 L Ed 60 (1803).

[23] See *United States v Nixon*, 418 US 683; 94 S Ct 3090; 41 L Ed 2d 1039 (1974); *Clinton v Jones*, 520 US 681; 117 S Ct 1636; 137 L Ed 2d 945 (1997); *Chadha*, 462 US 919; *Trump v Hawaii*, 585 US ___; 138 S Ct 2392; 201 L Ed 2d 775 (2018); *Train v City of New York*, 420 US 35; 95 S Ct 839; 43 L Ed 2d 1 (1975); *Clinton*, 524 US 417.

tion doctrine because, while caselaw from the United States Supreme Court and this Court "require *some* standards for the delegation of legislative authority," such that "in theory, an inadequate standard would be insufficient," "until today, the United States Supreme Court and this Court have struck down statutes under the nondelegation doctrine only when the statutes contained *no* standards to guide the decision-maker's discretion." However, it is not this majority that has "announced" any novel proposition; rather, it is the Chief Justice who has announced a new principle by stating that repeated judicial statements espousing the necessity of meaningful legislative standards in support of a delegation do not mean what they say. Instead, all that is required is a standard—some standard, any standard, a standard however illusory or meaningless or ineffectual in achieving its obvious and fundamental purpose—to transform a delegation of "legislative" power into a delegation of "executive" power. And as a result, the only delegation that will ever *actually* run afoul of the Constitution will be one in which there are "*no* standards to guide the decision-maker's discretion." By this understanding, the Legislature may dissipate and reconfigure its own constitutional authority through empty and standardless delegations, and this Court will have no recourse but to affirm these delegations and acquiesce in the transformation of our system of separated powers and checks and balances, facilitating the dilution of perhaps the greatest constitutional barrier to abuse of public power. We do not believe that such a proposition is supported by either federal or state caselaw, and for good reason.[24] Rather, we have explained that a statute

[24] It is questionable to assert that the United States Supreme Court has never invalidated a statute that included some standard. In

must at least "contain[] *sufficient* limits or standards . . . ." *Seaman*, 396 Mich at 308 (emphasis added). And the United States Supreme Court has used similar language as well. See, e.g., *Mistretta*, 488 US at 374 ("[W]e harbor no doubt that Congress' delegation of authority to the Sentencing Commission is *sufficiently* specific and detailed to meet constitutional requirements.") (emphasis added). It is a very real and meaningful demand upon this Court that we ensure that delegations of authority are properly undertaken. As Justice Gorsuch opined:

> [Enforcing the separation of powers is] about respecting the people's sovereign choice to vest the legislative power in Congress alone. And [it is] about safeguarding a structure designed to protect their liberties, minority rights,

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Schechter Poultry Corp, the statute invalidated by the United States Supreme Court as violating the nondelegation doctrine arguably did include a standard: "fair competition." See *Schechter Poultry Corp*, 295 US at 521-522. See also *Whitman*, 531 US at 474 (observing that in *Schechter Poultry Corp*, the Court invalidated a statute "which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition' "); *Clinton*, 524 US at 486 (Breyer, J., dissenting) ("[*Schechter Poultry Corp*] involved a delegation through the National Industrial Recovery Act, 48 Stat. 195, that contained not simply a broad standard ('fair competition'), but also the conferral of power on private parties to promulgate rules applying that standard to virtually all of American industry.") (citations omitted). But tallying up the number of such cases is not the point and is mere distraction; we acknowledge that there are not a large number of such cases. See note 21 of this opinion. What *is* relevant, however, is this: (a) there is a constitutional test, articulated by both the United States Supreme Court and this Court, imposing limits upon excessive delegations of power; (b) that test has regularly been considered and applied by each of those Courts; (c) that test is predicated upon both the language and the logic of our federal and state Constitutions, see, e.g., US Const, art I, § 1; Const 1963, art 4, § 1; Const 1963, art 3, § 2; and (d) there is in the present dispute a delegation of power by the Legislature that is unparalleled in Michigan legal history. The critical question is this—if the EPGA does not constitute an excessive delegation of power under our Constitution, what ever would?

> fair notice, and the rule of law. So when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed. [*Gundy*, 588 US at ___; 139 S Ct at 2135 (Gorsuch, J., dissenting).]

Third, the Chief Justice also believes that this majority has "announced" a new principle to the effect that the standards imposed upon the executive must become more rigorous as the scope of the powers conferred becomes greater. Again, we disagree. As already noted, the United States Supreme Court has stated that "the degree of agency discretion that is acceptable varies according to the scope of the power . . . conferred." *Whitman*, 531 US at 475. It then explained that the standards imposed must be "substantial" when the scope of the powers conferred is great: "While Congress need not provide any direction to the [Environmental Protection Agency] regarding the manner in which it is to define 'country elevators,' which are to be exempt from new-stationary-source regulations governing grain elevators, see 42 U.S.C. § 7411(i), it must provide substantial guidance on setting air standards that affect the entire national economy." *Id*. Although we are obviously not bound by *Whitman* or the lower federal courts that have applied this same principle, see, e.g., *People v Tanner*, 496 Mich 199, 221; 853 NW2d 653 (2014), it is hardly novel for this Court, as suggested by the Chief Justice, to invoke federal judicial decisions, including those of the United States Supreme Court, for their persuasiveness.

Fourth, the Chief Justice disagrees with our conclusion that the EPGA includes only the words "reasonable" and "necessary" as defining the standards governing the Governor's emergency orders. She states that "[t]he EPGA does not use 'reasonable' or 'neces-

sary' in a vacuum; the Governor's action must be 'reasonable' or 'necessary' to 'protect life and property or to bring the emergency situation within the affected area under control.' " We respectfully disagree concerning the pertinent "standards" in the present analysis. Although we have already quoted from part of Justice Kagan's explanation of a nondelegation analysis in her *Gundy* lead opinion, we do so again with more of the surrounding language:

> [A] nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. [*Gundy*, 588 US at ___; 139 S Ct at 2123 (opinion by Kagan, J.).]

Here, the "task" that the EPGA delegates to the Governor is to promulgate "orders, rules, and regulations" to "protect life and property" and to "bring the emergency situation within the affected area under control." MCL 10.31(1). The "instructions," i.e., the standards, that the EPGA provides are that such "orders, rules, and regulations" be "reasonable" and "necessary" for the enumerated tasks. *Id*. Thus, the only standards are that the Governor's orders be "reasonable" and "necessary."

Fifth, to the extent the Chief Justice suggests our decision is inconsistent with the cases of the United States Supreme Court sustaining various broad delegations, we respectfully disagree and find the following sampling of cases illustrative and useful:

In *New York Central Securities Corp v United States*, 287 US 12; 53 S Ct 45; 77 L Ed 138 (1932), the Interstate Commerce Commission (ICC) authorized a

set of railroad-system leases pursuant to the Interstate Commerce Act, which provided that the ICC may authorize such leases when in the "public interest." *Id*. at 19, 20 n 1. At issue before the United States Supreme Court was whether the "public interest" standard constituted an invalid delegation because it was "uncertain." *Id*. at 24. The Court sustained the delegation, reasoning as follows:

> Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the "public interest." It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. . . . [T]he term "public interest" as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the [ICC] has constantly addressed itself in the exercise of the authority conferred. [*Id*. at 24-25.]

Thus, the standard in *New York Central Securities Corp* was not simply "public interest" but also "adequacy of transportation service," "essential conditions of economy and efficiency," and "appropriate provision and best use of transportation facilities."

In *Fed Radio Comm v Nelson Bros Bond & Mtg Co*, 289 US 266; 53 S Ct 627; 77 L Ed 1166 (1933), the Court was confronted with a delegation challenge to the Radio Act of 1927, which provided that the Federal Radio Commission may allow radio frequency use by a particular entity " 'from time to time, as public convenience, interest, or necessity requires . . . .' " *Id*. at 279, quoting 47 USC 84. The Court rejected the challenge,

reasoning that when 47 USC 84 was read in context, the standard was limited by several specific concerns:

> In granting licenses the commission is required to act "as public convenience, interest or necessity requires." This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. . . . The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services, and, where an equitable adjustment between states is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities. [*Id*. at 285.]

Thus, the standard in *Fed Radio Comm* was not simply "public convenience, interest, or necessity" but also "the nature of radio transmission and reception," "the scope, character, and quality of services," and in certain cases "the relative advantages in service which will be enjoyed by the public through the distribution of facilities."

In *Yakus v United States*, 321 US 414; 64 S Ct 660; 88 L Ed 834 (1944), the United States Supreme Court considered a nondelegation challenge to § 2(a) of the Emergency Price Control Act, which authorized the "Price Administrator" to fix commodity prices at a level that " 'in his judgment will be generally fair and equitable and will effectuate the purposes of this Act' . . . ." *Id*. at 420, quoting § 2(a). In rejecting the challenge, the Court explained:

> The boundaries of the field of the Administrator's permissible action are marked by the statute. It directs that the prices fixed shall effectuate the declared policy of the Act to stabilize commodity prices so as to prevent war-time inflation and its enumerated disruptive causes and effects. In addition the prices established must be fair and equitable, and in fixing them the Administrator is directed to give due consideration, so far as practicable, to prevailing

> prices during the designated base period, with prescribed administrative adjustments to compensate for enumerated disturbing factors affecting prices. In short the purposes of the Act specified in § 1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in § 2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards . . . . [*Yakus*, 321 US at 423.]

Thus, the standard in *Yakus* was not simply "fair and equitable" but also "prevailing prices during the designated base period" and "administrative adjustments to compensate for enumerated disturbing factors affecting prices."

And in *Whitman*, the United States Supreme Court considered a nondelegation challenge to § 109(b)(1) of the Clean Air Act (CAA), which "instructs the EPA to set 'ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documents of § 108] and allowing an adequate margin of safety, are requisite to protect the public health.' " *Whitman*, 531 US at 472, quoting 42 USC 7409(b)(1) (brackets in original). In addressing the challenge, the Court first noted its agreement with the Solicitor General's interpretation of § 109(b)(1):

> We agree with the Solicitor General that the text of § 109(b)(1) of the CAA at a minimum requires that "[f]or a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air." Requisite, in

> turn, "mean[s] sufficient, but not more than necessary." [*Id*. at 473 (citations omitted; brackets in original).]

The Court then rejected the challenge:

> Section 109(b)(1) of the CAA, which to repeat we interpret as requiring the EPA to set air quality standards at the level that is "requisite"—that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent. [*Id*. at 475-476.]

Thus, the standard in *Whitman* was not simply "requisite to protect the public health" but also included consideration of "a discrete set of pollutants" and "published air quality criteria that reflect the latest scientific knowledge." See 42 USC 7408.

As these cases suggest, it reflects an incomplete understanding of United States Supreme Court nondelegation law to assert that vague terms such as "public interest" are ordinarily or typically sufficient to sustain a statute against a nondelegation challenge, even those statutes whose breadth and purview is far more narrow than that of the EPGA. Indeed, if the Chief Justice is correct that a statute only violates the nondelegation doctrine when "the statute[] contain[s] *no* standards to guide the decision-maker's discretion," *why* would the United States Supreme Court continually hear such appeals only to decide whether the standards in these cases are *sufficient*?

Sixth, in the end, if the standards in support of the EPGA's delegation of power satisfy the Constitution, our response can only be: what standards would ever *not satisfy* the Constitution? As laid out earlier in this opinion, the EPGA confers an unprecedentedly broad power in Michigan that is restrained by only two words—"reasonable" and "necessary"—that do almost nothing to cabin either the authority or the discretion

of the person in whom this power has been vested. Put simply, and our criticism is not of the Governor in this regard but of the statute in dispute—almost certainly, no individual in the history of this state has ever been vested with as much concentrated and standardless power to regulate the lives of our people, free of the inconvenience of having to act in accord with other accountable branches of government and free of any need to subject her decisions to the ordinary interplay of our system of separated powers and checks and balances, with even the ending date of this exercise of power reposing exclusively in her own judgment and discretion. It is in no way to diminish the present pandemic for this Court to assert, as we now do, that with respect to the most fundamental propositions of our system of constitutional governance, with respect to the public institutions that have most sustained our freedoms over the past 183 years, there must now be some rudimentary return to normalcy.

Finally, we observe in response to the Chief Justice that this decision should be understood as it has been explained throughout this opinion. It is not, we believe, a decision that does anything other than apply *ordinary* principles of administrative law, essentially balancing the required specificity of legislative standards that must accompany a grant of delegated powers with the breadth of those powers. What principally is *extraordinary* in this case is the scope of the statute under consideration, the EPGA, and the expansiveness of the authority it concentrates in a single public official. We do not believe that the conflation of circumstances giving definition to the delegated powers in this case—the breadth of the delegation, the indefiniteness of the delegation, and the inadequacy of the standards limiting the delegation—will soon come before this Court again. We have not sought here to

redefine the constitutional relationship between the legislative and executive branches but only to *maintain* that relationship as it has existed for as long as our state has been a part of this Union. Although singular assertions of governmental authority may sometimes be required in response to a public emergency—and the present pandemic is clearly such an emergency—the sheer magnitude of the authority in dispute, as well as its concentration in a single individual, simply cannot be sustained within our constitutional system of separated powers.

V. CONCLUSION

We conclude that the Governor lacked the authority to declare a "state of emergency" or a "state of disaster" under the EMA after April 30, 2020, on the basis of the COVID-19 pandemic. Furthermore, we conclude that the EPGA is in violation of the Constitution of our state because it purports to delegate to the executive branch the legislative powers of state government—including its plenary police powers—and to allow the exercise of such powers indefinitely. As a consequence, the EPGA cannot continue to provide a basis for the Governor to exercise emergency powers.[25]

ZAHRA, VIVIANO (as to Parts III(A), (B), (C)(2), and IV), and CLEMENT, JJ., concurred with MARKMAN, J.

VIVIANO, J. (*concurring in part and dissenting in part*). According to the Centers for Disease Control and

[25] We note that majorities of this Court have joined in full Part III(B) of this opinion, in which we hold that the Governor lacked the authority to declare a "state of emergency" or a "state of disaster" under the EMA after April 30, 2020, and Part III(C)(2), in which we hold that the EPGA is unconstitutional. The former is a unanimous holding of this Court.

Prevention, the severe acute respiratory disease known as COVID-19 has been involved in the deaths of thousands of Michiganders and over 190,000 people nationwide.[1] There is little doubt that COVID-19 is one of the most significant public-health challenges our state has ever faced. To limit the spread of the disease, Governor Gretchen Whitmer has issued scores of executive orders regulating many of the daily activities of our state's inhabitants. It is not the Court's place here to adjudge the efficacy or reasonableness of those orders. Instead, we must determine whether they are lawful, i.e., whether the power the Governor has asserted in issuing those orders is validly claimed under the Constitution and laws of this state.

While the majority decides this case on constitutional grounds, I believe it is easily resolved by the correct interpretation of the statute at issue, the Emergency Powers of the Governor Act of 1945 (the EPGA), MCL 10.31 *et seq*. Contrary to the majority, I would conclude that the EPGA does not allow for declarations of emergency to confront public-health events like pandemics. In light of this conclusion, it would be unnecessary to decide the constitutional question of whether the EPGA violates the separation of powers. Yet, because the rest of the Court, both majority and dissent, have interpreted the statute much more broadly, I believe it is incumbent upon me to decide the constitutional issue as well. In doing so, I agree with the majority and join its analysis holding that the EPGA (under the majority's construction) is an unconstitutional delegation of legislative power. I also agree

[1] See Centers for Disease Control and Prevention, *Provisional Death Counts for Coronavirus Disease 2019 (COVID-19)* <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm> (accessed October 1, 2020) [https://perma.cc/8HKP-SN6A].

with the majority that the Governor lacked authority to renew her declarations under the Emergency Management Act (the EMA), MCL 30.401 *et seq*. Accordingly, I join Parts III(A), (B), (C)(2), and IV of the majority opinion and concur in part and dissent in part.

I. THE EPGA: HISTORY, TEXT, AND CONTEXT

The EPGA's history is a good place to begin because, in this case, it helps illuminate the statute's meaning.[2] In the summer of 1943, a little less than two years before the EPGA's enactment, Detroit experienced a violent riot sparked by racial tensions. Thousands of soldiers entered the city, 34 individuals were killed, property damages amounted to $2 million, and countless injuries occurred. Capeci & Wilkerson, *Layered Violence: The Detroit Rioters of 1943* (Jackson: University Press of Mississippi, 1991), pp 17-18. One of the most difficult problems officials faced was how to authorize the use of federal troops to control the rioting. See Shogan & Craig, *The Detroit Race Riot: A Study in Violence* (New York: Da Capo Press, 1976), pp 68-76. Although thousands of police officers had been deployed, officials believed that something more was needed. *Id*. at 70. In the midst of the crisis, Governor Harry Kelly was informed that martial law had to be declared in order to obtain federal assistance.

[2] It is true that we generally do not look to contemporaneous history when interpreting a statute unless its meaning is doubtful. See *People v Hall*, 391 Mich 175, 191; 215 NW2d 166 (1974). I believe the correct interpretation of the EPGA—that it does not encompass public health—is not doubtful. But given the significance of the issues at stake in this case, and that a majority of a Court of Appeals panel, the Court of Claims, and my colleagues here have all reached a different conclusion, it is worth examining whether the historical context supports or undermines my conclusion.

Id. at 75-76. That would have required suspending all local and state laws in the city, depriving the city council and police departments of all authority, and suspending state-government operations in the area. *Id*.

Understandably, Governor Kelly was reluctant to take that step. *Id*. Instead, without relying on any apparent authority, he proclaimed a " 'state of emergency,' " authorizing the use of the "State Troops"—at that time, an "inexperienced" and "volunteer organization set up . . . to replace National Guard units called into federal service during" World War II. *Id*. at 76-77, 79. In his proclamation, Governor Kelly also banned the sale of alcohol, closed "[a]ll places of amusement," established a curfew, and prohibited assembly and the carrying of weapons. Kelly, Declaration and Proclamation (June 21, 1943), reprinted in *The Detroit Race Riot*, pp 144-145. Later the same day, federal officials found a way to offer assistance short of declaring martial law. *The Detroit Race Riot*, p 80. President Franklin D. Roosevelt issued a presidential proclamation, and army troops moved in to bring the situation under control. *Id*. at 80-82, 153-154.

When the EPGA was introduced and enacted in 1945, it was well known that the legislation stemmed from the recent race riot and the perceived inability to order troops without declaring martial law; indeed, when it was first introduced in the Legislature, it was dubbed the "Anti-Riot Bill."[3] The text reflects this

[3] See *Senators Offer Anti-Riot Bill*, Detroit Free Press (April 7, 1945), p 2 ("A bill to equip the Governor with authority to deal with rioting without declaring martial law was introduced in the Senate . . . . [Senator] Hittle said the bill was proposed by State Police Commissioner Oscar H. Olander and results from experience in the 1943 Detroit riot."); see also *Governor Gets Great Powers: Can Suppress Civil Disorders Quickly*, The Herald-Press (May 26, 1945), p 2 (noting that the law gives

emphasis. The first section is the most important for our purposes. Its first sentence describes when and how the statute may be invoked:

> *During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled*, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. [MCL 10.31(1) (emphasis added).]

The provision for proclaiming "a state of emergency" very clearly reflects Governor Kelly's declaration, which used the same term (albeit without any statutory authorization to do so).

The second two sentences pertain to the scope of the Governor's authority to address an emergency situation once an emergency has been declared:

> After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control. Those orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation, within the area or any section of the area; designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated;

"wide powers to suppress civil disorder without proclaiming martial law" and "was requested by state police as an aftermath of the Detroit race riots" due to their discovery that "there was no middle ground legally between minor laws forbidding unlawful assembly and the drastic ordering of martial law, suspending civil rights"); The Sebewaing Blade (May 4, 1945), p 2 ("This measure is designed to remedy a legal handicap which arose in the Detroit race riots two years ago . . . .").

> control of places of amusement and assembly and of persons on public streets and thoroughfares; establishment of a curfew; control of the sale, transportation, and use of alcoholic beverages and liquors; and control of the storage, use, and transportation of explosives or inflammable materials or liquids deemed to be dangerous to public safety. [*Id*.]

The list of possible emergency orders comes, in large part, from the 1943 proclamation. Both speak of controlling "places of amusement" and "assembly," and both contain provisions for curfews and prohibitions on the "sale . . . of alcoholic beverages." And as originally passed, the EPGA also allowed the Governor "control of the possession, sale, carrying and use of firearms [and] other dangerous weapons," 1945 PA 302(1), repealed by 2006 PA 546, just as the proclamation had prohibited the carrying of "arms or weapons of any description," Kelly, Declaration and Proclamation (June 21, 1943), reprinted in *The Detroit Race Riot*, p 145. Thus, the very structure of the act and its key terms largely reflect the 1943 proclamation.

The second section also describes the powers the Governor wields once an emergency has been declared, but as the Governor's counsel conceded at argument, this section does not address or expand the types of situations that qualify as emergencies:

> It is hereby declared to be the legislative intent to invest the governor with sufficiently *broad power of action in the exercise of the police power of the state* to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this act shall be broadly construed to effectuate this purpose. [MCL 10.32 (emphasis added).]

The final section makes it a misdemeanor to violate rules or orders prescribed pursuant to the statute. MCL 10.33.

The dispositive issue here is whether this statute applies in the sphere of public health generally or to an epidemic like COVID-19 in particular. The statute provides a list of events—for example, disaster, rioting, and catastrophe—justifying a declaration of emergency. MCL 10.31(1). But tacked to the end of the list is the stipulation that the Governor may take such action only "when public safety is imperiled." The Attorney General in this case has correctly recognized that it modifies the entire series that precedes it. See generally Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 147 (straightforward, parallel constructions of nouns in a series are normally all modified by postpositive modifiers). In other words, not just any catastrophe will do; it must be one that imperils "public safety."

The Governor reads "public safety" expansively to encompass "public health." She does not provide a source defining this exact term, however. By itself, the ordinary meaning of "safety" at the time the EPGA was enacted in 1945 might lend some support to the Governor's reading. The dictionary she cites defined safety as the "[c]ondition of being safe; freedom from danger or hazard." *Webster's New Collegiate Dictionary* (1949). "Safety" could, therefore, cover health issues.[4] But, as we shall see below, four justices from this Court read the same lay dictionary definition (from an earlier edition) as excluding health considerations. *Chicago & N W R Co v Pub Utilities Comm*, 233 Mich 676, 696; 208 NW 62 (1926) (opinion by SHARPE, J.). Moreover, we are looking for the meaning of "public safety." None of the everyday dictionaries defines that term. Nor do the legal dictionaries from the period. See, e.g., *Black's Law Dictionary* (4th ed).

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[4] The last entry in *Webster's* definition for "safety" characterized it as "[a] keeping of oneself or others safe, esp. from danger of accident or disease." *Id*.

The statutory context makes clear that the EPGA uses "public safety" as a term of art with a narrower meaning than the one the Governor posits. Recall that MCL 10.32 gives the Governor "sufficiently broad power of action in the exercise of the *police power* of the state . . . ." (Emphasis added.) As we have explained, "It has been long recognized that the state, pursuant to its inherent police power, may enact regulations to promote the public health, safety, and welfare." *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 73; 367 NW2d 1 (1985); see also *Osborn v Charlevoix Circuit Judge*, 114 Mich 655, 664; 72 NW 982 (1897) (same). In other words, "public safety" was one of the objectives for which the police power could be exercised; so was "public health." See Legarre, *The Historical Background of the Police Power*, 9 U Pa J Const L 745, 791 (2007) (noting caselaw standing for the proposition "that the state's police power existed only for certain limited objectives, namely, the promotion of public health, safety, and morals").

Thus, when terms from the police-power context like "public safety" crop up in statutes, as they frequently do, courts treat them as terms of art. Cf. *Lincoln Ctr v Farmway Co-Op, Inc*, 298 Kan 540, 552; 316 P3d 707 (2013) (noting that the meaning of the terms "public health" and "public safety" is "widely understood in legal circles"); *CLEAN v Washington*, 130 Wash 2d 782, 804; 928 P2d 1054 (1996) (en banc) (noting that the "terms 'public peace, health or safety' " are "synonymous with an exercise of the State's 'police power' "). In light of the lengthy history and pervasive use of the terms "police power" and "public safety," the Legislature's intent in employing them in the EPGA is unmistakable. By invoking "public safety" and placing it alongside "police power," the Legislature incorporated the specialized legal meanings of these terms.

Another contextual clue supports this conclusion. If the term "public safety" is given the ordinary meaning offered by the Governor and embraced by the majority, it would render as surplusage the phrase "when public safety is imperiled." Courts, however, strive to avoid interpretations that read statutes as containing terms that are surplusage or nugatory. *People v Pinkney*, 501 Mich 259, 282; 912 NW2d 535 (2018). As noted, the full phrase—"when public safety is imperiled"—modifies the entire preceding list of triggering events (i.e., "times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state"). The term "public" already precedes and modifies this list, so interpreting it under its ordinary meaning in the phrase "public safety" inevitably leads to surplusage. And by defining "safety" broadly as " 'the condition of being safe from undergoing or causing hurt, injury, or loss,' " the majority also fails to give it any real meaning. It is hard to imagine a "great . . . crisis, disaster, riot[], catastrophe, or similar public emergency" that does not risk "causing hurt, injury, or loss" to "people in general." Thus, ignoring context and reading "public safety" as a term of ordinary meaning renders it nugatory by giving it no meaning at all.

So our task is to decide whether "public safety," as a term of art related to the "police power," includes public-health issues like epidemics.

II. THE DISTINCTION BETWEEN PUBLIC SAFETY AND PUBLIC HEALTH

A. CASELAW

The distinction between "public safety" and "public health" is borne out in caselaw from this Court and

others.[5] Most directly, in 1931 this Court defined public safety as it was used in a constitutional provision allowing laws to take immediate effect if necessary " 'for the preservation of the public peace, health or safety,' " i.e., if they invoked the police power. *Naudzius v Lahr*, 253 Mich 216, 227; 234 NW 581 (1931) (citation omitted). Our core interpretation suggests that public health is not within the scope of "public safety": " 'Laws in regard to "public safety" are allied in their application and effect to those enacted to promote the public peace, preserve order, and provide that security to the individual which comes from an observance of law.' " *Id*. at 228, quoting *Pollock v Becker*, 289 Mo 660; 233 SW 641, 649 (1921) (en banc). This definition of "public safety" matches others from both that period and now.[6]

Our adoption of *Pollock*'s definition is particularly meaningful because *Pollock* was interpreting a similar constitutional provision and went on to define each of the terms in that provision. "Public peace," according

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[5] The distinction stretches at least as far back as Lord Blackstone, who distinguished offenses against the "public peace" (e.g., murder, public fighting, and destruction of public property) and offenses against "public health," which involved communicable diseases. 4 Blackstone, Commentaries on the Laws of England, pp **142-149, 161. Blackstone's contemporary, Jeremy Bentham, similarly carved up the police powers "into eight *distinct* branches," including "the prevention of offences," "the prevention of calamities," and "the prevention of endemic diseases." Bentham, *A General View of a Complete Code of Laws*, in 3 Bentham, The Works of Jeremy Bentham (Bowring ed, 1843), p 169 (emphasis added).

[6] See Graves, *American State Government* (Boston: DC Heath & Co, 3d ed, 1946), p 784 (stating that public safety included laws on criminal control, protection of life and property, industrial safety, fireworks, firearms, building codes, and motor vehicles); 16A CJS, Constitutional Law (June 2020 update), § 707 (stating that public-safety laws concern "dangerous persons, restraining dangerous practices, and prohibiting dangerous structures") (citations omitted).

to *Pollock*, was "that quiet, order and freedom from disturbance guaranteed by law." *Pollock*, 233 SW at 649. "By the 'public health,' " the court explained, "is meant the wholesome sanitary condition of the community at large." *Id*.

We had also acknowledged the distinctions earlier in *Newberry v Starr*, 247 Mich 404; 225 NW 885 (1929). Examining the same constitutional provision, we answered whether an act creating school districts could be given immediate effect because it bore "any real or substantial relation to preservation of public health, peace, or safety[.]" *Id*. at 411. We treated these as three separate categories, noting that "school districts have most important duties relating to preservation of health," during such epidemics, "and less important duties respecting peace and safety," including building safety and the safety of students in attendance. *Id*.

We again addressed the distinction in *Chicago*, 233 Mich at 699 (opinion by SHARPE, J.). There, a state law requiring cab curtains for the health of railroad employees was challenged as conflicting with federal railroad legislation that expressly stated its purpose was safety. Justice SHARPE, writing for four justices on a Court of eight, explained:

> In my opinion, the words "health" and "safety," as used in these acts, are not synonymous terms. "Health" is defined by Webster as "The state of being hale, sound, or whole, in body, mind, or soul; especially, the state of being free from physical disease or pain," and "safety" as "freedom from danger or hazard; exemption from hurt, injury, or loss." While some of the safety provisions of the federal acts may tend to protect the health of the employees, such protection is but incidental to the main purpose, that of safeguarding the lives and limbs of the employees and

> protecting th[at] which is being transported, be it passengers or freight. [*Id*. at 696.][7]

Thus, four justices rejected the conflation of safety and health, using an earlier version of the same dictionary the Governor cites here. The other four justices did not reject this argument but instead thought the federal legislation "covered 'the entire locomotive and tender and all their parts' . . . ." *Id*. at 689.[8]

And the distinction has persisted in more recent cases from our sister state courts as well. In *Olivette v St Louis Co*, 507 SW3d 637, 638, 645-646 (Mo App, 2017), the court rejected a county's effort to ground an ordinance establishing minimum police-force standards on a 1945 statute allowing it to promulgate rules to promote the " 'public health' " and prevent contagious diseases. *Id*. at 642 (citation omitted). In doing so, the court declined to adopt a broad definition of "public health," noting that the legislature had created "different departments to address 'public safety' and 'public health,' " indicating that "it considers these two different and distinct areas of government authority." *Id*. at 645. In addition, the Legislature had enacted numerous statutes distinguishing the terms, "such as

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[7] That conclusion reflected the majority position of the Wisconsin Supreme Court in *Chicago & N W R Co v R Comm of Wisconsin*, 188 Wis 232; 205 NW 932, 934 (1925) ("[T]he public health and the public safety afford two distinct fields of legislation. It is true that to some extent regulations promoting public safety also promote public health, but that fact alone cannot make a health regulation of a regulation distinctly in the interest of safety."), rev'd on other grounds by *Napier v Atlantic Coast Line R Co*, 272 US 605 (1926).

[8] That was also the conclusion of the United States Supreme Court when it decided the issue in *Napier v Atlantic Coast Line R Co*, 272 US 605; 47 S Ct 207; 71 L Ed 432 (1926). Again, the distinction drawn between health and safety was not rejected, however. The Court merely observed that regulations for health or comfort may incidentally promote safety. *Id*. at 611-612.

in the phrase 'public health, safety and welfare[.]' " *Id*.; see also *Winterfield v Palm Beach*, 455 So 2d 359, 361 (Fla, 1984) ("At the very least, the public safety purpose of the police and fire projects is separate and distinct from the public health purpose of the sewer projects.").

B. STATUTORY CONTEXT

The statutory structure in place when the Legislature enacted the EPGA also confirms the distinct meanings of "public safety" and "public health" and demonstrates that the Legislature did not mean to conflate the two concepts in the EPGA.

As far back as 1873, the Legislature had created the State Board of Health (the Board), which was given "general supervision of the interests of the health and life of the citizens of this State." 1873 PA 81, § 2.[9] The Board was to "make sanitary investigations and inquiries respecting the causes of disease, and especially of epidemics[.]" *Id*. Around the same time, the Legislature enacted a framework for localities to address contagious diseases, once again under the rubric of "health" rather than "safety." In 1883, the Legislature authorized municipal health officers to investigate any outbreaks of "communicable disease dangerous to the public health" and order isolation of the sick, require vaccinations, and mandate other sanitary measures to combat the disease. 1883 PA 137, § 1. A violation of the health officer's orders was a finable offense. 1883 PA

[9] Even further back, our earliest statutes devoted a separate statutory title to "Public Health" (providing for local boards of health and quarantines, among other things), as distinct from the title dealing with the "Internal Police of the State" (providing for the regulation of disorderly persons, taverns, and "the law of the road," among other things). See 1838 RS, Part 1, Titles VIII and IX.

137, § 2. Ten years later, the Legislature granted similar powers to the State Board of Health, allowing it to isolate individuals suspected of having communicable diseases—the Governor's only role was to draw money from the general fund for the Board's use. 1893 PA 47.

The statutory structure in place in 1945 took shape in the wake of the influenza epidemic of 1918. In the midst of that epidemic, Governor Albert Sleeper banned by order various public meetings. *State Closing is "Flu" Order*, Lansing State Journal (October 19, 1918), p 1. The order did not cite any authority allowing the Governor to take such action, but the closures lasted only a few weeks. *Id*. (reprinting order); *Governor Lifts "Flu" Ban*, The Sebewaing Blade (November 7, 1918), p 1. Perhaps in response, just months after the ban, the Legislature overhauled the statutory framework for addressing statewide epidemics and public health more generally. In an act "to protect the public health," the Legislature replaced the State Board of Health with a State Health Commissioner, who was given authority over the health laws as well as public meetings. 1919 PA 146, §§ 1, 2, and 9.

As things stood in 1945, the Commissioner had "general charge and supervision of the enforcement of the health laws" of the state. 1948 CL 325.2.[10] And there was a lot to supervise—the health code stretched over multiple chapters and sections, involving statistics, local health boards, handling of dead bodies, mental diseases, hospitals, and communicable diseases, among others. One of the first provisions in the code came from 1919 PA 146, § 9—the section of the act addressing public meetings:

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[10] Although the citations are to the 1948 compiled laws, all statutes cited appeared the same in 1945.

> In case of an epidemic of any infectious or dangerous communicable disease within this state or any community thereof, the state health commissioner may, if he deem it necessary to protect the public health, forbid the holding of public meetings of any nature whatsoever except church services which may be restricted as to number in attendance at 1 time, in said community, or may limit the right to hold such meetings in his discretion. Such action shall not be taken, however, without the consent and approval of the advisory council of health. . . . Such order shall be signed by the health commissioner and if applicable to the entire state be countersigned by the governor. [1948 CL 325.9]

An entire chapter of the code contained detailed provisions applicable to communicable diseases. Upon finding that, among other things, a "dangerous communicable disease" existed inside or outside the state "whereby the public health is imperiled," the State Health Commissioner was "authorized to establish a system of quarantine for the state of Michigan and the governor shall have authority to order the state militia to any section of the state on request of the state board of health to enforce such quarantine." 1948 CL 329.1. The purpose of the quarantine was to prevent travel within the state and detain individuals exposed to the disease. 1948 CL 329.2. Railroad cars and "public or private conveyances" could also be detained under rules produced by the Commissioner if they contained persons or property carrying the infection, which could then be isolated. 1948 CL 329.3. Violation of the Commissioner's rules was a misdemeanor. 1948 CL 329.6.

Local health boards also played a large role in the response to epidemics. Most directly, local health boards had authority to quarantine those "infected with a dangerous communicable disease." 1948 CL 327.15; see also 1948 CL 327.27 and 1948 CL 327.28 (allowing townships to set up quarantine grounds and establish

joint quarantine areas); 1948 CL 327.29 (permitting the township board of health to quarantine vessels). Localities bordering other states could examine any travelers from "infected places in other states" for "any infection which may be dangerous to the public health" and restrain their entry if necessary. 1948 CL 327.17. Localities could also establish hospitals specifically for dealing with any "disease which may be dangerous to the public health." 1948 CL 327.35.[11] During outbreaks, the township board of health had to "immediately provide such hospital[s]" or places for the infected and had to remove infected individuals to that place. 1948 CL 327.39; 1948 CL 327.40. Boards of health had a general duty to "use all possible care to prevent the spreading of the infection . . . ." 1948 CL 327.41. Many other statutes mentioned both "health" and "safety," indicating that these terms had different meanings—if they meant the same thing, the Legislature would not likely have used each term. See, e.g., 1948 CL 42.17 (providing that charter townships had the same authority as cities "to provide for the public peace and health and for the safety of persons and property").

Other provisions, both in the health code and elsewhere, constructed elaborate rules on how epidemics were to be handled, spanning from the appointment of state medical officials to specific instructions for railroads and summer resorts to criminal penalties for spreading communicable diseases.[12]

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[11] See also 1948 CL 327.49 (applying township standards to cities and villages); 1948 CL 331.202 (authorizing certain counties to build and maintain "a hospital for the treatment of persons suffering from contagious and infectious diseases"); 1948 CL 67.52 (authorizing village councils to provide for a hospital for persons with infectious or contagious diseases and authorizing the council to order detention and treatment of those individuals).

[12] See, e.g., 1948 CL 329.4 and 1948 CL 329.5 (disinfection of persons and property); 1948 CL 329.51 (appointment of a state medical inspec-

An entirely different batch of statutes addressed public safety.[13] Just as it had announced when it was

tor); 1948 CL 325.23 (creating a state bacteriology position tasked with examining and analyzing materials "in localities where there is an outbreak of any contagious disease or epidemic" if the examination or analysis was "necessary to the public health and welfare"); 1948 CL 327.43 (providing duties with regard to any "disease dangerous to the public health" in boarding houses and hotels); 1948 CL 327.44 (obligating physicians to report any cases of diseases "dangerous to the public health"); 1948 CL 125.485 (allowing an officer of the health department to order that a dwelling be vacated if it was "infected with contagious disease"); 1948 CL 462.5(a) (prohibiting railroads from offering free transportation except in limited circumstances, including offering free passage "with the object of providing relief in cases of general epidemic, pestilence or otherwise calamitous visitation"); 1948 CL 455.212 (allowing the board of summer resorts to enact bylaws "to protect all occupants from contagious diseases and to remove from said lands any and all persons afflicted with contagious diseases"); 1948 CL 750.473 ("No person sick with . . . any other communicable disease, dangerous to the public health, and no article which has been infected or is liable to propagate or convey any such disease, shall come or be brought into any township, city or village in Michigan . . . ."); 1948 CL 125.757d (requiring owners of trailer-coach parks to report to a board of health any person suspected of having a "communicable disease").

[13] It is true that a few health statutes mentioned "safety" or "public safety." For example, the statute allowing local boards of health to quarantine individuals with diseases gave the boards the power to "make effectual provision in the manner in which it shall judge best for the safety of the inhabitants and it may remove such sick or infected person to a separate house or hospital . . . ." 1948 CL 327.15. But it seems likely that the Legislature invoked safety because these statutes involved removing individuals. That would explain why the Legislature provided for justices of the peace to make out warrants directing law enforcement to conduct the removals. 1948 CL 327.18. Other courts have made this connection. See *Haverty v Bass*, 66 Me 71, 73 (1874) ("[The statute] enables [officials charged with enforcing the statute] to command the services of others. It might be difficult to obtain the necessary assistance, in an undertaking so hazardous to health. But, by means of a warrant, they can compel executive officers to act. They can remove a sick person without the aid of a warrant, or they can use that instrumentality to enforce obedience to their commands, if a resort to such means of assistance becomes necessary."). For this reason, the cases cited by the majority that addressed statutes referring to both health and safety—*Jacobson v Massachusetts*, 197 US 11, 37; 25 S Ct 358; 49 L Ed 643 (1905);

legislating for "public health," the Legislature did so with "public safety." The title to the 1935 legislation creating the state police began, "An Act to provide for the public safety[.]" 1935 PA 59, title. In creating the state police, the Legislature transferred to it the "department of public safety" and made the state police commissioner the state's deputy oil inspector and fire marshal. 1948 CL 28.5; 1948 CL 28.13 ("Whenever reference is made in any law to the 'commissioner of public safety' or to the 'department of public safety' such reference shall be construed to mean, respectively, the commissioner of the Michigan state police and department of Michigan state police . . . ."). In other words, the state had a separate department assigned to "public safety," and it fell within the state police force's purview. None of the relevant statutes regarding that department or the police force referred to epidemics or communicable diseases.[14] Rather, the police were assigned to enforce the criminal laws. 1948 CL 28.6. Other matters also fell within the concept of public safety, such as highway traffic regulation. In 1941, the Legislature created the "Michigan state safety commission" for the express purpose of "promot-[ing] . . . greater safety on the public highways and other places within the state . . . ." 1941 PA 188, title.

This was the state of the law in 1945 when the Legislature passed the EPGA. These statutes, like the caselaw, support the conclusion that "public health"

People ex rel Hill v Lansing Bd of Ed, 224 Mich 388, 391; 195 NW 95 (1923)—are distinguishable.

[14] Some statutes regulating the police mentioned "public health." The title to one such act for inspection of kerosene and petroleum products referred to "the protection of public health and safety[.]" 1939 PA 114, title. Of course, an explosive substance poses a safety risk unlike an epidemic, and thus it makes sense that it would fall under the purview of the police.

and "public safety" represented distinct legal concepts. The statutory context does more than that, however. Reading the EPGA in light of this context also demonstrates how improbable it is that the Legislature meant to depart from the historical understanding of "public safety" by expanding the concept to include "public health" emergencies.

In general, we interpret statutes in the manner "most compatible with the surrounding body of law into which the provision must be integrated[.]" *Green v Bock Laundry Machine Co*, 490 US 504, 528; 109 S Ct 1981; 104 L Ed 2d 557 (1989) (Scalia, J., concurring). The statutory terms and phrases a court interprets are not only part of a whole statute but more broadly are "part of an entire *corpus juris*. So, if possible, it should no more be interpreted to clash with the rest of that corpus than it should be interpreted to clash with other provisions of the same law." *Reading Law*, p 252. One way we do so is by adhering to the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v United States*, 485 US 759, 778; 108 S Ct 1537; 99 L Ed 2d 839 (1988) (plurality opinion by Scalia, J.); see also *Grimes v Dep't of Transp*, 475 Mich 72, 89-90; 715 NW2d 275 (2006) (courts avoid interpretations that render text surplusage). "If possible, every word and every provision is to be given effect . . . . None should needlessly be given an interpretation that causes it to duplicate another provision . . . ." *Reading Law*, p 174. In a like manner, when a statute specifically addresses a topic, that statute will control over a more general statute that might otherwise apply. See *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 350; 952 NW2d 384 (2020).

The Governor's broad reading of the EPGA does not comport with these longstanding interpretive principles. For her to be correct, we would have to assume that the Legislature in 1945 meant to lay waste to the extensive statutory provisions specifically addressing epidemics and communicable diseases. Under her reading, this body of statutory law would have been mere surplusage. An epidemic would constitute a "public safety" event justifying a state of emergency. At that point, the actual "public health" statutes would have been totally eclipsed by a statute that, on its face, does not even refer to public health or epidemics. The powerful but limited tools given to the Governor and the State Health Commissioner under the health code would have been superfluous—the Governor, applying the EPGA, could have fashioned any tools she thought fit and transgressed any limitations prescribed by the health code.

The same problem arises in the statutory context today. When the meaning of a term is questionable, as "public safety" might be thought of here, courts should "construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." *West Virginia Univ Hosps, Inc v Casey*, 499 US 83, 100; 111 S Ct 1138; 113 L Ed 2d 68 (1991). This is "because it is our role to make sense rather than nonsense out of the *corpus juris*." *Id*. at 101.

The Governor's interpretation makes nonsense out of the current body of statutes. Many laws similar to those above remain on the books.[15] Most notably, the

[15] See, e.g., MCL 333.2221(1) (charging the Department of Public Health with the responsibility to "continually and diligently endeavor to prevent disease"); see also MCL 333.2221(2)(a) and (d) (giving the department "general supervision of the interests of the health and life of

1919 law passed in the wake of the influenza epidemic and Governor Sleeper's actions is still the law, albeit in slightly modified form. See MCL 333.2253 (allowing the director of the health department to "prohibit the gathering of people for any purpose and [to] establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws"). But this law is redundant alongside the EPGA. As if to prove this, the Director of the Department of Health and Human Services (DHHS) has issued a series of orders under MCL 333.2253 simply "reinforcing" key executive orders on COVID-19, such as those mandating masks and instituting the Safe Start Program, which itself contains the Governor's overarching regulatory response to COVID-19 (e.g., remote-work requirements, public-accommodation restrictions, and prohibitions on large gatherings). *Emergency Order Under MCL 333.2253 — Regarding Executive Orders 2020-153, 2020-160, and 2020-161*, order of the Director of the DHHS, entered July 29, 2020 ("reinforcing" EOs 2020-153, 2020-160, and 2020-161). In other words, nearly

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the people of this state" and making it responsible for investigating "[t]he causes of disease and especially of epidemics"); MCL 333.5115 (the department must establish standards for "the discovery and care of an individual having or suspected of having a communicable disease or a serious communicable disease or infection"); MCL 333.5203(1) (the department must issue warnings to individuals with communicable diseases deemed to be "health threat[s] to others"); MCL 333.5205 (those warnings can be enforced in court); MCL 333.5207 (the individuals can be temporarily detained, tested, and treated); MCL 333.9621 (allowing local health departments, state institutions, and physicians to require microbiological examinations in locations "where there is an outbreak of a communicable disease or epidemic requiring the examination or analysis to protect the public health"); MCL 331.202 (allowing counties with a certain population to construct and maintain hospitals for individuals with "contagious and infectious diseases").

everything the Governor has done under the EPGA, she has also purported to do, via the DHHS Director, under MCL 333.2253.

The contextual clues within the EPGA all lead to the same conclusion. To begin with, nowhere does the EPGA refer to terms or tools traditionally associated with public-health emergencies. This stands in stark contrast to the provisions from the 1945 health code discussed above. Those statutes referred to quarantines, removal of the sick, and medical treatment—the common responses to epidemics for centuries. See Zuckerman, *Plague and Contagionism in Eighteenth-Century England: The Role of Richard Mead*, 78 Bull Hist Med 273, 287-289 (2004); Link, *Public Health History: Toward a New Synthesis*, 19 Reviews Am Hist 528, 529 (1991) (book review).

Instead, what we find in the EPGA are terms suggesting safety concerns of the sort law enforcement agencies have a duty to confront. Consider the nonexhaustive list of example orders the Governor can issue controlling matters such as traffic, places of amusement, alcoholic beverages, and explosives. These all appear to anticipate events like riots, in which the behavior of the public is what poses the safety risk. None of the examples relates to contagious diseases or epidemics. The references to designated "area[s]" and "specific zones" also suggest a focus on safety issues like civil disturbances. Although the statute does not expressly or impliedly limit the geographic scope of the emergency, it was evidently crafted with local emergencies in mind. That focus is also evident in the provision allowing city mayors and county sheriffs to seek emergency declarations. The accommodation for localities seems designed for civil disturbances and the like, not epidemics that could easily spread from place

to place across the state. Read as part of the larger statutory context, then, the EPGA suggests a focus on public safety rather than public health.

C. PRACTICAL CONSTRUCTION OF THE EPGA

Another relevant interpretive consideration is how governors have used and construed the EPGA in the past. See *Westbrook v Miller*, 56 Mich 148, 151-152; 22 NW 256 (1885) (noting that "great deference is always" owed to an executive's practical construction of a statute it enforces); 2B Singer, Sutherland Statutory Construction (7th ed, October 2019 update), § 49:3 (noting that "long-continued contemporaneous and practical interpretation of a statute by executive officers . . . is an invaluable aid to construction" and "is closely related to the doctrine that statutes are given their common and ordinary meaning").

In this regard, although "public health" was mentioned in past emergency declarations and orders under the EPGA, none ever involved public-health emergencies.[16] Rather, prior to the adoption of the EMA in 1976, in the handful of times it was invoked, governors had employed the EPGA for events like riots, energy shortages, and violent strikes or protests. See, e.g., Executive Order No. 1967-3 (riots). Since the passage of the EMA in 1976, the EPGA has been mostly dormant. The only executive order expressly citing the EPGA in the past 50 years was in response to an oil

[16] It has been observed that Governor William Milliken ostensibly used the EPGA in 1970 to ban fishing in Lake St. Clair and the St. Clair River due to pollution concerns; two weeks after issuing that order, he issued a similar order banning commercial walleye fishing on Lake Erie. See Van Beek, *A History of Michigan's Controversial 1945 Emergency Powers Law* (August 31, 2020), p 3. But even assuming that this falls within the realm of "public health," Governor Milliken's orders did not cite the EPGA or declare an emergency. Executive Order No. 1970-6; Executive Order No. 1970-7.

spill—but the EMA was also invoked. Executive Order No. 2010-7. That is it.

This limited, practical use of the EPGA was perhaps a result of Governor Milliken's belief, expressed in his "Special Message to the Legislature on Natural Disasters," that the statute was "pertinent to civil disturbances . . . ." 1973 House Journal 861 (No. 41, April 11, 1973). Whatever the reason for its limited use, the Governor's current application of the statute to cover public-health emergencies is unprecedented.[17] Thus, an examination of the statute's prior uses also supports the narrower interpretation given above.

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[17] Not only is the Governor's use of the statute unprecedented in Michigan, it is unique across the entire country. The statutory authority invoked in the COVID-19 emergency declarations by nearly every other state governor explicitly contemplates public-health emergencies. See Ala Code 31-9-1 and Ala Code 31-9-3(4); Alas Stat 26.23.020(i); Ariz Rev Stat Ann 26-301(15), Ariz Rev Stat Ann 26-303(D) and Ariz Rev Stat Ann 36-787; Ark Code Ann 12-75-102 and Ark Code Ann 20-7-110; Cal Gov Code 8558; Colo Rev Stat 24-33.5-704.5; Conn Gen Stat 19a-131a; Del Code Ann, tit 20, §§ 3102(2) and 3132(11); Fla Stat 381.00315; Ga Code Ann 38-3-51(a); Hawaii Rev Stat 127A-2; Idaho Code 46-1002 and Idaho Code 46-1007; Ill Comp Stat, ch 20, 3305/4; Ind Code 10-14-3-12 and Ind Code 10-14-3-1; Iowa Code 29C.6(1); Kan Stat Ann 48-904; Ky Rev Stat Ann 39A.020(12); La Stat Ann 29:762; Me Stat, tit 37-B, § 703 and Me Stat, tit 22, § 801(4-A); Md Code Ann, Pub Safety, 14-101(c); Mass Gen Laws, ch 17, § 2A; Minn Stat 4.035(2); Miss Code Ann 33-15-5(g); Mont Code Ann 10-3-103(4); NJ Stat Ann 26:13-2; NM Stat Ann 12-10A-3 and NM Stat Ann 12-10-4(B); NY Exec Law 20 (McKinney); NC Gen Stat 166A-19.3(6); ND Cent Code 37-17.1-04; Ohio Rev Code Ann 5502.21; Okla Stat, tit 63, §§ 683.2(A) and 683.3; Or Rev Stat 401.025; Pa Cons Stat, tit 35, § 7102; RI Gen Laws, tit 30, § 30-15-3; SC Code Ann 25-1-440 and SC Code Ann 44-4-130; SD Codified Laws 34-48A-1; Tenn Code Ann 58-2-102; Tex Gov't Code Ann 418.014; Utah Code Ann 53-2a-202(1); Vt Stat Ann, tit 20, § 1(a); Va Code Ann 44-146.14(a) and Va Code Ann 44-146.16; Wash Rev Code 38.52.010 and Wash Rev Code 38.52.020(1); W Va Code 15-5-1; Wis Stat 323.10; Wy Stat Ann 19-13-103(a) and Wy Stat Ann 35-4-115(a)(i); see also Nev Rev Stat 414.0335 and Nev Rev Stat 414.0345 (the governor did not cite specific statutes in the COVID-19 declaration of emergency but instead broadly invoked the "laws" of the state—these statutes allow emergency declarations for public-health events).

III. CONSTITUTIONAL DOUBT

If, after all this, I had any lingering doubts about the meaning of the statute, then, as plaintiffs point out, I would still be forced to choose the narrower interpretation. That is because it avoids the grave constitutional questions raised by the Governor's exceedingly broad reading of the statute. " '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). This principle, known as the constitutional-doubt canon, "rests on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v Martinez*, 543 US 371, 381; 125 S Ct 716; 160 L Ed 2d 734 (2005).[18]

In the remaining few states, the respective governors have invoked statutes that at least arguably define emergencies or disasters with enough breadth to cover public health. See Neb Rev Stat 81-829.39(2) and (3) (defining "emergency" and "disaster" to mean, in relevant part, "any event or the imminent threat thereof causing serious damage, injury, or loss of life or property resulting from any natural or manmade cause"); Mo Rev Stat 44.010 (defining emergencies to include natural disasters that affect the "safety and welfare" of the residents, including things like bioterrorism); NH Stat 21-P:35(VIII) (defining "state of emergency" as a "condition, situation, or set of circumstances deemed to be so extremely hazardous or dangerous to life or property that it is necessary and essential to invoke, require, or utilize extraordinary measures, actions, and procedures to lessen or mitigate possible harm").

[18] This rule of interpretation is often invoked alongside a separate rule of judicial procedure: the rule of constitutional avoidance. See *Reading Law*, p 251. The latter rule is also deeply rooted in our constitutional jurisprudence. See *Powell v Eldred*, 39 Mich 552, 553

Here, plaintiffs claim that the statute, under the Governor's interpretation, would violate the separation of powers by improperly delegating legislative authority and by failing to articulate standards to guide the Governor's exercise of the statutory power. Our Constitution divides the powers of government among the three branches and states that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2.

As I explain below, I believe that if the Governor's and the majority's interpretation is correct, then the EPGA is in trouble. The spin the Governor and the majority give the statute allows her to wield staggering powers across the entire terrain of our lives and our laws. And once declared, an emergency ends only when

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(1878) ("It is a cardinal principle with courts not to pass upon the constitutionality of acts of the Legislature, unless where necessary to a determination of the case."). Courts should be reluctant—and indeed should refuse—"to undertake the most important and the most delicate of the Court's functions . . . until necessity compels it in the performance of constitutional duty." *Rescue Army v Muni Court of Los Angeles*, 331 US 549, 569; 67 S Ct 1409; 91 L Ed 1666 (1947). The rule of constitutional avoidance protects the separation of powers. See *id*. at 570 (noting that the rule is "basic to the federal system and this Court's appropriate place within that structure"); *id*. at 571 (noting that the rule is founded on, among other things, "the necessity, if government is to function constitutionally, for each to keep within its power, including the courts"). Indeed, we have said that the "avoidance of unnecessary constitutional issues" is a core aspect of "judicial power." *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614-615; 684 NW2d 800 (2004), rev'd on other grounds by *Lansing Sch Ed Ass'n, MEA/NEA v Lansing Bd of Ed*, 487 Mich 349 (2010); see also *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 292-293; 737 NW2d 447 (2007) (citing *Nat'l Wildlife*'s definition of "judicial power" and stating that preservation of the separation of powers depends on the judiciary confining itself to this definition), rev'd on other grounds by *Lansing Sch*, 487 Mich 349.

she says it ends. Until then, the Governor has vast powers. Using these powers here, she has unilaterally suspended statutes and determined which businesses can open, what they can sell, and how they can sell it; which homes residents can use; whether and how people socialize; what outdoor recreation is acceptable; what medical services individuals can obtain; and much more besides.[19] All of this raises serious doubts about the statute's constitutionality. Indeed, below I explain that, assuming the Governor and the majority are correct on what the statute means, I agree with the majority that the EPGA constitutes an unconstitutional delegation of legislative power. But I would avoid these determinations by adopting the more reasonable (and, in my opinion, clearly correct) interpretation above.

IV. RESPONSE TO THE MAJORITY

By focusing on ordinary meaning, the majority opinion fails to seriously consider the fundamental principle that "[w]ords are to be understood in their ordinary, everyday meanings—*unless* the context indicates that they bear a technical sense." See *Reading Law*, p 69 (emphasis added). It is true that "[i]nterpreters should not be required to divine arcane nuances or to discover hidden meanings" and that "we should not make [interpretation] gratuitously roundabout and complex." *Id*. at 69-70. And it is also true, as I have pointed out elsewhere, that " '[o]ne should assume the contextually appropriate ordinary meaning unless

[19] See Governor Gretchen Whitmer, *MI Safe Start: A Plan to Re-Engage Michigan's Economy* (May 7, 2020), available at <https://www.michigan.gov/documents/whitmer/MI_SAFE_START_PLAN_689875_7.pdf> (accessed October 1, 2020) [https://perma.cc/CM42-6JDS]; Executive Order Nos. 2020-4, 2020-5, 2020-6, 2020-14, 2020-17, and 2020-21.

there is reason to think otherwise.' " *In re Erwin Estate*, 503 Mich 1, 33 n 15; 921 NW2d 308 (2018) (VIVIANO, J., dissenting), quoting *Reading Law*, p 70. But, as Scalia and Garner are quick to point out, "[s]ometimes there *is* reason to think otherwise, which ordinarily comes from context." *Reading Law*, p 70.

As the authors explain, in somewhat elementary fashion, "[e]very field of serious endeavor develops its own nomenclature—sometimes referred to as *terms of art*," and "[s]ometimes context indicates that [this] technical meaning applies." *Id*. at 73. This is not a new principle. See, e.g., 1 Kent, Commentaries on American Law (1826), p 432 ("The words of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense."). It is deeply embedded in our law. See MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language; but 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.").

The majority ignores the obvious contextual clues that inexorably lead to the conclusion that "public safety" is a term of art—i.e., it is an object of the police power and is referenced in a statute that explicitly delegates the police power to the Governor. Instead, the majority rejects the technical meaning without any serious analysis by asserting in conclusory fashion that the statute is "common" and "clear" and by rejecting such "fine" distinctions in a case of this magnitude.

But that is not all. As described above, by reading "public safety" according to the ordinary meanings of its two words, the majority opinion ignores the statu-

tory context and renders the entire phrase "when public safety is imperiled" nugatory. This disregards yet another widely accepted and routinely applied canon of interpretation: the surplusage canon.[20]

Perhaps most troubling—in a case in which the majority endeavors to protect the separation of powers—is the majority's disregard of yet another fundamental and longstanding interpretive rule: the constitutional-doubt canon. Although I believe my reading of the EPGA is the most reasonable interpretation of the statute, even if I were inclined to accept the Governor's interpretation, courts have an obligation to go further to see if "a construction of the statute is fairly possible by which the question may be avoided." *Workman*, 404 Mich at 508 (quotation marks and citation omitted). The majority opinion not only overlooks basic interpretive principles in the first instance, but it also fails to take a second look to see if there is another reasonable construction of the statute. This failure to grapple with the constitutional-doubt canon deprives the majority of an indispensable interpretive tool that functions both to uncover the meaning of statutory text and also to respect separation-of-powers principles by "minimiz[ing] the occasions on

[20] The majority opinion also finds it significant that I was the first to raise the question of whether "public safety" should be interpreted as a legal term of art when I did so at oral argument and notes that plaintiffs "effectively conceded" this argument. However, the Court requested supplemental briefing on the issue, and all parties and amici have had an opportunity to be heard on this issue. In any event, the Court is certainly not bound by the concession. Compare *Bisio v The City of the Village of Clarkston*, 506 Mich 37, 47 n 7; 954 NW2d 95 (2020) (adopting an interpretation of a statute favoring a party contrary to that party's concession when the issue was raised at the eleventh hour by amicus, the issue was not addressed at oral argument, and the parties were not given an opportunity for supplemental briefing).

which [the courts] confront and perhaps contradict the legislative branch." *Reading Law*, p 249.

I would not suspend the sound principles of interpretation that have guided our interpretive efforts for centuries for this or any case. Instead, I would give the EPGA its fair meaning, as outlined above.

V. DELEGATION

It should be abundantly clear by now that I do not believe we need to reach the constitutional question in this case because the statute simply does not apply. But six justices disagree, and so my interpretation is not binding. Instead, the interpretation that now governs reads the EPGA to cover nearly everything under the sun, thus bringing the delegation issue into focus. This is, moreover, a certified-question case in which we are presented two discrete issues, one of which involves delegation. Therefore, I consider it my duty to answer whether the EPGA, as construed by the majority, constitutes an impermissible delegation of legislative powers.[21]

I fully agree with and join the majority's analysis and conclusion that the EPGA is an unconstitutional delegation. I write only to explain why, in an appropriate future case, I would consider adopting the approach to nondelegation advocated by Justice Gorsuch

[21] Cf. *Jefferson Co v Acker*, 527 US 423, 448; 119 S Ct 2069; 144 L Ed 2d 408 (1999) (Scalia, J., concurring in part and dissenting in part) ("For the foregoing reasons, I would hold that this case was improperly removed. In view, however, of the decision of a majority of the Court to reach the merits, I join Parts I, III, and IV of the Court's opinion. Cf. *Edgar v. MITE Corp*., 457 U.S. 624, 646, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) (Powell, J., concurring in part); *United States v. Jorn*, 400 U.S. 470, 488, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) (Black, J., concurring in judgment).").

in *Gundy v United States*, 588 US ___, ___; 139 S Ct 2116, 2131; 204 L Ed 2d 522 (2019) (Gorsuch, J., dissenting). The framework he advanced is firmly grounded in history and makes short work of the modern view, illustrated by the Chief Justice's "*any* standards" test here, that a legislature can cede immense power to the executive so long as it sprinkles in a few vague adjectives that a court can pass off as standards.

As Justice Gorsuch stated, the core principle underlying the nondelegation doctrine—and one that is enshrined in our own Constitution, Const 1963, art 3, § 2—is that the Legislature simply may not " 'delegate . . . powers which are strictly and exclusively legislative.' " *Gundy*, 139 S Ct at 2133 (Gorsuch, J., dissenting), quoting *Wayman v Southard*, 23 US (10 Wheat) 1, 42-43; 6 L Ed 253 (1825). 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. *Id*. at 2134. Our own Constitution, of course, reflects these same requirements. Const 1963, art 4, §§ 26 and 33. And throughout our constitutional history, especially near the beginning of our statehood, the same fears of excessive lawmaking by the legislative branch were prevalent. See, e.g., Campbell, *Judicial History of Michigan* (1886), p 44 (noting that the 1850 Constitution contained a "number of provisions which seem to indicate that it was supposed the people could not trust their agents and representatives"); see generally Shugerman, *The People's Courts: Pursuing Judicial Independence in America* (Cambridge: Harvard University Press, 2012), pp 6, 123-143 (describing popular distrust of legislatures in the mid-nineteenth century).

The strict requirements for legislation would mean nothing, Justice Gorsuch observed, if the legislative branch "could pass off its legislative power to the executive branch . . . ." *Gundy*, 588 US at ___; 139 S Ct at 2134 (Gorsuch, J., dissenting). More important still, these hedges against hasty lawmaking and the separation of powers were not an experiment designed to preserve "institutional prerogatives or governmental turf"; they were, instead, meant to "respect[] the people's sovereign choice to vest the legislative power" in one branch alone and to "safeguard[] a structure designed to protect their liberties, minority rights, fair notice, and the rule of law." *Id*. at 2135. So when a court throws up its hands and says an airy standard like "reasonableness" is enough to make a delegation proper, the court is not simply letting the Legislature recalibrate its institutional interests—it is allowing the Legislature to pass off responsibility for legislating, thereby endangering the liberties of the people, as the present case has vividly demonstrated.[22]

How, then, are courts to discern improper delegations? Justice Gorsuch offered three standards covering the circumstances in which delegations are permissible. "First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.' "

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[22] In outlining the problems that would arise in such a scenario, Justice Gorsuch described a situation eerily similar to the present case:

> Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President. And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice. [*Gundy*, 588 US at ___; 139 S Ct at 2135 (Gorsuch, J., dissenting).]

Id. at 2136. This standard comes from United States Supreme Court Chief Justice Marshall, who, in an early decision, "distinguished between those 'important subjects, which must be entirely regulated by the legislature itself,' and 'those of less interest, in which a general provision may be made, and the power given to those who are to act . . . to fill up the details.' " *Id*., quoting *Wayman*, 23 US (10 Wheat) at 31, 43. We have similarly recognized that "[t]he leaving of details of operation and administration" to the executive "is not an objectionable delegation of legislative power." *People v Babcock*, 343 Mich 671, 680; 73 NW2d 521 (1955); see also *Argo Oil Corp v Atwood*, 274 Mich 47, 52; 264 NW 285 (1935) ("It is too well settled to need the citation of supporting authorities that the Legislature, within limits defined in the law, may confer authority on an administrative officer or board to make rules as to details, to find facts, and to exercise some discretion, in the administration of a statute. The difficulty is in determining whether the limits are sufficiently defined to avoid delegation of legislative powers.").

"Second," Justice Gorsuch continued, "once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding." *Gundy*, 588 US at ___; 139 S Ct at 2136 (Gorsuch, J., dissenting). For example, a statute might impose trade restrictions on another country if the President determines that that country has taken or not taken certain actions. *Id*. Once again, our caselaw contains this same standard. See *Argo Oil Corp*, 274 Mich at 52; see also *Tribbett v Marcellus*, 294 Mich 607, 615; 293 NW 872 (1940) ("While the legislature cannot delegate its power to make a law, nevertheless it can enact a law to delegate a power to

determine a fact or a state of things upon which the application of the law depends.").

In fact, we have noted that "for many years this and other courts evaluated delegation challenges in terms of whether a legislative (policymaking) or administrative (factfinding) function was the subject of the delegation . . . ." *Blue Cross & Blue Shield of Mich*, 422 Mich at 51. But we jettisoned this more restrained and historically grounded test in favor of the regnant "standards" test, i.e., the "intelligible principle" test. *Id*. Why? Not because this new test better reflected the Constitution's original meaning or historical practice. Rather, we adopted the new position because we deemed the "standards" test to reflect the "essential purpose of the delegation doctrine" and because we better liked the consequences of this new test, i.e., that the Legislature could gather "the resources and expertise of agencies and individuals to assist the formulation and execution of legislative policy." *Id*. These are not considerations that normally justify a constitutional interpretation. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 59; 921 NW2d 247 (2018) (the object of constitutional interpretation is uncovering the text's original public meaning); *Tyler v People*, 8 Mich 320, 333 (1860) ("The expediency or policy of the statute has nothing to do with its constitutionality[.]"). As Justice Gorsuch described, the same mutation occurred in federal law, whereby a stray statement about intelligible principles "began to take on a life of its own" and eventually overwhelmed the traditional tests. *Gundy*, 588 US at ___; 139 S Ct at 2138-2140 (Gorsuch, J., dissenting).

Finally, the third realm of permissible delegation is the assignment of nonlegislative tasks to the executive (or judicial) branches. *Id*. at 2137. Almost by definition,

if the delegated authority is not legislative, but already falls within the scope of executive authority, then no improper delegation has occurred. Our earlier caselaw similarly reflects this view. See, e.g., *People v Collins*, 3 Mich 343, 415-416 (1854) ("That the legislature may confer upon others, in their discretion, *administrative* powers necessary or proper for carrying on the government, not otherwise vested by the constitution, and in some cases involving the exercise of a discretion which the legislature itself might, but could not conveniently have exercised, no one will question. These, however, are not the law-making powers, and therefore do not here require particular notice. . . . *But the power of enacting general laws cannot be delegated—not even to the people*. There is nothing in the constitution which authorizes or contemplates it; nothing in the nature of the power which requires it; nothing in the usages of our American government which sanctions it; no single adjudication of a court of last resort, in any state, which affirms it; and such delegation would be contrary to the intent manifested by the very structure of the legislative department of the government.").

Our holding today could be explained through this traditional framework. The power the Governor holds under the EPGA is no mere "filling in the details." Nor could the EPGA be thought of as a fact-finding statute or a grant of nonlegislative power. Instead, the EPGA bestows upon the Governor pure lawmaking authority, precisely what the separation of powers is designed to prevent.

No one in this case has requested that we consider the analytical framework sketched by Justice Gorsuch. It is, however, a possible path toward a nondelegation doctrine that reflects the original public meaning of *our* Constitution—every version of which contains more

explicit language bearing upon nondelegation than does our federal counterpart.[23] Thus, if the issue is properly presented in a future case, I would consider whether, and to what extent, we should adopt this framework.[24] But in the present matter, I fully concur with the majority's holding that the EPGA constitutes an unconstitutional delegation of legislative power.

VI. CONCLUSION

As discussed above, I believe that this case can be resolved on statutory grounds. In particular, I do not believe that the EPGA applies to public-health events like pandemics. Because my colleagues disagree and proceed to decide the constitutional issue, I consider it my duty to reach that issue as well. I agree with and join the majority's analysis and holding that the EPGA represents an unconstitutional delegation of legislative authority. To my mind, the case also raises a larger

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[23] See Const 1963, 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."); Const 1908, art 4, § 2 ("No person belonging to 1 department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution."); Const 1850, art 3, § 2 (same); Const 1835, art 3, § 1 ("[O]ne department shall never exercise the powers of another, except in such cases as are expressly provided for in this constitution."). See Cooley, Constitutional Limitations (1868), p 116 ("One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.").

[24] The Chief Justice apparently disagrees with this framework and asserts that it is based on "armchair history." Others disagree. See Wurman, *Nondelegation at the Founding*, 130 Yale L J (forthcoming), abstract, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559867#> (accessed October 1, 2020) [https://perma.cc/PVG7-8Y3M] (refuting the attempt by Professors Julian Mortenson and Nicholas Bagley to "challenge the conventional wisdom that, as an originalist matter, Congress cannot delegate its legislative power").

point that the Court would do well to examine in an appropriate case: does the current "standards" test in the nondelegation doctrine reflect our Constitution's original public meaning? For now, however, I fully agree with the majority's articulation and application of the current standard here. I also agree with the majority's holding as to the EMA. For these reasons, I join Parts III(A), (B), (C)(2), and IV of the majority opinion and concur in part and dissent in part.

MCCORMACK, C.J. (*concurring in part and dissenting in part*). Every eighth-grade civics student learns about the separation of powers and checks and balances—design features of our government to prevent one branch from accumulating too much power. The principle of separation of powers is fundamental to democracy. As James Madison put it: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (Madison) (Rossiter ed, 1961), p 301.

In this light, the Legislature's delegation of authority to the Governor in the Emergency Powers of the Governor Act (the EPGA), MCL 10.31 *et seq*., may appear concerning at a superficial glance, given that it vests the Governor, and the Governor alone, with the authority to exercise the whole of the state's police power in some emergencies. But our job is to apply the law. And all our precedent (and that of the United States Supreme Court) vindicates the Legislature's choice to delegate authority to the Governor in an emergency.

That does not insulate the Governor's exercise of that authority from checks and balances. To the con-

trary, there are many ways to test the Governor's response to this life-and-death pandemic.

Some of these are judicial. For example, the statute allows a legal challenge to the Governor's declaration that COVID-19, as a threshold matter, constitutes a "great public crisis" that "imperil[s]" "public safety." MCL 10.31(1). For another example, any order issued under the statute could be challenged as not "necessary" or "reasonable" to "protect life and property or to bring the emergency situation within the affected area under control." *Id*. In these ways and others, the courts can easily be enlisted to assess the exercise of executive power, measuring the adequacy of its factual and legal bases against the statute's language.

There are legislative mechanisms available too. The Legislature might revisit its longstanding decision to have passed the EPGA. If the Legislature saw fit, it could repeal the statute. Or, the Legislature might amend the law to alter its standards or limit its scope. Changing the statute provides a ready mechanism for legislative balance.

What is more, Michigan's citizens can initiate petition drives to repeal the EPGA (and they are) and to recall the Governor (and they are), exercising yet other constitutional safeguards to curb executive overreach. Citizens by petition could alternatively amend the statute. And with or without a citizens' petition, the Governor undoubtedly will be politically accountable to voters for her actions in our next gubernatorial election, the ultimate check.

Not content with available constitutional devices and unwilling to acknowledge the limitations expressed by the EGPA's terms, the majority forges its own path. It announces a new constitutional rule to strike down a 75-year-old statute passed to address

emergencies. In so doing, the majority needlessly inserts the Court into what has become an emotionally charged political dispute. Because our precedent does not support the majority's decision, because I would not make new rules to address a once-in-a-century global pandemic, and because there are many other remedies available to curb executive overreach, I respectfully dissent in part.[1]

I. THE NONDELEGATION DOCTRINE

As the majority observes, "[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003). In *Dep't of Natural Resources v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976), this Court adopted a three-pronged standard for evaluating whether a statute has provided sufficient standards for the delegation of legislative power to be constitutional. First, the act in question must be read as a whole. Second, the standard must be as reasonably precise as the subject matter requires or permits. And third, if possible, the statute must be construed in a way that renders it valid, not invalid; as conferring administrative, not legislative, power; and as vesting discretionary, not arbitrary, authority. The second prong is at the center of this dispute.

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[1] I concur in the majority's opinion to the extent that it concludes that we should answer the certified questions; holds that the Governor's executive orders issued after April 30, 2020, were not valid under the Emergency Management Act (the EMA), MCL 30.401 *et seq*.; and rejects the plaintiffs' statutory arguments that the EPGA does not authorize the Governor's executive orders. I therefore concur in Parts III(A) and (B) and all but the last paragraph of Part III(C)(1) of the majority opinion.

In applying this standard, we have consistently upheld statutes with broad and indefinite delegations of legislative authority. See, e.g., *G F Redmond & Co v Mich Securities Comm*, 222 Mich 1, 7; 192 NW 688 (1923) (concluding that the statutory term "good cause" for revocation of a license was "sufficiently definite" to constitute an adequate standard); *Smith v Behrendt*, 278 Mich 91, 93-94, 96; 270 NW 227 (1936) (upholding a statute that delegated the authority to grant permits to operate otherwise-prohibited oversize vehicles on public highways "in special cases"); *State Hwy Comm v Vanderkloot*, 392 Mich 159, 172; 220 NW2d 416 (1974) (holding that " 'necessity' is an adequate standard in the context of delegated eminent domain authority" and noting that " '[n]ecessity' is also a recognized standard guiding administrative bodies in making other discretionary determinations based upon delegated legislative authority").

The United States Supreme Court takes a similar approach: a delegation of legislative authority is valid if it provides an " 'intelligible principle' " to guide the decision-maker's authority. *Mistretta v United States*, 488 US 361, 372; 109 S Ct 647; 102 L Ed 2d 714 (1989), quoting *J W Hampton, Jr & Co v United States*, 276 US 394, 409; 48 S Ct 348; 72 L Ed 624 (1928). Under this standard, the United States Supreme Court has approved of "broad standards" for congressional delegation of legislative power. *Mistretta*, 488 US at 373. There is a reason for this: "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id*. at 372. Using such delegations, "Congress gives its delegee the flexibility to deal with real-world constraints in carrying out his charge." *Gundy v United States*, 588 US ___, ___; 139 S Ct 2116, 2130; 204 L Ed 2d 522 (2019) (opinion by Kagan, J.).

The United States Supreme Court has only invalidated a statute under the nondelegation doctrine in two cases, both from 1935. *Panama Refining Co v Ryan*, 293 US 388; 55 S Ct 241; 79 L Ed 446 (1935); *ALA Schechter Poultry Corp v United States*, 295 US 495; 55 S Ct 837; 79 L Ed 1570 (1935). By contrast, the Court has "over and over upheld even very broad delegations" of authority in numerous cases spanning various decades. *Gundy*, 588 US at ___; 139 S Ct at 2129 (opinion by Kagan, J.). For a far-from-exhaustive list, see *Gundy*, 588 US at ___; 139 S Ct at 2129 (opinion by Kagan, J.); *id*. at 2131 (Alito, J., concurring in the judgment); *Whitman v American Trucking Associations, Inc*, 531 US 457, 472; 121 S Ct 903; 149 L Ed 2d 1 (2001); *Mistretta*, 488 US at 379; *United States v Mazurie*, 419 US 544, 556-557; 95 S Ct 710; 42 L Ed 2d 706 (1975); *United States v Sharpnack*, 355 US 286, 296-297; 78 S Ct 291; 2 L Ed 2d 282 (1958); *American Power & Light Co v Securities & Exch Comm*, 329 US 90, 104-106; 67 S Ct 133; 91 L Ed 103 (1946); *Yakus v United States*, 321 US 414, 425-426; 64 S Ct 660; 88 L Ed 834 (1944); *Mulford v Smith*, 307 US 38, 47-49; 59 S Ct 648; 83 L Ed 1092 (1939); *J W Hampton, Jr & Co*, 276 US at 409-411; *United States v Grimaud*, 220 US 506, 516-517, 521; 31 S Ct 480; 55 L Ed 563 (1911); *Marshall Field & Co v Clark*, 143 US 649, 693-694; 12 S Ct 495; 36 L Ed 294 (1892); *Wayman v Southard*, 23 US (10 Wheat) 1; 6 L Ed 253 (1825). Thus, the current state of the law is such that a successful nondelegation challenge in that Court is very hard to come by.[2]

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[2] *Gundy* suggests that some members of the current United States Supreme Court are prepared to revisit the doctrine in a future case. Justice VIVIANO finds Justice Gorsuch's approach potentially persuasive and suggests we might adopt it in a future case. But for now, Justice Gorsuch's approach is not the law, and *Panama Refining Co* and *ALA Schechter Poultry Corp* remain the only nondelegation challenges that

Both Courts have tests that require *some* standards for the delegation of legislative authority—in theory, an inadequate standard would be insufficient. But until today, the United States Supreme Court and this Court have struck down statutes under the nondelegation doctrine only when the statutes contained *no* standards to guide the decision-maker's discretion. See *Mistretta*, 488 US at 373 n 7 (discussing *Panama Refining Co* and *ALA Schechter Poultry Corp*); *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 52; 367 NW2d 1 (1985) (agreeing with the plaintiff that the statute at issue contained " 'absolutely no standards' "); *Osius v St Clair Shores*, 344 Mich 693, 700; 75 NW2d 25 (1956) (invalidating an ordinance giving a zoning board of appeals authority to approve or deny the erection of gas stations but providing no standards to guide its decisions). The bar for what standards qualify as constitutional is low.

The delegation in the EPGA plainly has standards that surmount that bar. For the Governor to invoke the EPGA, her actions must be "reasonable" and "necessary," they must "protect life and property" or "bring the emergency situation . . . under control," and they may be taken only at a time of "public emergency" or

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have succeeded in that Court. And it is armchair history to suggest that the founding generation believed that the constitutional settlement imposed restrictions on the delegation of legislative power or that it empowered the judiciary to police the Legislature's delegations. As Professors Bagley and Mortenson have shown, the overwhelming majority of Founders didn't see anything wrong with delegations as a matter of legal theory. See Mortenson & Bagley, *Delegation at the Founding*, 121 Columbia L Rev (forthcoming 2021), available at <https://originalismblog.typepad.com/the-originalism-blog/2020/01/julian-davis-mortenson-nicholas-bagley-delegation-at-the-founding-with-a-response-from-ilan-wurmanmi.html> (accessed October 1, 2020) [https://perma.cc/9BF5-8SUX]; see generally Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: The University of North Carolina Press, 1996).

"reasonable apprehension of immediate danger" when "public safety is imperiled." MCL 10.31(1). Those are standards. Reasonable people might disagree about their rigor, but this Court and the United States Supreme Court have consistently held similar standards constitutional. Until today, a delegation was invalid only when there were *no* standards. *Panama Refining Co*, 293 US 388; *Blue Cross & Blue Shield of Mich*, 422 Mich 1.

It is not my view that only delegations with no standards are unconstitutional. But until today this Court and the United States Supreme Court upheld every delegation that had some standards to guide the decision-maker's discretion. The particular standards in the EPGA are as reasonably precise as the statute's subject matter permits. Given the unpredictability and range of emergencies the Legislature identified in the statute, it is difficult to see how it could have been more specific. Indeed the EPGA contains *multiple* limitations on the Governor's authority, each limitation requiring more of the Governor when exercising authority.[3] Therefore, our precedent holds that it does not violate the nondelegation doctrine.

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[3] The majority concludes otherwise by asserting that the EPGA contains only the limitations that the Governor's actions be "reasonable" and "necessary," but as the majority notes, the United States Supreme Court has observed that the word "necessary" may be *part* of a sufficient standard imposed upon the executive branch. *Touby v United States*, 500 US 160; 111 S Ct 1752; 114 L Ed 2d 219 (1991).

So too here. The EPGA does not use "reasonable" or "necessary" in a vacuum; the Governor's action must be "reasonable" or "necessary" to "protect life and property or to bring the emergency situation within the affected area under control." What more important objectives does a Governor have in an emergency than to protect life and property and bring the emergency situation under control? And given the variety, breadth, and scope of potential emergencies, how much more specific could the Legislature have been in setting the standards guiding the Governor's discretion to accomplish those goals? Far from "illusory," as

The majority believes that *Whitman* provides the foundation for its decision that a delegation as broad as this one requires more specific standards guiding the Governor's discretion. But *Whitman* cannot bear the weight that they place on it. *Whitman* does state (sensibly) that the degree of discretion that is acceptable varies according to the scope of the power conferred. But it then sets broad parameters that can't be cast aside here:

> [E]ven in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a "determinate criterion" for saying "how much [of the regulated harm] is too much." In *Touby* [*v United States*, 500 US 160; 111 S Ct 1752; 114 L Ed 2d 219 (1991)], for example, we did not require the statute to decree how "imminent" was too imminent, or how "necessary" was necessary enough, or even—most relevant here—how "hazardous" was too hazardous. [*Whitman*, 531 US at 475 (citation omitted).]

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the majority calls them, these standards are specifically targeted to allow the Governor to remedy the dire consequences flowing from the emergency. For that reason, the United States Supreme Court precedent discussed in the majority opinion that holds that a "necessity" or some comparable standard might not have been sufficient in and of itself, but was enough when coupled with some criterion, applies to the EPGA. In other words, the authority that the majority cites says the statute is constitutional. The majority's discussion of those cases also contradicts its claim that the standards in the EPGA are confined to "reasonable" or "necessary." For example, the majority admits that the standard in *New York Central Securities Corp v United States*, 287 US 12; 53 S Ct 45; 77 L Ed 138 (1932), was not simply confined to the "public interest" but also included "adequacy of transportation service," "essential conditions of economy and efficiency," and "appropriate provision and best use of transportation facilities" because those terms supplied some criterion. But the majority fails to recognize that the EPGA similarly contains some criterion when it states that the Governor's orders must be necessary to "protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

And the *Whitman* Court *upheld* the delegation in that case. Thus, even in a "sweeping" law (like the EPGA), the United States Supreme Court's rules have said—and ours were in accordance until today—that the standards provided are enough to guide the Governor's exercise of her discretion.[4]

The majority reaches a contrary conclusion only by breaking new ground in our nondelegation jurisprudence. And what is its justification for doing so? Essentially this—the scope of the Governor's power under the EPGA is unprecedented, so we need a new nondelegation rule to contain it. But creating new constitutional doctrine to respond to a problem that has many other solutions puts the Court in a precarious position. If, as Aristotle said, "the law is reason free from passion," an emotionally charged case seems like a terrible candidate for making new law. When there is a settled rule that has been in place for decades, discarding it to respond to an outlier case (especially when there are other solutions available) is imprudent.

Breaking new constitutional ground here to facially invalidate the EPGA is unnecessary because there are

[4] The majority finds some light in the language from *Synar v United States*, 626 F Supp 1374, 1386 (D DC, 1986), that "[w]hen the scope increases to immense proportions . . . the standards must be correspondingly more precise." *Synar*, of course, is not binding on us or any other court outside the DC Circuit, and it cited no authority for its claim. Why we would (or should) rely on that standard, which has no support in our law or that of the United States Supreme Court, is anyone's guess. But if we were to rely on it, it cuts against the majority's assertion that the duration of the delegation in the EPGA makes it unconstitutional. See *id*. at 1386-1387 (stating that "while extremely limited duration has been invoked as one of the elements sustaining a delegation, lengthy duration has never been held to render one void" and noting that "[t]he delegations upheld in [*J W Hampton, Jr & Co*, 276 US at 394], and [*Marshall Field & Co*, 143 US at 649] . . . were for indefinite terms").

other judicial remedies. If the citizens of this state believe that the Governor has overstepped, they can challenge her determination that this public-health crisis is an emergency that imperils public safety and seek a declaration that she no longer has the authority to act under the EPGA.[5] Or those aggrieved by her orders can challenge any or all of them. (Indeed, that's exactly what the plaintiffs here did.) If any order is not reasonable and necessary because it is not directed at protecting life and property or bringing the emergency situation under control, or not issued at a time of public emergency or reasonable apprehension of immediate danger that imperils public safety, it will fall. There are justiciable questions as to whether the Governor can continue to declare an ongoing emergency and invoke the EPGA generally, as well as to the propriety of specific individual executive orders.[6]

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[5] When the Governor issued the initial state of emergency back in March and a very real danger existed of hospitals being overrun with COVID-19 patients or running out of ventilators and personal-protection equipment, there was a specific set of facts to justify her declaration that the pandemic was a disaster that threatened public safety. Whether she can make a persuasive case that a disaster threatening public safety continues today is a question a court could decide. Resolving the Governor's authority to act under the EPGA by adjudicating such a challenge rather than striking the act altogether (an act that the Legislature believed gave the Governor necessary and important tools for combating emergencies) would be a more modest use of our judicial power. I therefore strongly disagree with the majority that the Governor's powers under the EPGA are of indefinite duration. And for that same reason, I don't view the lack of a specific durational limitation in the EPGA as "considerably broaden[ing] the scope of authority" conferred by the statute.

[6] Of course, separation-of-powers disputes do not *always* involve political questions to be avoided by the judiciary (the majority's straw man offering). *This* separation-of-powers dispute is best resolved by the many other remedies available (including judicial remedies) before facially invalidating the EPGA.

Political remedies abound too. The people could convince their elected representatives to repeal (or amend) the EPGA, or attempt to do so themselves. Indeed, a petition to repeal the EPGA is circulating, and recent news reports suggest that it may already have enough signatures to proceed. See, e.g., Hermes & Booth, *Michigan Group Surpasses Signatures Needed for Petition Against Gov. Whitmer's Emergency Powers* (September 14, 2020), available at <https://www.clickondetroit.com/news/michigan/2020/09/14/group-gathers-signatures-to-petition-against-gov-whitmers-emergency-powers/> (accessed October 1, 2020) [https://perma.cc/98ZL-REE8]. Not to mention the most potent political remedy of all: the ballot box. If citizens are unhappy with the Governor's actions, they can launch a petition to recall her (and again, at least one is already circulating)—or vote against her in the next election.

Our nondelegation jurisprudence does not support the majority's decision to facially invalidate the EPGA. And the availability of other remedies makes this case a poor vehicle for reshaping the law. I dissent from the majority's sweeping constitutional ruling.[7]

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[7] I also question whether the facial validity of the EPGA is properly before the Court, even though I concede that is how the federal court presented the issues to us. The plaintiffs in the federal district court sought only as-applied relief. See Plaintiffs' Complaint (May 12, 2020) at 35-36, requesting the following relief:

> a. A declaratory judgment that the Provider Plaintiffs are permitted under Executive Order 2020-17, Executive Order 2020-77, and the HHS order to continue their business operations and Mr. Gulick is permitted under Executive Order 2020-17, Executive Order 2020-77, and the HHS order to obtain knee replacement surgery and other vital medical treatment;
>
> b. Alternatively, a declaration that Executive Order 2020-17 and Executive Order 2020-77, as applied to the Plaintiffs, violates the Michigan Constitution, the Fourteenth Amendment, and the Commerce Clause of the United States Constitution;

Finally, the plaintiffs seek a declaration prohibiting the defendants from enforcing Department of Health and Human Services orders issued by defendant Director Robert Gordon. Those orders proclaim to draw their authority not from the EMA or EPGA but from MCL 333.2253. The federal district court did not certify to this Court any question regarding the validity of those orders, and this Court does not offer any opinion on the validity or continued enforcement of those orders.

II. CONCLUSION

I agree with the majority that the Governor's executive orders issued after April 30, 2020, were not valid under the EMA. But I dissent from its holding that the EPGA is facially unconstitutional under the nondelegation doctrine. I would uphold the EPGA as a valid delegation of legislative authority under our settled jurisprudence.

BERNSTEIN and CAVANAGH, JJ., concurred with MCCORMACK, C.J.

BERNSTEIN, J. (*concurring in part and dissenting in part*). Like Chief Justice MCCORMACK, whose separate

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c. Preliminary and permanent injunctive relief preventing the Defendants from enforcing Executive Order 2020-17, Executive Order 2020-77, and the HHS order against the Plaintiffs;

d. Damages for the violation of the Plaintiffs' constitutional rights, in an amount to be proven at trial;

e. Costs and expenses of this action, including reasonable attorneys' fees, in accordance with 42 U.S.C. § 1988; and

f. Any further relief that the Court deems appropriate.

Yet the federal district court certified to this Court the question whether the Governor has the authority under the EPGA or EMA after April 30, 2020, to issue *any* executive order related to the COVID-19 crisis.

opinion I join in full, I concur in the majority's opinion in part but dissent from its ultimate holding that the Emergency Powers of the Governor Act (EPGA), MCL 10.31 *et seq*., is unconstitutional. I write separately to express how I came to this difficult conclusion.

The Centers for Disease Control and Prevention report that, in the United States, there have been more than 7,000,000 confirmed cases of COVID-19, and more than 200,000 associated deaths.[1] This data confirms that the United States is the worldwide leader in both confirmed cases and deaths.[2] In Michigan alone, there have been more than 100,000 confirmed cases of COVID-19, and more than 6,000 associated deaths.[3] Although many of the measures enacted by executive order have led to the containment of these numbers in Michigan, history warns us that deadlier second or third waves may still await us.[4]

In short, the situation we all are facing is tremendously grave. COVID-19 has posed and continues to pose a very real threat to both the lives and livelihoods of everyone in Michigan. This is, of course, an understatement to everyone who has lost a loved one or their

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[1] Centers for Disease Control and Prevention, *COVID Data Tracker* <https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days> (accessed September 30, 2020) [https://perma.cc/9BCR-6CAL].

[2] World Health Organization, *Coronavirus Disease (COVID-19) Dashboard* <https://covid19.who.int/> (accessed September 30, 2020) [https://perma.cc/ME95-PTFZ].

[3] Michigan, *Coronavirus* <https://www.michigan.gov/coronavirus/> (accessed September 30, 2020) [https://perma.cc/Z2NE-XRLE].

[4] "The first pandemic influenza wave appeared in the spring of 1918, followed in rapid succession by much more fatal second and third waves in the fall and winter of 1918–1919, respectively . . . ." Taubenberger & Morens, *1918 Influenza: The Mother of All Pandemics*, 12(1) Emerg Infect Dis 15, 16 (2006), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3291398/> (accessed September 30, 2020).

very way of life. We are truly experiencing a global health crisis of unprecedented scope, and the fact that the Governor of Michigan has attempted to curb the threat by issuing executive orders is understandable. However, as my fellow Justices have recognized, it is not our role to consider or debate the practicality of any of these measures—instead, our job is to determine whether the Governor had the legal authority to act in the first place.

The separation of powers is one of the fundamental principles of our form of government.[5] As one of the Framers put it:

> If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. [The Federalist No. 51 (Madison) (Rossiter ed, 1961), p 322.]

Our entire government is built on the understanding that a system of checks and balances between the branches is necessary for a fully functioning democracy. Our interest in policing the boundaries between

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[5] "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Seila Law LLC v Consumer Fin Protection Bureau*, 591 US ___, ___; 140 S Ct 2183, 2202; 207 L Ed 2d 494 (2020), quoting *Bowsher v Synar*, 478 US 714, 730; 106 S Ct 3181; 92 L Ed 2d 583 (1986). " 'There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates' . . . ." The Federalist No. 47 (Madison) (Rossiter ed, 1961), p 302, quoting Montesquieu. "Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty. The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people." *Bowsher*, 478 US at 722.

the separate branches of government is more than merely academic. I am reminded of a passage in the Bible, which reads, "Now there arose a new king over Egypt, who did not know Joseph." Exodus 1:8. It is this concern over a new king that propels my unease here. It is not enough to be content with how a *specific* individual may be wielding their power. Instead, we are concerned with the inherent authority to act, because in our system of government, leaders may come and go depending on the will of the electorate. That a specific leader can be credited with acting in good faith does not prevent a successor from behaving differently. It can only help sharpen our understanding of how best to protect our democracy to think about how an unknown future actor might exercise this authority and what concerns that might raise.[6]

That said, after a thorough examination of prior caselaw from both this Court and the Supreme Court of the United States, I agree with Chief Justice MCCORMACK that the grant of power found in the EPGA does not offend the separation of powers. To be clear, I find this conclusion inherently troubling. Again, we are a government of checks and balances, and at first blush, it seems more than a little strange that a delegation of this scope could be constitutionally appropriate. However, as Justice Alito recently acknowledged, "[S]ince

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[6] See Somin, *Obama's Constitutional Legacy*, 65 Drake L Rev 1039, 1041-1046 (2017); Prokop, Vox, *How Barack Obama Is Expanding Presidential Power — and What It Means for the Future* <https://www.vox.com/2014/9/9/5964421/obama-lawsuit-republicans-abuse-of-power> (posted September 9, 2014) (accessed September 30, 2020) ("So future Republic presidents will inevitably cite the new precedents Obama is setting to justify actions of their own. 'I think Democrats are going to rue the day they did not push back against Obama on these things,' says [Mitchel] Sollenberger, the University of Michigan professor [of Political Science]. 'Just as Republicans regretted the same thing when they didn't push back against Bush.' ").

1935, the [Supreme Court of the United States] has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards." *Gundy v United States*, 588 US ___, ___; 139 S Ct 2116, 2130-2131; 204 L Ed 2d 522 (2019) (Alito, J., concurring in the judgment).[7] Consistent

[7] For years, legal commentators have noted that the nondelegation doctrine does very little work. Eskridge & Ferejohn, *The Article I, Section 7 Game*, 80 Geo L J 523, 561 (1992) ("Although contrary to the Framers' apparent understanding in 1789, we agree with *Mistretta* [*v United States*, 488 US 361; 109 S Ct 647; 102 L Ed 2d 714 (1989),] that the nondelegation doctrine is essentially unenforceable as a constructional doctrine."); Wilkins & Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 Geo Wash L Rev 479, 541 (1995) (stating that "the New Deal-era nondelegation decisions have seemed virtually toothless since 1935 . . . ."); Young, *The Constitution Outside the Constitution*, 117 Yale L J 408, 446 (2007) ("For example, Congress's ability to shift lawmaking responsibility to the executive branch was once limited by the nondelegation doctrine, which permitted shifting implementation functions to agencies but insisted that Congress make the basic policy decisions by articulating an 'intelligible principle' to guide agency discretion. But the courts found the concept of excessive delegation very difficult to define and police, and they eventually gave up trying."); Watts, *Rulemaking as Legislating*, 103 Geo L J 1003, 1016 (2015) ("So how is it that the Court continues to insist pursuant to the nondelegation doctrine's central premise that Congress may not delegate legislative power while, at the same time, Congress routinely delegates broad rulemaking powers to federal agencies and enables agencies to promulgate legislative rules on wide-ranging subjects that carry the force and effect of law? The answer lies in what is known as the intelligible principle requirement—a requirement that might sound substantial but, in reality, is quite toothless."). See also *Gundy*, 588 US at ___ n 62; 139 S Ct at 2140 n 62 (Gorsuch, J., dissenting).

To the extent that this commentary is understood to be limited to a federal context, this Court has also noted that application of the intelligible-principle requirement has led to "uniformly unsuccessful" delegation challenges since the New Deal era. *Taylor v Gate Pharm*, 468 Mich 1, 9; 658 NW2d 127 (2003). "In Michigan, this Court has considered similar claims regarding statutes where the claims included an allegation of improperly delegating the Legislature's power to a Michi-

with decades of jurisprudence from both this Court and the Supreme Court of the United States, I therefore agree with Chief Justice MCCORMACK that the nondelegation doctrine, as it is currently understood, is ill-suited to address the unique problem placed before us now. As Justice Alito noted:

> If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment. [*Id*. at 2131.]

Given that this Court considers its understanding of the nondelegation doctrine to be similar to that of the Supreme Court of the United States,[8] I would continue to apply the standards test that this Court has consistently used to analyze nondelegation challenges.[9] Because I agree with Chief Justice MCCORMACK that a straightforward application of that test leads to the conclusion that the EPGA satisfies the constitutional principle of the separation of powers, I would leave to the Supreme Court of the United States to decide whether it is now time to revisit the nondelegation doctrine.

To conclude, as I do, that Governor Whitmer has the legal authority to issue orders under the EPGA would not prevent the people of Michigan from otherwise expressing their frustrations with the COVID-19 orders. Efforts to repeal the EPGA are already underway. As with all elected officials, the Governor herself is politically accountable to the electorate, via the recall

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gan agency, and we have rejected the claims on a basis similar to the federally developed rationale." *Id*. at 10.

[8] See *Taylor*, 468 Mich at 10.

[9] See *Westervelt v Natural Resources Comm*, 402 Mich 412, 439-440; 263 NW2d 564 (1978).

process or at the next gubernatorial election.[10] The enforcement of individual executive orders could and has already been challenged, as evidenced in the underlying case before us, as not being "reasonable" or "necessary to protect life and property." MCL 10.31(1).[11] As a hypothetical example, Executive Order No. 2020-180 states:

> [A]thletes training for, practicing for, or competing in an organized sport must wear a facial covering (except when swimming) or consistently maintain 6 feet of social distance (except for occasional and fleeting moments). For example, an athlete participating in a football, soccer, or volleyball game would not be able to consistently maintain 6 feet of distance, and therefore would need to wear a facial covering.

One could mount a challenge to the enforcement of this order in a region with a lower incidence of COVID-19, as a mask mandate might not be necessary to protect life and property under those circumstances. The very duration and scope of the executive orders could also be challenged under the same language, as some of the more invasive restrictions may no longer be reasonable or necessary if a vaccine were to be widely distributed or if a spike of infections were to be successfully flattened. All of these options would remain available

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[10] As Alexander Hamilton has stated in referring to executive power, "it is far more safe there should be a single object for the jealousy and watchfulness of the people[.]" The Federalist No. 70 (Hamilton) (Rossiter ed, 1961), p 430. This appears to have been borne out in practice, as the Board of State Canvassers notes that 20 recall petitions against Governor Whitmer have been filed in 2020 alone. Michigan Secretary of State, Board of State Canvassers, *2020 Recall Petitions Submission and Status*, available at <https://www.michigan.gov/documents/sos/2020_BSC_Recall_Petitions_v2_703097_7.pdf> (accessed on September 30, 2020) [https://perma.cc/X4AD-ZAH2].

[11] See also *Dep't of Health & Human Servs v Manke*, 505 Mich 1110 (2020).

to the people of Michigan even if this Court concluded that the Governor had the authority to issue orders under the EPGA.

In conclusion, on the basis of settled caselaw from this Court and the Supreme Court of the United States, I would hold that the EPGA does not offend the nondelegation doctrine, and I would leave to the people of Michigan the right to mount challenges to individual orders issued under the EPGA.

PEOPLE v BROWN

Docket No. 158663. Decided December 3, 2020.

Troy A. Brown was convicted by a jury in the Macomb Circuit Court of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a). According to the victim, defendant threatened her with a belt and then forced her legs open and penetrated her. The victim disclosed the assault to her brother the next day. Defendant agreed to come to the police station for an interview and voluntarily spoke to the police for approximately three hours. The entirety of defendant's interview with two detectives was videorecorded; however, the video was not admitted at trial. Instead, the detectives testified as to what transpired during the interview. At trial, one detective testified that defendant said that the truth was "probably somewhere in the middle" of the victim's story and defendant's story. Defense counsel cross-examined the detective about whether the detective—not defendant—was actually the one who asked defendant in the interview whether the truth was somewhere in the middle. Defense counsel asked whether the video should be shown, but the prosecutor objected, and the trial court sustained the objection. When defense counsel continued to question the detective, the prosecutor reinforced his position on redirect examination instead of conceding that the detective's earlier testimony was incorrect. During closing arguments, defense counsel again argued to the jury that the detective's testimony was incorrect, but the prosecutor objected, and the court sustained the objection. Following a five-day jury trial, defendant was convicted and sentenced to the statutory mandatory minimum of 25 years in prison, MCL 750.520b(2)(b), and to a maximum of 60 years in prison. Defendant appealed. In an unpublished order entered on June 28, 2017 (Docket No. 336058), the Court of Appeals, SAAD, P.J., and SERVITTO and GLEICHER, JJ., granted a stipulated request to expand the record to include the videorecording of the police interview. The video revealed that the detective, in fact, had been the one to ask defendant if the truth was somewhere in the middle. The video further showed that defendant, in response to the detective's questioning, did not move or make any gesture whatsoever. In an unpublished order

entered on July 25, 2017, the Court of Appeals, SERVITTO, P.J., and JANSEN and SAAD, JJ., granted defendant's motion to remand for an evidentiary hearing. On remand, the trial court conducted a hearing and heard testimony from defense counsel. In an opinion and order, the trial court denied defendant's request for a new trial. Defendant appealed, and in an unpublished per curiam opinion issued on October 18, 2018, the Court of Appeals, O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ., affirmed. Defendant sought leave to appeal in the Supreme Court.

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

A prosecutor may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, and a prosecutor has an affirmative duty to correct patently false testimony, especially when that testimony conveys to the jury an asserted confession from the defendant. In this case, the detective testified that defendant said that the truth between the victim's allegations and defendant's claims of innocence was actually "somewhere in the middle." This claimed confession, however, was false, as evidenced by the videorecording of the interview. Therefore, the prosecutor elicited false testimony from the detective on direct examination. The prosecutor then allowed this false testimony to stand uncorrected. At most, the prosecutor's direct examination and defense counsel's cross-examination left for the jury the task of determining the detective's credibility regarding the claimed confession. And even if defense counsel's questioning worked to correct the detective's inaccurate statements, the prosecutor failed in his duty to correct false testimony by subsequently attempting on redirect examination to restore the detective's credibility regarding his initial statements. Furthermore, the attorneys' closing arguments did not correct or alleviate the harm done by the detective's testimony. Accordingly, the prosecutor's conduct failed to comport with due process. Defendant was entitled to a new trial because there was a reasonable probability that the prosecution's exploitation of the false testimony affected the verdict. The trial presented a credibility contest between defendant and the victim. The prosecutor not only failed to correct the false testimony, which essentially claimed that defendant confessed to the crime, but the prosecutor undertook affirmative actions to cloud defense counsel's efforts to correct the record. Accordingly, defendant was entitled to a new trial.

Court of Appeals judgment reversed, defendant's conviction vacated, and case remanded for a new trial.

TRIAL — FALSE TESTIMONY — PROSECUTOR'S DUTY TO CORRECT FALSE TESTIMONY.

A prosecutor may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, and a prosecutor has an affirmative duty to correct patently false testimony, especially when that testimony conveys to the jury an asserted confession from the defendant.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *Emil Semaan*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *David W. Lewarchik*) for defendant.

PER CURIAM.

At issue is whether defendant, Troy Antonio Brown, is entitled to a new trial because the detective who conducted defendant's police interview testified falsely against him. We conclude that (1) the detective's testimony against defendant was false, (2) the prosecutor failed to correct the false testimony, and (3) there is a reasonable likelihood that the uncorrected false testimony affected the judgment of the jury. *People v Smith*, 498 Mich 466, 475-476; 870 NW2d 299 (2015). Therefore, we reverse the judgment of the Court of Appeals, vacate defendant's conviction, and remand to the trial court for a new trial.

I. FACTS AND HISTORY

Defendant lived across the street from the victim's babysitter. On April 27, 2015, the 11-year-old victim was at defendant's home playing with his two children and the babysitter's children. According to the victim, defendant told her to go to his bedroom, and he locked

the other children in a playroom. In the bedroom, he threatened to "whoop" the victim with a belt, and then he forced her legs open and penetrated her vagina with his penis. Afterward, defendant told her not to say anything and gave her a dollar. The victim then went back to her babysitter's house. She disclosed the assault to her adult brother the next day.

Defendant agreed to come to the police station for an interview and voluntarily spoke to the police for approximately three hours. Detective-Sergeant Robert Eidt was one of two detectives who participated in defendant's interview, the entirety of which was videorecorded. At trial, the video was not admitted. Instead, the detectives testified as to what transpired during the interview. The prosecutor concluded his direct examination of Eidt by asking about Eidt's questioning of defendant:

> *Q*. At some point did you confront the Defendant with the fact that [the victim] was staying [sic] one thing and [that defendant's] story didn't match up?
>
> *A*. Yes, I did.
>
> *Q*. All right. And what was [defendant's] response?
>
> *A*. He said that it was probably somewhere in the middle.
>
> *Q*. That what was probably somewhere in the middle?
>
> *A*. The truth.

A short time later during the direct examination, the prosecutor repeated this point to conclude his questioning of Eidt:

> *Q*. So Sergeant, you had indicated that the Defendant said that the truth was probably somewhere in the middle?
>
> *A*. Yes.

Following the prosecutor's direct examination of Eidt, defense counsel asked for and was granted a recess to review the videorecorded interview before beginning his cross-examination. Defense counsel then cross-examined Eidt about whether *he* was actually the one who asked defendant whether the truth was somewhere in the middle:

> *Q*. I asked for a recess to go back to this and watch it, to make sure my notes were accurate. If I told you the DVD says that you said the truth's somewhere in the middle and [defendant] never said that word, would you have any reason to dispute that?
>
> *A*. As I said before, the report I did not author and this did happen a year and a half ago and I reviewed the report and that's what the report says.

Defense counsel then asked, "Do we need to show this part of the video?" But the prosecutor objected on the ground that the question was argumentative, and the trial court sustained the objection. Defense counsel then continued his cross-examination of Eidt:

> *Q*. Do you, do you disagree with my position that the video shows you saying the truth is somewhere in the middle and not [defendant], at 6:49:50, it's not him but you that says that?
>
> *A*. It's possible.
>
> *Q*. So your testimony earlier could be incorrect?
>
> *A*. About that, yes.

Instead of conceding the point, the prosecutor reinforced his position on redirect examination, asking Eidt if one of *defendant's* responses during the interview was "that the truth is somewhere in the middle[.]" Defense counsel objected before Eidt could answer, and defense counsel again said, "[I]f we want to show the

video I gladly will." But the prosecutor responded that "we can rely on the previous testimony and the report," and the trial court agreed.

Closing arguments were held the next day. When defense counsel argued to the jury that he had asked for the recess to make sure that his review of the DVD was correct, that his notes were accurate, and that Eidt lied, the prosecutor objected on the ground that this was "Counsel's testimony of what he saw" on the DVD and that "this is facts not in evidence," and the trial court sustained the objection. And while the prosecutor did not specifically mention the "truth is in the middle" statement in his closing argument, he did argue during rebuttal:

> Counsel suggested that I'm hiding something from you by not showing you the three-hour video. Do you really think you need to watch three hours of that kind of manipulation? You don't, because you have him here in the flesh. That's even better, and you can judge for yourselves whether or not he's lying.

Following the five-day jury trial, defendant was convicted as charged on one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a). He was sentenced to the statutory mandatory minimum of 25 years in prison, MCL 750.520b(2)(b), and a maximum sentence of 60 years. On appeal, the Court of Appeals granted a stipulated request to expand the record to include the videorecording of the police interview. *People v Brown*, unpublished order of the Court of Appeals, entered June 28, 2017 (Docket No. 336058). The video revealed that Eidt, in fact, had been the one to ask defendant if the truth was somewhere in the middle. And the video further showed that defendant, in response to Eidt's questioning, did not move or make any gesture whatsoever. The Court of Appeals granted defendant's motion

to remand for an evidentiary hearing. *People v Brown*, unpublished order of the Court of Appeals, entered July 25, 2017 (Docket No. 336058). On remand, the trial court conducted a hearing and heard testimony from trial defense counsel. In an opinion and order, the trial court denied defendant's request for a new trial. Defendant appealed, and the Court of Appeals affirmed. *People v Brown*, unpublished per curiam opinion of the Court of Appeals, issued October 18, 2018 (Docket No. 336058). We are now tasked with determining whether the detective's testimony, in conjunction with the prosecutor's actions, violated defendant's constitutional right to due process.

II. LEGAL PRINCIPLES

A due-process violation presents a constitutional question that this Court reviews de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010). A prosecutor's use of false testimony is inconsistent with due process. *Smith*, 498 Mich at 475. In other words, "a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction . . . ." *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959).[1] Importantly, a prosecutor "has an *affirmative duty* to correct" patently false testimony, *Smith*, 498 Mich at 476 (emphasis added), especially when that testimony conveys to the jury an asserted confession from the defendant. See *People v Tanner*, 496 Mich 199, 254; 853 NW2d 653 (2014) ("[C]onfessions and incriminating statements constitute perhaps the most compelling and important evidence available to fact-finders in the justice system's search for

[1] Although Justice ZAHRA dissented in *Smith*, he expressed "agree[ment] with this fundamental proposition, and imagine[d] that no one denies it." *Smith*, 498 Mich at 494-495 (ZAHRA, J., dissenting).

truth."). And while "not every contradiction is material and the prosecutor need not correct every instance of mistaken or inaccurate testimony, it is the *effect* of a prosecutor's failure to correct false testimony that is the crucial inquiry for due process purposes." *Smith*, 498 Mich at 476 (quotation marks and citations omitted). A prosecutor's referencing, or taking advantage of, false testimony is of paramount concern because it "reinforce[s] the deception of the use of false testimony and thereby contribute[s] to the deprivation of due process." *Id*. (quotation marks and citation omitted; alterations by the *Smith* Court). "A new trial is required if the uncorrected false testimony 'could . . . in any reasonable likelihood have affected the judgment of the jury.' " *Id*., quoting *Napue*, 360 US at 271-272.

III. ANALYSIS

At trial, Eidt testified that defendant said that the truth between the victim's allegations and defendant's claims of innocence was actually "somewhere in the middle." In essence, Eidt told the jury that defendant at most confessed to committing first-degree criminal sexual conduct or at a minimum admitted that he engaged in sexual activity with the victim. This claimed confession, however, was false, as evidenced by the videorecording of the interview. During the interview, Eidt actually asked defendant if the truth was "somewhere in the middle," but defendant gave no indication —verbally or nonverbally—in response to this questioning.[2] Therefore, the prosecutor elicited false testimony from the detective on direct examination.

[2] The Court of Appeals explained, "[I]t is apparent that defendant made a non-verbal response to the challenged statement about the truth being somewhere in the middle, nodding his head in a discernable

Our inquiry then turns to whether the prosecutor allowed this false testimony to stand uncorrected. Both the trial court and the Court of Appeals held that defense counsel sufficiently impeached Eidt on this point and thus that there was no need for the prosecutor to correct the record. Certainly, after the prosecutor elicited Eidt's response during direct examination, defense counsel attempted to set the record straight. Defense counsel requested a recess and then questioned Eidt about what was actually said during the interview. In response to defense counsel's questioning, Eidt initially continued to testify that defendant made the inculpatory statement as was recounted in the police report, but in response to Eidt's comments, defense counsel asked if the video of the interview should be played for the jury. The prosecutor objected to this questioning, and the trial court sustained the objection. When defense counsel continued his examination, he again asked if it was the detective, and not defendant, who made the inculpatory statement. Importantly, the detective never admitted that he was

affirmative reply." *Brown*, unpub op at 5. As a result, the Court held that "even if that particular portion of the video would have been shown to the jury to correct Sergeant Eidt's testimony . . . , the jury would have learned that although defendant did not orally state that the truth was somewhere in the middle, he did indeed nod in assent when it was said." *Id*. We have reviewed the videorecorded interview, and the Court's assertions are in error. At one point in the interview, Detective James Twardesky asked a similar question that "somewhere in the middle is probably the truth, right like any other story?" Defendant made a slight nod to this question but seconds later said, "I told you I didn't touch her." Indeed, defendant nodded in response to many of the detectives' questions but denied the criminal allegations over 20 times throughout the three-hour interview. But even if this one nod constituted evidence that defendant agreed with Twardesky's assertion, Eidt's testimony nonetheless remained inaccurate and misleading because Eidt indicated at trial that while he was questioning defendant, defendant made the incriminating statement, not that defendant simply nodded his head in response to another detective's questioning.

mistaken. Rather, he simply stated that it was "possible" he was wrong and agreed that his testimony "could be incorrect." We cannot conclude, as the trial court and Court of Appeals did, that this questioning sufficiently corrected the record. At most, the prosecutor's direct examination and defense counsel's cross-examination left for the jury the task of determining Eidt's credibility regarding the claimed confession.

Even if defense counsel's questioning worked to correct Eidt's inaccurate statements, the prosecutor failed in his duty to correct false testimony by subsequently attempting on redirect examination to restore Eidt's credibility regarding his initial statements. Despite being aware that there might be video evidence to the contrary, the prosecutor asked Eidt, "And to summarize some of the responses that you got from [defendant] is that . . . the truth is somewhere in the middle?" Defense counsel objected and argued that the prosecutor was mischaracterizing Eidt's testimony and that Eidt actually admitted that "he does not remember" whether defendant confessed.[3] Instead of correcting the record and having Eidt concede that defendant never made any such admission, the prosecutor said, "Your Honor, we can rely on the previous testimony and the [police] report." Eidt's testimony on direct and cross-examination was contradictory, and the police report was patently false.[4] Thus, the redirect examina-

[3] Defense counsel's characterization of Eidt's testimony, i.e., that Eidt simply "[did] not remember" what defendant said during the interview, further indicates that Eidt did not unequivocally admit that he, rather than defendant, made the inculpatory statement.

[4] According to the police report, defendant told Eidt during the interview that "the truth was probably in the middle." The police report was not admitted at trial, but Eidt testified that this is what the report indicated. Thus, even though Eidt correctly relayed the information in the police report, the report itself was factually inaccurate, and the

tion did nothing to correct the record and, indeed, further suggested that the prosecutor believed that Eidt initially told the truth and that defendant made the admission during the interview.[5] Here, the prosecutor's failure to correct the testimony and instead rely on that testimony in questioning is especially problematic because it "reinforce[d] the deception of the use of false testimony and thereby contribute[d] to the deprivation of due process." *Smith*, 498 Mich at 476 (quotation marks and citation omitted).

We further find that the attorneys' closing arguments did not correct or alleviate the harm done by Eidt's testimony. Defense counsel attempted to highlight to the jury that defendant made no such admission. However, the prosecutor again objected, arguing that those facts were "not in evidence." The trial court sustained the objection, further underscoring the pros-

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prosecutor failed to adhere to his duty to correct the record when he told the court and the jury that they could "rely on . . . the report."

[5] It is clear that the prosecutor has a duty to apprise the court when he or she knows the witness is giving false testimony. See *Smith*, 498 Mich at 477 ("Regardless of the lack of intent to lie on the part of the witness, *Giglio* [*v United States*, 405 US 150; 92 S Ct 763; 31 L Ed 2d 104 (1972)] and *Napue* require that the prosecutor apprise the court when he *knows* that his witness is giving testimony that is substantially misleading.") (quotation marks and citation omitted; emphasis added). But, contrary to the prosecutor's contention on appeal, the prosecutor also has such a duty when it should be obvious that the witness is giving false testimony. " '[W]hen it should be obvious to the Government that the witness' answer, although made in good faith, is untrue, the Government's obligation to correct that statement is as compelling as it is in a situation where the Government knows that the witness is intentionally committing perjury.' " *Smith*, 498 Mich at 477, quoting *United States v Harris*, 498 F2d 1164, 1169 (CA 3, 1974). This is not a case of "inconsistencies" among witnesses, as the prosecutor now suggests. Rather, it should have been obvious to the trial prosecutor that Eidt's testimony was false at least by the time defense counsel requested a recess, sought to correct the record (over the prosecutor's objections), and asked if the taped interview should be played for the jury.

ecutor's attempt to obscure the truth about the claimed confession. And, finally, the prosecutor during rebuttal argued to the jury that he was not trying to hide anything by keeping the actual video from them. This argument at worst misled the jury to believe that defendant admitted his guilt or at best muddied the record so that the jury would have to assess on its own whether Eidt was telling the truth regarding the admission. We are unable to conclude that the prosecutor adhered to his duty to correct the record; instead, he left intact the false statements that Eidt made. Accordingly, we hold that Eidt's testimony was false; that the prosecutor's actions did not correct the false testimony; and that as a result, the prosecutor's conduct failed to comport with due process. *Smith*, 498 Mich at 482.

We must determine whether the prosecutor's use of the false testimony merits relief. A defendant is entitled to a new trial when "there is a reasonable probability that the prosecution's exploitation of the substantially misleading testimony affected the verdict." *Id*. at 470, citing *Napue*, 360 US at 271-272. As with many sexual-assault cases, the trial presented a credibility contest between defendant and the victim. There was no DNA evidence, no physical injury to the victim, and no eyewitness testimony that supported the prosecutor's assertion that defendant sexually assaulted the victim. Rather, the prosecutor's case rested largely on the victim's testimony. Throughout the trial, defense counsel fleshed out inconsistencies in the victim's allegations, including (1) whether the assault occurred on the bed or on the floor, (2) whether the victim cleaned herself up before or after the assault, (3) whether the victim kept her underwear on or took them off, and (4) whether the victim was quiet and did not fight back during the assault or whether she

screamed and attempted to forestall defendant's advances. Additionally, defense counsel argued that the victim had a proclivity for stealing and lying, highlighting the fact that she stole a candy bar the day of the assault.

Conversely, the prosecutor effectively attacked defendant's credibility by admitting portions of a jail-call video wherein defendant made comments to his fiancée that he "fucked up," that he could not say anything or else he would get "locked up," and that "she came on to me and I fell right into the trap." Additionally, the officers testified that defendant at one point in the interview said, "It never got that far," rather than simply and repeatedly denying the allegations. The prosecutor also emphasized throughout the trial that defendant's bedding was in the washer when the police searched his home, indicating that defendant may have been trying to cover up the evidence. And finally, the prosecutor introduced defendant's prior conviction of assault with a dangerous weapon in order to rebut defendant's claim that he had not been convicted of prior assaultive crimes.

Yet, both sides had viable defenses of each aspect of their questioning. The prosecutor argued that although defense counsel highlighted inconsistencies in aspects of the victim's allegations, the victim's main assertion—that defendant sexually assaulted her—never wavered. Moreover, the prosecutor pointed to consistencies regarding the victim's allegations, such as that she gave the dollar she received from defendant to her brother and that officers found the belt with which defendant allegedly threatened her on defendant's dresser. On the other hand, defendant and his fiancée testified that during their jail call they were not referring to the allegations against defendant but

about his recent affair with another woman. His fiancée also explained that she washed the bedding because one of the children urinated on it. As for defendant's prior conviction, he clarified that he had not been convicted of any other crime involving *sexual* assault, not assault in general.

These illustrations reinforce that the trial was essentially a credibility contest in which both sides either bolstered or attacked the trustworthiness of defendant and the victim. When credibility is a dominant consideration in ascertaining guilt or innocence, other independent evidence apart from the testimony of the defendant and the victim is particularly vital to the fact-finding process. And false testimony simply undermines the jury's ability to discern the truth in these circumstances. This is not to say that false testimony always gives rise to a violation of due process meriting a new trial. In some cases, a new trial will not be warranted given the sheer strength of the truthful evidence relative to the false testimony. "[N]ot every contradiction is material and the prosecutor need not correct every instance of mistaken or inaccurate testimony . . . ." *Smith*, 498 Mich at 476 (quotation marks and citation omitted). However, "confessions and incriminating statements constitute perhaps the most compelling and important evidence available to fact-finders in the justice system's search for truth." *Tanner*, 496 Mich at 254. And when an alleged confession is introduced into a trial, even if the reliability of the confession is in question, there is a greater likelihood that this testimony, when false, will destructively affect the judgment of the jury. As we explained in *Smith*, a new trial is warranted when there is a reasonable probability that the prosecutor's exploitation of the false testimony affected the verdict. *Smith*, 498 Mich at 470. Once again, the prosecutor here not

only failed to correct Eidt's testimony, which essentially claimed that defendant confessed to the crime, but the prosecutor undertook affirmative actions to cloud defense counsel's efforts to correct the record. A prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones," and "[i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v United States*, 295 US 78, 88; 55 S Ct 629; 79 L Ed 1314 (1935). We recognize that the prosecutor may not have relied heavily on this false testimony throughout the trial, but his actions nonetheless left it to the jury to decide if defendant made self-incriminatory statements during the interview. Leaving this kind of false testimony for the jury to assess on its own is highly prejudicial in the present circumstances, and we conclude that there is a reasonable likelihood that it affected the jury's verdict, one ultimately resting on the credibility of the victim and defendant. We therefore reverse the judgment of the Court of Appeals, vacate defendant's conviction, and remand for a new trial.[6]

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

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[6] Given our holding, we do not address defendant's remaining claims, including that the CARE House interviewer's testimony and the prosecutor's comments violated the legal principles set forth in *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995). See also *People v Thorpe*, 504 Mich 230; 934 NW2d 693 (2019). However, we urge the prosecutor on retrial to ensure that any testimony, and any arguments relying on that testimony, fully comports with the standards set forth in *Peterson* and *Thorpe*.

COUNCIL OF ORGANIZATIONS AND OTHERS FOR EDUCATION ABOUT PAROCHIAID v STATE OF MICHIGAN

Docket No. 158751. Argued November 10, 2020 (Calendar No. 2). Decided December 28, 2020.

The Council of Organizations and Others for Education About Parochiaid, the American Civil Liberties Union of Michigan, and others brought an action in the Court of Claims against the state of Michigan, the Governor, and others, challenging the constitutionality of MCL 388.1752b and seeking to enjoin defendants from distributing under MCL 388.1752b appropriated funds to reimburse nonpublic schools for actual costs they incurred in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of the state. Plaintiffs asserted that MCL 388.1752b violated Article 4, § 30 and Article 8, § 2, as amended by Proposal C, of the 1963 Michigan Constitution because the statute allocates money from the state's general fund to reimburse actual costs incurred by nonpublic schools. Proposal C relevantly provides that no public monies or property shall be appropriated or paid directly or indirectly to aid or maintain any private, denominational, or other nonpublic, pre-elementary, elementary, or secondary school. Proposal C further provides, in relevant part, that no public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school. The parties stipulated not to disburse any funds under MCL 388.1752b until the Court of Claims resolved the case. Plaintiffs and defendants both moved for summary disposition. In July 2017, the Legislature amended MCL 388.1752b to appropriate additional funds for the 2017–2018 school year. Also in that month, the Court of Claims issued a preliminary injunction against disbursing the appropriated funds. Defendants then sought leave to appeal in the Court of Appeals, and the Court of Appeals denied the application in an unpublished order entered on August 14, 2017 (Docket No. 339545). Defendants sought leave to appeal in the Supreme Court, and the Supreme Court denied leave to appeal. 501 Mich 1015 (2018). In April 2018, the Court of Claims, CYNTHIA D. STEPHENS, J., concluded that plaintiffs had standing to file suit

and granted plaintiffs' motion for summary disposition, concluding that MCL 388.1752b violated Const 1963, art 8, § 2 because it authorized the payment of public monies to aid or maintain nonpublic schools and to support the employment of persons at nonpublic schools. The court declared the entire statute unconstitutional and enjoined defendants from distributing any funds under the statute; the court did not address plaintiffs' argument under Const 1963, art 4, § 30. Defendants appealed. Meanwhile, in June 2018, the Legislature again amended MCL 388.1752b to appropriate funds for the 2018–2019 school year. In October 2018, the Court of Appeals, MURPHY, P.J., and LETICA, J. (GLEICHER, J., concurring in part and dissenting in part), reversed the Court of Claims, holding that plaintiffs possessed standing and that MCL 388.1752b did not violate Const 1963, art 8, § 2 to the extent that a reimbursed mandate satisfies a three-part test. 326 Mich App 124 (2018). The Court of Appeals remanded to the Court of Claims for that court to apply the three-part test and to address plaintiffs' alternative argument that MCL 388.1752b violates Const 1963, art 4, § 30. Judge GLEICHER agreed that plaintiffs possessed standing but disagreed that MCL 388.1752b was constitutional, concluding that MCL 388.1752b violates Const 1963, art 8, § 2 because the public money directly and indirectly assists nonpublic schools in keeping their doors open and meeting their payroll. Plaintiffs sought leave to appeal in the Supreme Court, and the Supreme Court granted leave, directing the parties to address whether MCL 388.1752b violates Const 1963, art 8, § 2. 504 Mich 896 (2019).

The judgment of the Court of Appeals was affirmed by equal division.

Justice MARKMAN, joined by Justices ZAHRA and VIVIANO, writing for affirmance, stated that MCL 388.1752b is in accordance with both the religion clauses of the First Amendment of the United States Constitution and Article 8, § 2, as amended by Proposal C, of the 1963 Michigan Constitution. *Traverse City Sch Dist v Attorney General*, 384 Mich 390 (1971), recognized that a literal interpretation of Proposal C would raise significant questions about whether the provision violates the Free Exercise Clause given its effect on religion; rather, *Traverse City* stated that Proposal C prohibits the purchase, with public funds, of educational services from a nonpublic school. Because *Traverse City* was issued contemporaneously with the ratification of Proposal C, it was entitled to particular deference. *Traverse City* upheld the provision of both shared-time and auxiliary services but engaged in a distinct analysis for each: concerning shared

time, *Traverse City* reasoned that it was constitutional to provide shared-time services to nonpublic-school students because the control of the funds, teachers, and subjects remained within the public-school system; concerning auxiliary services, rather than emphasizing the "control" aspect, *Traverse City* instead reasoned that providing auxiliary services to nonpublic-school students was constitutional because such services were general health and welfare measures and only had an incidental relation to the instruction of private-school students. Shared-time services are inherently educational in nature; auxiliary services are not. Consequently, because Proposal C was only understood to prohibit appropriations for nonpublic-school educational services, such health and welfare measures as auxiliary services fell outside the scope of Proposal C. Regarding MCL 388.1752b, there is no language in the statute to suggest that public funds are to be appropriated for nonpublic-school *educational* services; rather, MCL 388.1752b provides that public funds are to be appropriated only for "police power" public services to which all educational institutions and all students are generally entitled. Accordingly, MCL 388.1752b does not violate Const 1963, art 8, § 2, as amended by Proposal C, because it does not appropriate funds for nonpublic-school educational services. Justice MARKMAN therefore would have affirmed the judgment of the Court of Appeals that MCL 388.1752b is constitutional and would have remanded this case to the Court of Claims for further proceedings.

Justice CAVANAGH, joined by Chief Justice MCCORMACK and Justice BERNSTEIN, writing for reversal, would have declared that MCL 388.1752b violates Const 1963, art 8, § 2 and that operation of Const 1963, art 8, § 2 to prohibit funding of nonpublic schools through MCL 388.1752b did not raise federal constitutional concerns. *Traverse City* set forth an analysis for considering the effect of Const 1963, art 8, § 2 on different categories of funding. The first step of the analysis is to determine whether the statute at issue violates Const 1963, art 8, § 2 as the constitutional provision would be commonly understood. If the statute does violate Const 1963, art 8, § 2, the next step is to determine whether the application of Const 1963, art 8, § 2 would conflict with the federal Constitution. If there is no conflict, then the funding is prohibited. However, if application of Const 1963, art 8, § 2 would conflict with the federal Constitution, then the question is whether there is an alternative constitutional construction that also preserves the purpose of Const 1963, art 8, § 2 and is consonant with a common understanding of the language used in Const 1963, art 8, § 2. In this case, MCL 388.1752b violates Const 1963, art 8, § 2 as the constitutional provision would be commonly

understood; MCL 388.1752b appropriates general-fund monies for the specific purpose of providing that money directly to nonpublic schools, and only to nonpublic schools, to compensate those schools for costs incurred in adhering to this state's general health, safety, and welfare laws. For a nonpublic school, or any other organization in Michigan, complying with general health, safety, and welfare laws is just a cost of doing business. And to say that paying a portion of a teacher's salary does not support that teacher's employment is a forced construction. The opinion for affirmance departed from the *Traverse City* analysis. *Traverse City* employed the alternative construction to shared-time and auxiliary services only after concluding that the literal application of Const 1963, art 8, § 2 created a conflict with the federal Constitution; therefore, the opinion for affirmance in this case erred by applying an alternative construction of Const 1963, art 8, § 2 without first identifying a federal constitutional problem. Moreover, the opinion for affirmance misapplied the alternative analysis by focusing on the limited discussion in *Traverse City* regarding auxiliary services even though that discussion was explicitly limited to the auxiliary services at issue in that case. Accordingly, Justice CAVANAGH would have reversed the Court of Appeals, declared MCL 388.1752b unconstitutional, and prohibited funding under MCL 388.1752b.

Affirmed by equal division.

Justice CLEMENT did not participate because of her prior involvement as chief legal counsel for Governor Rick Snyder.

White Schneider PC (by *Jeffrey S. Donahue* and *Andrew J. Gordon*) for Council of Organizations and Others for Education About Parochiaid.

Daniel S. Korobkin for the American Civil Liberties Union Fund of Michigan, Michigan Parents for Schools, and 482Forward.

Dickinson Wright PLLC (by *Peter H. Ellsworth* and *Brandon C. Hubbard*), *Phillip J. DeRosier*, and *Ariana D. Pellegrino* for the Michigan Association of School Boards, the Michigan Association of School Administrators, the Michigan Association of Intermediate School Administrators, the Michigan School Business Officials, the Michigan Association of Secondary School

Principals, the Middle Cities Education Association, the Michigan Elementary and Middle School Principals Association, Kalamazoo Public Schools, and Kalamazoo Public Schools Board of Education.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Ann M. Sherman*, Deputy Solicitor General, and *Toni L. Harris*, *Raymond O. Howd*, and *Precious Boone*, Assistant Attorneys General, for the State of Michigan, the Governor, the Department of Education, and the Superintendent of Public Instruction.

Amici Curiae:

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Bursch Law PLLC (by *John J. Bursch*) for Immaculate Heart of Mary and First Liberty Institute.

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MARKMAN, J. (*for affirmance*). This Court, as the highest court of our state, is obligated to defer to the highest law of our land, the United States Constitution. We are also obligated to defer, if at all possible, to the will of our citizenry, which serves as the foundation of our state Constitution. And we are finally obligated to defer, when this can be done, to the judgment of our Legislature, which directly represents that citizenry and enacts laws on its behalf. This case involves the intersection of each of these three sources of self-government: our federal Constitution, our state Constitution, and our statutory law. We are asked in this dispute to either nullify the will of the citizenry, which has ratified an amendment of our state Constitution, or to nullify the judgment of our Legislature. Respectfully, we decline to take either course. Instead, we conclude that MCL 388.1752b, a law of this state reimbursing nonpublic schools for costs incurred in complying with state health, safety, and welfare mandates, is in accordance with both the religion clauses of the First Amendment of our federal Constitution and Article 8, § 2, as amended by Proposal C in 1970, of our state Constitution. Accordingly, we would affirm the judgment of the Court of Appeals and remand to the Court of Claims for further proceedings consistent with our opinion.

I. FACTS & HISTORY

In June 2016, Governor Rick Snyder signed into law 2016 PA 249, which was codified at MCL 388.1752b. This statute appropriated $2.5 million in funds for the 2016–2017 school year "to reimburse costs incurred by nonpublic schools" for compliance with various state health, safety, and welfare mandates to be identified by the Department of Education, such as state asbestos

regulations and vehicle inspections. In July 2016, the Governor asked this Court for an advisory opinion as to whether MCL 388.1752b violates Const 1963, art 8, § 2, which generally prohibits "aid" to "nonpublic schools," but we declined this request. *In re Request for Advisory Opinion Regarding Constitutionality of 2016 PA 249*, 500 Mich 875 (2016).

In March 2017, plaintiffs sued the state defendants in the Court of Claims, alleging that MCL 388.1752b violates Const 1963, art 8, § 2 and Const 1963, art 4, § 30, which provides that "[t]he assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of public money or property for local or private purposes." The parties promptly stipulated not to disburse any funds under the statute until the Court of Claims resolved the case. In July 2017, the Legislature amended MCL 388.1752b to appropriate additional funds for the 2017–2018 school year. Also in that month, the Court of Claims issued a preliminary injunction against disbursing the appropriated funds. Defendants then sought leave to appeal in the Court of Appeals, and the panel denied the application. *Council of Organizations & Others for Ed About Parochiaid v Michigan*, unpublished order of the Court of Appeals, entered August 14, 2017 (Docket No. 339545). Defendants sought leave to appeal in this Court, and this Court denied leave to appeal as well. *Council of Organizations & Others for Ed About Parochiaid v Michigan*, 501 Mich 1015 (2018).

In April 2018, the Court of Claims entered a permanent injunction against disbursing the appropriated funds, concluding that MCL 388.1752b violates Const 1963, art 8, § 2, and defendants appealed that decision. Meanwhile, in June 2018, the Legislature again

amended MCL 388.1752b, this time to appropriate funds for the 2018–2019 school year. In October 2018, the Court of Appeals—in a split decision with the opinion of the Court authored by Judge MURPHY and joined by Judge LETICA—reversed the Court of Claims and remanded to that court for further proceedings. *Council of Organizations & Others for Ed About Parochiaid v Michigan*, 326 Mich App 124; 931 NW2d 65 (2018). The Court of Appeals held that plaintiffs possessed standing under MCL 600.2041(3) and MCR 2.201(B)(4)(a), consistent with *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). *Council of Organizations & Others for Ed About Parochiaid*, 326 Mich App at 138-139. The Court of Appeals further held that MCL 388.1752b does not violate Const 1963, art 8, § 2 to the extent that a reimbursed mandate satisfies the following three-part test:

> [T]he reimbursement may only [constitutionally] occur if the action or performance that must be undertaken to comply with a health, safety, or welfare mandate (1) is, at most, merely *incidental* to teaching and providing educational services to nonpublic school students (noninstructional in nature), (2) does not constitute a *primary* function or element necessary for a nonpublic school to exist, operate, and survive, and (3) does not involve or result in excessive religious entanglement. [*Id*. at 130-131.]

The Court of Appeals then remanded to the Court of Claims for that court to apply this test to each reimbursable mandate and to address plaintiffs' alternate argument that MCL 388.1752b violates Const 1963, art 4, § 30. *Id*. at 131.

Judge GLEICHER agreed with the Court of Appeals majority that plaintiffs possessed standing but disagreed that MCL 388.1752b was constitutional. She concluded that MCL 388.1752b violates Const 1963, art 8, § 2 because "[t]he public money directly and

indirectly assists nonpublic schools in keeping their doors open and meeting their payroll. It is unconstitutional for that simple reason." *Id*. at 170 (GLEICHER, J., concurring in part and dissenting in part).

Plaintiffs next sought leave to appeal in this Court. We granted leave, directing that the "parties shall include among the issues to be briefed whether MCL 388.1752b violates Const 1963, art 8, § 2." *Council of Organizations & Others for Ed About Parochiaid v Michigan*, 504 Mich 896 (2019).

II. STANDARD OF REVIEW

"Matters of constitutional and statutory interpretation are reviewed de novo." *People v Skinner*, 502 Mich 89, 99; 917 NW2d 292 (2018). "A statute will be presumed to be constitutional by the courts unless the contrary clearly appears; and in case of doubt every possible presumption not clearly inconsistent with the language and the subject matter is to be made in favor of the constitutionality of legislation." *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939). "Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution, that a court will refuse to sustain its validity." *Id*.

Furthermore, " '[w]hen courts are considering the constitutionality of an act, they should take into consideration the things which the act affirmatively permits, and not what action an administrative officer may or may not take.' " *Rassner v Fed Collateral Soc, Inc*, 299 Mich 206, 217-218; 300 NW 45 (1941), quoting *Northern Cedar Co v French*, 131 Wash 394, 412; 230 P 837 (1924). Thus, "[a] valid statute is not rendered

unconstitutional on the basis of improper administration." *Council of Organizations & Others for Ed About Parochiaid v Governor*, 455 Mich 557, 570-571; 566 NW2d 208 (1997). "Similarly, an invalid statute is not redeemed by compensating actions on the part of its administrators." *Id*. at 571.

III. BACKGROUND

After our Constitution was adopted in 1963, Article 8, § 2 provided as follows:

> The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

In *Advisory Opinion re Constitutionality of 1970 PA 100*, 384 Mich 82, 89-90; 180 NW2d 265 (1970), this Court addressed the constitutionality of a statute enacted by the Legislature earlier that year, 1970 PA 100, providing "for the purchase by the Department of Education from eligible units of educational services in secular subjects at a cost of not to exceed 50 per cent of the salaries of lay teachers teaching secular subjects for the fiscal years 1970–71 and 1971–72 and 75 per cent of such salaries thereafter."[1] Relevant to the instant dispute, the law provided for the appropriation of public funds to nonpublic schools to pay a portion of the salaries of teachers who taught secular subjects.

[1] "Eligible unit" was defined, in part, by 1970 PA 100 as "a board of education, association or corporation operating a nonpublic school or system of nonpublic schools," *id*. at 89 n 2, while "secular subjects" was defined, in part, as "those courses of instruction commonly taught in the public schools of this state," *id*. at 90 n 3. 1970 PA 100 prohibited payment for educational services to any teacher who was "a member of a religious order . . . or who wears any distinctive habit, or both."

See *id*. We held that 1970 PA 100 did not violate the Establishment Clause of the First Amendment of the United States Constitution because it satisfied the requirement set forth in *Sch Dist of Abington Twp v Schempp*, 374 US 203, 222; 83 S Ct 1560; 10 L Ed 2d 844 (1963), that " 'to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.' "[2] *Id*. at 95, quoting *Sch Dist of Abington Twp*, 374 US at 222. The Court also held that 1970 PA 100 did not violate Const 1963, art 1, § 4,[3] explaining that " 'incidental benefits' to religious sects or societies do not invalidate an otherwise constitutional statutory program plainly intended and formulated to serve a public purpose." *Advisory Opinion re Constitutionality of 1970 PA 100*, 384 Mich at 104. Rather, "[t]o adopt a strict 'no benefits, primary or incidental' rule would render religious places of worship and schools completely ineligible for all State services." *Id*. "To accept the arguments of the opponents of [1970 PA 100] would sanction open hostility to

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[2] The Establishment Clause provides as follows: "Congress shall make no law respecting an establishment of religion . . . ." US Const, Am I. It is applicable to the states as well as the federal government. See *Everson v Ewing Twp Bd of Ed*, 330 US 1, 8; 67 S Ct 504; 91 L Ed 711 (1947).

[3] Const 1963, art 1, § 4 provides as follows:

> Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.

sectarian institutions. This violates the posture of neutrality incumbent upon the State in its relation to sectarian institutions." *Id*. at 105.

Meanwhile, in response to 1970 PA 100, commonly known as "Parochiaid,"[4] a citizen group named "Council Against Parochiaid" circulated petitions and obtained sufficient signatures to place a proposed "anti-parochiaid" constitutional amendment, Proposal C, on the ballot for the November 1970 election. See *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 406 n 2; 185 NW2d 9 (1971). That amendment was ratified, adding the following language to Const 1963, art 8, § 2:

> Nonpublic schools, prohibited aid.
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> No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

This Court was soon thereafter called upon to interpret Proposal C in *Traverse City*. In that case, this Court considered several issues, two of which are relevant here. First, the Court considered whether Proposal C precluded the provision of "shared time" instruction,

[4] We are cognizant that many view this term as pejorative. We use it here not to express our approbation, but simply because it constituted a commonplace description of 1970 PA 100 and was a term widely employed in the course of the surrounding public discussion and debate.

which it described as " 'an arrangement for pupils enrolled in nonpublic elementary or secondary schools to attend public schools for instruction in certain subjects,' " to nonpublic-school students. *Traverse City*, 384 Mich at 411 n 3, quoting Staff of Senate Committee on Labor and Public Welfare, 88th Cong (1st Sess), *Proposed Federal Promotion of "Shared Time" Education* (Comm Print, 1963), p 1. We observed that "[s]hared time has been an accepted fact of American life for more than forty years. . . . On the basis of historical analysis, therefore, it would require a strong showing that Proposal C really did intend to outlaw shared time in the public schools because that had become a long accepted practice over a number of years." *Traverse City*, 384 Mich at 411 n 3. The Court then held that Proposal C did not preclude the provision of "shared time," at least on public-school property, reasoning as follows:

> Shared time differs from parochiaid in three significant respects. First, under parochiaid the public funds are paid to a private agency whereas under shared time they are paid to a public agency. Second, parochiaid permitted the private school to choose and to control a lay teacher whereas under shared time the public school district chooses and controls the teacher. Thirdly, parochiaid permitted the private school to choose the subjects to be taught, so long as they are secular, whereas shared time means the public school system prescribes the public school subjects. These differences in control are legally significant.
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> It should be needless to observe special circumstances not considered above may create unconstitutional religious entanglements, but shared time in and of itself does not. [*Id*. at 413-414, 417.]

Second, the Court considered whether Proposal C precluded the provision of "auxiliary services"—which it alternatively described as "special educational services designed to remedy physical and mental deficiencies of school children and provide for their physical health and safety" or "general health and safety measures"—to nonpublic-school students. *Id*. at 418-419.[5] We concluded that Proposal C did not preclude the provision of such "auxiliary services," asserting:

> The prohibitions of Proposal C have no impact upon auxiliary services. Since auxiliary services are general health and welfare measures, they have only an incidental relation to the instruction of private school children. They are related to educational instruction only in that by design and purpose they seek to provide for the physical health and safety of school children, or they treat physical and mental deficiencies of school children so that such children can learn like their normal peers. Consequently, the prohibitions of Proposal C which are keyed into prohibiting the passage of public funds into private school hands for purposes of running the private school operation are not applicable to auxiliary services which only incidentally involve the operation of educating private school children.
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> In addition auxiliary services are similar to shared time instruction in that private schools exercise no control over them. They are performed by public employees under the exclusive direction of public authorities and are given to private school children by statutory direction, not by an administrative order from a private school.

* * *

[5] At the time *Traverse City* was decided, such "auxiliary services" included "health and nursing services and examinations" and "teacher counsellor services for physically handicapped children," among other services. *Id*. at 417-418, quoting MCL 340.622, as enacted by 1955 PA 269, repealed by 1976 PA 451.

> We do not read the prohibition against public expenditures to support the employment of persons at nonpublic schools to include policemen, firemen, nurses, counsellors and other persons engaged in governmental, health and general welfare activities. Such an interpretation would place nonpublic schools outside of the sovereign jurisdiction of the State of Michigan.
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> Since the employment stricture is a part of the educational article of the constitution, we construe it to mean employment for educational purposes only. [*Id*. at 419-421.]

Furthermore, we observed that denying nonpublic-school students "shared time" or "auxiliary services," when these were otherwise offered to public-school students, might be viewed as imposing an affirmative burden upon the free exercise of religion as protected by the Free Exercise Clause of the First Amendment of the United States Constitution:[6]

> When a private school student is denied participation in publicly funded shared time courses or auxiliary services offered at the public school because of his status as a nonpublic school student and he attends a private school out of religious conviction, he also has a burden imposed upon his right to freely exercise his religion. The constitutionally protected right of the free exercise of religion is violated when a legal classification has a coercive effect upon the practice of religion without being justified by a compelling state interest. *Engel v Vitale*, 370 US 421; 82 S Ct 1261; 8 L Ed 2d 601 (1962); *Sherbert v Verner*, 374 US 398; 83 S Ct 1790; 10 L Ed 2d 965 (1963) . . . .
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> In passing, it may be noted that the Attorney General in his brief argued that *Sherbert* is inapplicable. He

[6] "The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, . . . provides that 'Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . .' " *Church of the Lukumi Babalu Aye, Inc v Hialeah*, 508 US 520, 531; 113 S Ct 2217; 124 L Ed 2d 472 (1993) (emphasis in *Lukumi*).

> pointed out "Proposal C does not deal with religious schools as such but rather with all private schools whether sectarian or nonsectarian." However, the Supreme Court of the United States in matters of racial discrimination looks to the "impact" of the classification. *Hunter v Erickson*, 393 US 385; 89 S Ct 557; 21 L Ed 2d 616 (1969). This same principle should apply to the First Amendment's protection against religious discrimination and here with ninety-eight percent of the private school students being in church-related schools the "impact" is nearly total. [*Id*. at 433-434 (citation omitted).]

Finally, the Court summarized the following pertinent conclusions:

> 1. Proposal C above all else prohibits state funding of purchased educational services in the nonpublic school where the hiring and control is in the hands of the nonpublic school, otherwise known as "parochiaid."
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> 2. Proposal C has no prohibitory impact upon shared time instruction wherever offered provided that the ultimate and immediate control of the subject matter, the personnel and the premises are under the public school system authorities and the courses are open to all eligible to attend the public school, or absent such public school standards, when the shared time instruction is merely "incidental" or "casual" or non-instructional in character, subject, of course, to the issue of religious entanglement.
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> 3. Proposal C does not prohibit auxiliary services and drivers training, which are general health and safety services, wherever these services are offered except in those unlikely circumstances of religious entanglement. [*Id*. at 435 (citations omitted).]

Four years later, in *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41; 228 NW2d 772 (1975), this Court considered the constitutionality of 1974 PA 242, a statute that required school districts to "purchase and loan or provide textbooks and supplies to all children of school age residing in such dis-

trict . . . .” We concluded that the statute violated Proposal C to the extent that it required the provision of textbooks and supplies to nonpublic-school students, asserting:[7]

> In my opinion the Court reached correct conclusions in the *Traverse City School District* case because the services examined therein were properly classified as “incidental” to a private school’s establishment and existence. . . . Such programs as shared time and auxiliary services, to be sure, do help a private school compete in today’s harsh economic climate; but, they are not “primary” elements necessary for the school’s survival as an educational institution. These incidental services are useful only to an otherwise viable school and are not the type of services that flout the intent of the electorate expressed through Proposal C.
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> A very different situation is presented, I find, in the case of the textbooks and supplies that would be made available to private schools under [1974 PA 242]. When we speak of textbooks and supplies we are no longer describing commodities “incidental” to a school’s maintenance and support. Textbooks and supplies are essential aids that constitute a “primary” feature of the educational process and a ‘primary’ element required for any school to exist. [*Id*. at 48-49.]

It is against this backdrop that the Legislature in 2016 enacted the law in present controversy, MCL 388.1752b.[8] MCL 388.1752b provides, in relevant part:

> (1) From the general fund money appropriated under [MCL 388.1611], there is allocated an amount not to

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[7] *In re Advisory Opinion* was authored by Justice SWAINSON. Although it is styled as a partial concurrence and dissent and authored in the first person, it was signed by a majority of the justices and therefore is tantamount to a majority opinion.

[8] As noted previously, MCL 388.1752b was amended in 2017, see 2017 PA 108, and in 2018, see 2018 PA 265. In addition, the Legislature passed an amendment of MCL 388.1752b in 2020, see 2020 PA 165, but that amendment was the subject of a line-item veto by the Governor.

exceed $2,500,000.00 for 2017-2018 and an amount not to exceed $250,000.00 for 2018-2019 to reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state.

(2) By January 1 of each applicable fiscal year, the department shall publish a form for reporting actual costs incurred by a nonpublic school in complying with a health, safety, or welfare requirement mandated under state law containing each health, safety, or welfare requirement mandated by a law or administrative rule of this state applicable to a nonpublic school and with a reference to each relevant provision of law or administrative rule for the requirement. . . .

(3) By June 30 of each applicable fiscal year, a nonpublic school seeking reimbursement for actual costs incurred in complying with a health, safety, or welfare requirement under a law or administrative rule of this state during each applicable school year shall submit a completed form described in subsection (2) to the department. . . .

(4) By August 15 of each applicable fiscal year, the department shall distribute funds to each nonpublic school that submits a completed form described under subsection (2) in a timely manner. . . .

* * *

(7) The funds appropriated under this section are for purposes related to education, are considered to be incidental to the operation of a nonpublic school, are noninstructional in character, and are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools and to reimburse nonpublic schools for costs described in this section.

(8) Funds allocated under this section are not intended to aid or maintain any nonpublic school, support the

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Although we now address the constitutionality of the present version of MCL 388.1752b, our analysis applies with equal force to the previous versions of the statute.

attendance of any student at a nonpublic school, employ any person at a nonpublic school, support the attendance of any student at any location where instruction is offered to a nonpublic school student, or support the employment of any person at any location where instruction is offered to a nonpublic school student.

* * *

(10) For the purposes of this section, the actual cost incurred by a nonpublic school for taking daily student attendance shall be considered an actual cost in complying with a health, safety, or welfare requirement under a law or administrative rule of this state. Training fees, inspection fees, and criminal background check fees are considered actual costs in complying with a health, safety, or welfare requirement under a law or administrative rule of this state.[9]

IV. ANALYSIS

The central issue here concerns the proper interpretation of Const 1963, art 8, § 2, as amended by Proposal C.[10] "The primary objective in interpreting a constitu-

[9] MCL 388.1752b thus specifies only "taking daily student attendance," as well as "[t]raining fees, inspection fees, and criminal background check fees," as reimbursable state health, safety, and welfare mandates. MCL 388.1752b(10). All other reimbursable mandates are to be identified by the Department of Education under MCL 388.1752b(2). In accordance with MCL 388.1752b(2), the Department of Education's "Section 152b Reimbursement Form" has identified about 35 to 40 reimbursable mandates since the statute was enacted, such as MCL 324.8316 (requiring notice to parents of pesticide application by the school), MCL 333.17609 (licensure of school speech pathologists), and MCL 408.681 *et seq*. (the Playground Equipment Safety Act). Michigan Department of Education, *Section 152b Reimbursement Form* <https://www.michigan.gov/documents/mde/Copy_of_2019_Section_152b_Reimbursement_Form_655754_7.xlsx> (accessed December 9, 2020) [Google generated HTML view preserved at https://perma.cc/F9CW-MP77].

[10] The issue of standing was litigated in the lower court. The Court of Appeals held that plaintiffs possess standing under MCL 600.2041(3),

tional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004). Proposal C relevantly provides that "[n]o public monies or property shall be appropriated or paid . . . directly or indirectly to aid or maintain any private, denominational or other nonpublic, preelementary, elementary, or secondary school." It further provides that "[n]o . . . public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school . . . ."

Read literally, the state would be prohibited from providing any public benefits to nonpublic schools because doing so would at least presumably "indirectly" aid the nonpublic school.[11] Providing police and fire services to a nonpublic school, for instance, "indirectly" aids that school because the school does not need to provide for its own police or fire protection and, as a result, has available additional funds for other educational purposes. And when that nonpublic school

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which provides, in pertinent part, that "an action to prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating thereto may be brought in the name of a domestic nonprofit corporation organized for civic, protective, or improvement purposes," and MCR 2.201(B)(4)(a), which similarly provides that "[a]n action to prevent illegal expenditure of state funds or to test the constitutionality of a statute relating to such an expenditure may be brought . . . in the name of a domestic nonprofit corporation organized for civic, protective, or improvement purposes[.]" Because our grant order did not direct the parties to address whether plaintiffs possess standing, we decline to address that issue today.

[11] Judicial interpretive processes grounded in "originalist," "textualist," or "interpretivist" premises are often caricatured as requiring "literal" readings of the law. More properly understood, such approaches to reading the law commonly require that the most "reasonable" meaning of the law be identified by discerning the intentions of the lawmakers using the ordinary meaning of the language they employed.

is religious in character and attended by students for that reason, denying the services of the police and fire departments to the nonpublic school—indeed, denying such services *alone* to such institutions—would seemingly raise concerns under the Free Exercise Clause. The only educational institutions that would be deprived of these and other fundamental public services —provided *exclusively* and *monopolistically* by the government—would be nonpublic schools. See *Sherbert*, 374 US at 410 ("[N]o State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.' "), quoting *Everson v Ewing Twp Bd of Ed*, 330 US 1, 16; 67 S Ct 504; 91 L Ed 711 (1947).[12] See also *Wisconsin v Yoder*, 406 US 205, 214; 92 S Ct 1526;

[12] We acknowledge the arguments of such amici as Immaculate Heart of Mary that Proposal C violates the Free Exercise Clause notwithstanding its interpretation by *Traverse City* and that MCL 388.1752b should be sustained as constitutional for that reason alone. Because no party has advanced that argument, see *Council of Organizations & Others for Ed About Parochiaid v Michigan*, 321 Mich App 456; 909 NW2d 449 (2017) (holding that entities such as Immaculate Heart of Mary did not possess a right to intervene as parties in this case), we decline to address it today. We note, however, that Free Exercise caselaw from the United States Supreme Court has developed significantly since Proposal C was enacted in 1970 (notably, *Traverse City* was decided shortly thereafter) and that these developments may conceivably warrant consideration in a future case addressing the constitutionality of that amendment. See, e.g., *Trinity Lutheran Church of Columbia, Inc v Comer*, 582 US___; 137 S Ct 2012; 198 L Ed 2d 551 (2017); *Espinoza v Montana Dep't of Revenue*, 591 US ___; 140 S Ct 2246; 207 L Ed 2d 679 (2020). See also *Roman Catholic Diocese of Brooklyn v Cuomo*, 592 US ___, ___; ___ S Ct ___; ___ L Ed 2d ___ (2020) (Docket No. 20A87) (Kavanaugh, J., concurring); slip op at 2 ("[I]t does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions.").

32 L Ed 2d 15 (1972) ("[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, 'prepare (them) for additional obligations.' "), quoting *Pierce v Society of Sisters*, 268 US 510, 535; 45 S Ct 571; 69 L Ed 1070 (1925). Thus, as *Traverse City* correctly recognized, a literal interpretation of Proposal C would raise significant questions about whether the provision violates the Free Exercise Clause given its effect on religion. See *Traverse City*, 384 Mich at 430, 433-434.[13]

[13] In this regard, although Proposal C is facially neutral with respect to religion, the United States Supreme Court has indicated that "the effect of a law in its real operation" and its "adverse impact" on religion are relevant considerations in assessing its constitutionality. *Lukumi*, 508 US at 535. About 98% of nonpublic schools in Michigan were religious when Proposal C was enacted, *Traverse City*, 384 Mich at 434, and according to the amicus brief of the Michigan Catholic Conference, about 90% of nonpublic schools in Michigan are religious today. There are also questions regarding the significance of any antireligious sentiments motivating the adoption of Proposal C. Compare *Lukumi*, 508 US at 540-541 (noting that the historical background of the challenged enactment, including "contemporaneous statements made by members of the decisionmaking body," were relevant), with *id*. at 558 (Scalia, J., concurring in part and concurring in the judgment) (declining to use these materials because "[t]he First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted"); see also *Reitman v Mulkey*, 387 US 369, 373; 87 S Ct 1627; 18 L Ed 2d 830 (1967) (assessing whether a state constitutional provision violated the federal Constitution on the basis of "its 'immediate objective' [and] its 'ultimate effect' ") (punctuation omitted). For example, Proposal C was drafted by an entity named "Council Against Parochiaid," and the term "Parochiaid" undoubtedly referred to public funding for religious schools. See *Webster's New World Dictionary of the American Language* (1974) (defining "parochial" as "of or in a parish or parishes" and "parochial school" as "a school supported and controlled

Ultimately, we do not believe that this literal interpretation would give reasonable understanding to the intentions of the ratifiers of the constitutional amendment, and in this view we are in accord with *Traverse City*.

Traverse City did not interpret Proposal C in such a literal manner in which even the most fundamental services of the state—the most universally recognized of its "police powers" in providing for the "health, safety, and welfare" of the public—would be denied *only* to nonpublic schools, their students, and the parents of those students. Rather, recognizing that Proposal C was ratified in immediate response to concerns of "Parochiaid"—a statute that provided public funds to nonpublic schools specifically to facilitate the teaching of secular subjects—and recognizing that a "literal" interpretation of Proposal C would give rise to serious concerns under the Free Exercise Clause as interpreted by such United States Supreme Court decisions as *Sherbert*, *Traverse City* stated that "read in the light of the circumstances leading up to and surrounding its adoption, and the common understanding of the words used, [Proposal C] prohibits the purchase, with public funds, of educational services from a nonpublic school." *Traverse City*, 384 Mich at 406-407.

The parties agree that the principles set forth in *Traverse City* interpreting Proposal C are critical in this case, and no party asks us to overrule this deci-

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by a church"). Such facts might suggest that Proposal C was intended to target religious schools. Ultimately, in light of the parties' failure to raise the First Amendment arguments and also *Traverse City*'s saving interpretation, we need not determine now whether these considerations regarding antireligious sentiments render Proposal C indistinguishable from the state constitutional provisions at issue in *Trinity Lutheran* and *Espinoza*.

sion. The importance of *Traverse City* is amplified because it was issued contemporaneously with the ratification of Proposal C; *Traverse City* is thus entitled to particular deference for that reason alone. See *McPherson v Blacker*, 92 Mich 377, 383; 52 NW 469 (1892) (" '[W]here a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that [a] strong presumption exists that the construction rightly interprets the intention.' "), quoting Cooley, Constitutional Limitations (5th ed), p 67. We therefore turn to an examination of its fundamental principles.

Traverse City, while upholding the provision of both shared-time and auxiliary services, nonetheless engaged in distinct analyses for each. Concerning shared time, *Traverse City* reasoned that it was constitutional to provide shared-time services to nonpublic-school students because the "control" of the funds, teachers, and subjects remained within the public-school system. *Traverse City*, 384 Mich at 413-414. The Court concluded that "Proposal C has no prohibitory impact upon shared time instruction wherever offered provided that the ultimate and immediate control of the subject matter, the personnel and the premises are under the public school system authorities . . . ." *Id.* at 435.

However, the *Traverse City* analysis regarding the provision of auxiliary services was considerably different. Rather than emphasizing the "control" aspect, *Traverse City* instead reasoned that providing auxiliary services to nonpublic-school students was constitutional because such services are "general health and welfare measures, [and] they have only an incidental relation to

the instruction of private school children." *Id*. at 419. The Court concluded that "Proposal C does not prohibit auxiliary services and drivers training, which are general health and safety services, wherever these services are offered except in those unlikely circumstances of religious entanglement." *Id*. at 435. Noticeably absent from its conclusion was any reference to "control." See *id*.

The reason for this analytical distinction is clear. Once again, as *Traverse City* explained, Proposal C, "read in the light of the circumstances leading up to and surrounding its adoption, and the common understanding of the words used, prohibits the purchase, with public funds, of educational services from a nonpublic school." *Id*. at 406-407. See also *id*. at 435 ("Proposal C above all else prohibits state funding of purchased educational services in the nonpublic school where the hiring and control is in the hands of the nonpublic school, otherwise known as 'parochiaid.' "). Consistently with this understanding that Proposal C only prohibits appropriations for nonpublic-school educational services, *In re Advisory Opinion* subsequently explained that "services" that are " 'incidental' to a private school's establishment and existence" are constitutional, whereas "aids that constitute a 'primary' feature of the educational process and a 'primary' element required for any school to exist" are unconstitutional. *In re Advisory Opinion*, 394 Mich at 48-49. Shared-time services are inherently educational in nature; auxiliary services are not. Appropriating public funds to educate nonpublic-school students implicates the core of Proposal C. It is for this reason, in our judgment, that *Traverse City* was careful to explain that shared-time services were constitutional only because, in all material respects, the "control" remained within the public-school system. But auxiliary ser-

vices, as "general health and welfare measures," *Traverse City*, 384 Mich at 419, are not educational in nature. "They are related to educational instruction only in that by design and purpose they seek to provide for the physical health and safety of school children, or they treat physical and mental deficiencies of school children so that such children can learn like their normal peers." *Id*. Consequently, because Proposal C was only understood to prohibit appropriations for nonpublic-school educational services, such health and welfare measures as auxiliary services simply fell outside the scope of Proposal C.[14]

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[14] The opinion for reversal reads *Traverse City* as having adopted in its construction of Proposal C a "literal" standard of interpretation pertaining to provisions that would *not* conflict with the federal Constitution and a varying "alternative" standard of interpretation pertaining to provisions that *would* conflict with the federal Constitution: "[*Traverse City*] recognized that a modification of the operation of Const 1963, art 8, § 2 is necessary *where there is a conflict with the federal Constitution*. But because there was no conflict with the federal Constitution in applying Const 1963, art 8, § 2 to 1970 PA 100, we applied Const 1963, art 8, § 2 without the alternative construction." We respectfully disagree that *Traverse City* adopted such an irregular approach to giving meaning to Proposal C. Rather, our decision in that case adopted a consistent standard of interpretation, one that "prohibit[ed] the purchase, with public funds, of educational services from a nonpublic school," *Traverse City*, 384 Mich at 407, and then applied that same standard throughout the case to other issues. Indeed, adopting variable standards of interpretation of a constitutional provision depending on the substantive issues involved would be contrary to traditional principles of constitutional interpretation: "A cardinal rule in dealing with written instruments is that they are to receive an unvarying [and consistent standard of] interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable." Cooley, Constitutional Limitations (8th ed), pp 123-124. Thus, we respectfully disagree with the opinion for reversal that *Traverse City* engaged in an exercise of variable interpretation *and* that as a result this Court should now engage in a similar exercise in the instant case. That is, we believe that this opinion, as with *Traverse City*, accords a consistent and reasonable (not a "literal") meaning to Proposal C.

With this in mind, we turn to MCL 388.1752b. This statute appropriates public funds to nonpublic schools "to reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state." MCL 388.1752b(1). It seems self-evident that any "health, safety, or welfare" mandate, including any of those specifically listed in MCL 388.1752b(10), exists to provide for the health, safety, or welfare of such individuals *as* nonpublic-school students, and we struggle to conceive of *any* "health, safety, or welfare" mandate concerning nonpublic schools that is *not* genuinely and in good faith incidental to the instruction of nonpublic-school children. Or as the Court of Appeals majority explained, "[a] state-law mandate on an issue concerning the *health, safety, or welfare* of a student almost by definition is 'incidental' to teaching and providing educational services to a student." *Council of Organizations & Others for Ed About Parochiaid*, 326 Mich App at 152. Reimbursements for compliance with such governmental mandates are permissible under *Traverse City*, which stated that public funds may constitutionally be appropriated to "provide for [nonpublic-school students'] physical health and safety," so long as such appropriations "only incidentally involve the operation of educating private school children" and do not create an "excessive entanglement between church and state." *Traverse City*, 384 Mich at 418-420.[15] There is no language in MCL 388.1752b(1) to suggest that public funds are to be appropriated for nonpublic-school *educational* services; rather, MCL 388.1752b(1) provides

[15] See also *Walz v Tax Comm of New York City*, 397 US 664, 674; 90 S Ct 1409; 25 L Ed 2d 697 (1970) ("We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree.").

that public funds are to be appropriated only for "police power" public services to which all educational institutions and all students are generally entitled. See *Bankers' Trust Co of Detroit v Russell*, 263 Mich 677, 684; 249 NW 27 (1933) ("[T]he police power . . . is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people . . . ."). Nor is there language in the remaining subsections of MCL 388.1752b to suggest that public funds are appropriated for nonpublic-school *educational* services.[16] Rather, MCL 388.1752b(2), (3), (4), (7), (9), (10), (11), and (12) explicitly refer to reimbursements for complying with a state "health, safety, or welfare" mandate, thus removing all doubt as to the nature of the appropriated funds.[17] Because it does not violate Proposal C to appropriate public funds to "provide for [nonpublic-school students'] physical health and safety," *Traverse City*, 384 Mich at 419, and because MCL 388.1752b appropriates

[16] We acknowledge that MCL 388.1752b(7) provides that the appropriated funds "are for purposes related to education . . . ." In our judgment, however, this language does not contemplate that the appropriated funds are for nonpublic-school educational services—given that the funds are clearly not being expended for that purpose—but only that such funds are being provided in the obvious context of the nonpublic-school process, i.e., that the funds are "connected with" or "related to" the nonpublic-school educational process, as opposed, for example, to being "connected with" or "related to" 1,001 other types of private and public institutions or processes. See also note 20 of this opinion.

[17] Indeed, because nonpublic schools are merely being *reimbursed* for compliance with state-imposed mandates, such reimbursements, as balanced against the mandates themselves, do not render the schools in a better position than they would have been in the absence of both the reimbursements and the mandates. That is, the reimbursements, at least arguably, do not "aid" the nonpublic schools for the purposes of Proposal C because they merely mitigate the effect of burdens imposed in the first place by the state for the health, safety, and welfare of nonpublic-school students.

funds only to provide for nonpublic-school students' "health, safety, and welfare," MCL 388.1752b is clearly constitutional.[18]

Moreover, the two "purpose clauses" of MCL 388.1752b, Subsections (7) and (8), reinforce the constitutionality of the statute.[19] Subsection (7) provides that the appropriated funds "are for purposes related to education, are considered to be incidental to the operation of a nonpublic school, are noninstructional in character, and are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools . . . ." This subsection is consistent with *Traverse City*, which allowed for the appropriation of public funds for auxiliary services that bear "only an incidental relation to the instruction of private school children" and "by design and purpose . . . seek to provide for the physical health and safety of school children . . . ." *Traverse City*, 384 Mich at 419.[20] Subsection (8) provides that the appropriated

[18] The Court of Claims on remand must ascertain whether any of the reimbursable mandates identified by the Department of Education would improperly provide funds to nonpublic schools for educational services. However, even if some of the mandates do improperly provide funds to nonpublic schools for educational services, this would not alter our conclusion that MCL 388.1752b is itself constitutional. See *Council of Organizations & Others for Ed About Parochiaid*, 455 Mich at 570-571 ("A valid statute is not rendered unconstitutional on the basis of improper administration.").

[19] When considering the constitutionality of a statute, courts can consider "both statements of fact and declarations of policy which indicate that the legislature considered the proposed legislation and, cognizant of the issue, determined that the statute was reasonable." 1A Singer & Singer, Sutherland Statutes and Statutory Construction (7th ed, November 2020 update), § 20:4.

[20] Subsection (7) states that the appropriated funds "are for purposes related to education," and *Traverse City* explained that Proposal C prohibits the appropriation of funds for the "educational instruction" of nonpublic-school students. See *Traverse City*, 384 Mich at 419. We find

funds "are not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, employ any person at a nonpublic school, support the attendance of any student at any location where instruction is offered to a nonpublic school student, or support the employment of any person at any location where instruction is offered to a nonpublic school student." This language tracks the prohibitions set forth in Proposal C itself and clearly demonstrates the intention of the Legislature to avoid a conflict with Proposal C.[21]

We recognize that *Traverse City* concerned the provision of health, safety, and welfare "services," whereas the instant case concerns the provision of public funds directly to nonpublic schools for compliance with state health, safety, and welfare mandates. However, we discern no principled difference in this regard because the auxiliary services permitted by *Traverse City* are

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this statutory language to be irrelevant for purposes of our analysis, however. *Traverse City* recognized that "auxiliary services" that concern health, safety and welfare "incidentally involve the operation of educating private school children." *Id*. at 419-420. So too here. State health, safety, and welfare mandates applicable to nonpublic schools incidentally involve the operation of educating nonpublic-school students and may fairly be characterized as "related to education" without running afoul of Proposal C.

[21] Of course, it is invariably "presumed that the Legislature intended to enact a constitutional law, and not an unconstitutional law; and it should be construed in accordance with this intent." *Clarence Twp v Dickenson*, 151 Mich 270, 272; 115 NW 57 (1908) (citation omitted). That presumption is particularly warranted here because MCL 388.1752b expressly evidences the Legislature's intention to enact a constitutional law. See *Redevelopment Comm of Greensboro v Security Nat'l Bank of Greensboro*, 252 NC 595, 611; 114 SE2d 688 (1960) ("Although the legislative findings and declaration of policy have no magical quality to make valid that which is invalid, and are subject to judicial review, they are [nonetheless] entitled to weight in construing the statute and in determining whether the statute promotes a public purpose or use under the Constitution.").

substantively indistinguishable from the reimbursements permitted by MCL 388.1752b. In both cases, public funds are appropriated to provide for the health, safety, and welfare of nonpublic-school students. And there is significant logical overlap between permissible auxiliary services and the specific reimbursements presumptively authorized by MCL 388.1752b. For instance, one auxiliary service permitted in *Traverse City* was "speech correction services." See *Traverse City*, 384 Mich at 418, quoting MCL 340.622, as enacted by 1955 PA 269, repealed by 1976 PA 451. And the Department of Education under MCL 388.1752b allows reimbursement for licensure of a school speech pathologist. See MCL 333.17609. If the state is constitutionally permitted to provide speech-correction services directly to nonpublic-school students without running afoul of Proposal C, it seems also, in our judgment, that the state should be able to facilitate those same services indirectly in the manner set forth by MCL 388.1752b.

Plaintiffs argue that MCL 388.1752b breaches the Constitution in three principal respects, none of which we find persuasive. First, plaintiffs argue that MCL 388.1752b breaches the Constitution because it "specifically provides for direct payments to nonpublic schools to assist them in complying with state mandates." However, to the extent that plaintiffs contend that *Traverse City* creates a bright-line rule against any direct payments to nonpublic schools whatsoever, we respectfully disagree. Such a rule is not found within *Traverse City* itself, nor can such a rule be reasonably or logically implied when that decision is viewed as a whole. As we have explained, *Traverse City* concerns the appropriation of public funds for nonpublic schools to provide *educational services*. To the extent that plaintiffs argue that any public aid in complying with state mandates is unconstitutional because com-

pliance with "mandates" is a necessary element of a nonpublic school's existence, see *In re Advisory Opinion*, 394 Mich at 49 (explaining that aiding " 'primary' elements necessary for the [nonpublic] school's survival as an educational institution" is unconstitutional under Proposal C), we also respectfully disagree and believe that this would require overruling *Traverse City*. The shared-time services upheld in *Traverse City* certainly aided the nonpublic schools in complying with their statutory mandate to teach secular subjects such as mathematics—when a nonpublic-school student receives advanced mathematics instruction at a public school under such a program, the nonpublic school is, at the very least, assisted in teaching mathematics to that student.[22] See MCL 388.551 of the private, denominational, and parochial schools act, MCL 388.551 *et seq*. ("It is the intent of this act that the sanitary conditions of the schools subject to this act, the courses of study in those schools, and the qualifications of the teachers in those schools shall be of the same standard as provided by the general school laws of this state.").[23] Thus, if we accepted plaintiffs' argument that public funds cannot be appropriated to aid nonpublic schools in complying with state mandates,

[22] In *Snyder v Charlotte Pub Sch Dist*, 421 Mich 517, 540; 365 NW2d 151 (1984), this Court explained that "the types of courses that have traditionally been offered on a shared time basis" include "band, art, domestic science, shop, [and] advanced math and science classes" because such courses "need not be taught in nonpublic schools." Presumably, when a nonpublic-school student receives advanced mathematics instruction at a public school, he or she need not also receive mathematics instruction at his or her nonpublic school. And as a result, "shared time . . . [also] incidentally defray[s] the cost of educational expenses incurred by parents and enables nonpublic schools to continue or upgrade their present curriculum . . . ." *Id*. at 544 n 15.

[23] The statute used substantially the same language at the time we decided *Traverse City*. 1970 CL 388.551.

we would be compelled to overrule *Traverse City* concerning its maintenance of shared-time programs, which even plaintiffs themselves have not sought from this Court.

Second, plaintiffs argue that MCL 388.1752b breaches the Constitution because it "support[s] the employment of persons at nonpublic schools," contrary to Proposal C, which prohibits state funds "to support . . . the employment of any person at any such nonpublic school." This argument, however, has already been foreclosed by *Traverse City*, in which the Court stated that "[s]ince the employment stricture is a part of the educational article of the constitution, we construe it to mean employment for educational purposes only." *Traverse City*, 384 Mich at 421. That is, because Article 8 of our Constitution is exclusively limited to educational matters, Proposal C, when read in context, prohibits the use of public funds for employment as to educational matters. To the extent that MCL 388.1752b indirectly reimburses nonpublic-school employees for complying with state health, safety, and welfare mandates, those funds are necessarily not being used for employment regarding educational matters.

Third, plaintiffs argue that MCL 388.1752b breaches the Constitution because "it provides funds directly to nonpublic schools, thus removing the 'control' that the Court found to be so important in [*Traverse City*]." As we have explained, however, *Traverse City* emphasized the "control" aspect only with regard to shared-time services, which genuinely are educational in nature. Concerning auxiliary services, the Court emphasized that such services "are general health and welfare measures, [and] they have only an incidental relation to the instruction of private school children." *Traverse City*, 384 Mich at 419. We therefore disagree with plaintiffs

that the extent to which the public funds appropriated by MCL 388.1752b are placed within the "control" of nonpublic schools is pertinent for purposes of our analysis.

V. CONCLUSION

We conclude that MCL 388.1752b does not violate Const 1963, art 8, § 2, as amended by Proposal C, because it does not appropriate funds for nonpublic-school educational services. Rather, MCL 388.1752b only exercises the "police powers" of the state on behalf of the "health, safety, and welfare" of nonpublic-school students, which is not proscribed by our Constitution. Therefore, we would affirm the judgment of the Court of Appeals that MCL 388.1752b is constitutional and remand this case to the Court of Claims for further proceedings consistent with our opinion. On remand, the Court of Claims should address whether the Department of Education has improperly administered the statute by purporting to reimburse nonpublic schools for educational services, contrary to Proposal C.

ZAHRA and VIVIANO, JJ., concurred with MARKMAN, J.

CAVANAGH, J. (*for reversal*). This appeal requires us to determine whether MCL 388.1752b, which allocates public funds to nonpublic schools, violates Const 1963, art 8, § 2. To do so, we are also required to determine whether operation of Const 1963, art 8, § 2 in this context would conflict with the federal Constitution. Because MCL 388.1752b clearly violates Const 1963, art 8, § 2, and because operation of Const 1963, art 8, § 2 to prohibit funding of nonpublic schools through MCL 388.1752b does not raise federal constitutional

concerns, we would reverse the Court of Appeals, declare MCL 388.1752b unconstitutional, and prohibit funding under the statute.

I. FACTS AND PROCEDURAL HISTORY

In 2016, MCL 388.1752b was enacted pursuant to 2016 PA 249. The statute allocated general funds to nonpublic schools through direct payments. For the 2016–2017 school year, the statute allocated up to $2.5 million. The statute was later amended, allocating additional funds for the school years 2017–2018 and 2018–2019. See 2017 PA 108; 2018 PA 265. In July 2016, this Court was asked to opine on whether MCL 388.1752b violates Const 1963, art 8, § 2, but we declined to do so. *In re Request for Advisory Opinion Regarding Constitutionality of 2016 PA 249*, 500 Mich 875 (2016).

In this case, plaintiffs filed their complaint in the Court of Claims in 2017, challenging the constitutionality of MCL 388.1752b under Const 1963, art 8, § 2 and Const 1963, art 4, § 30. The Court of Claims granted summary disposition to plaintiffs under MCR 2.116(C)(10), finding MCL 388.1752b to be in violation of Const 1963, art 8, § 2. The Court of Claims enjoined defendants from distributing funds under the statute and held that it was unnecessary to reach plaintiffs' arguments regarding Const 1963, art 4, § 30.

Defendants appealed as of right, and the Court of Appeals reversed the Court of Claims in a split decision. *Council of Organizations & Others for Ed About Parochiaid v Michigan*, 326 Mich App 124; 931 NW2d 65 (2018). The Court of Appeals majority employed a three-part test and remanded the case to the Court of Claims to apply the test against individual reimbursable costs and to address plaintiffs' argument regard-

ing Const 1963, art 4, § 30. *Id*. at 147, 157. Plaintiffs sought leave to appeal here, and we granted leave, directing the parties to address whether MCL 388.1752b violates Const 1963, art 8, § 2. *Council of Organizations & Others for Ed About Parochiaid v Michigan*, 504 Mich 896 (2019).

II. STANDARD OF REVIEW

This Court reviews de novo both questions of statutory interpretation and constitutional law. *People v Vanderpool*, 505 Mich 391, 397; 952 NW2d 414 (2020).

III. ANALYSIS

When construing the Michigan Constitution, this Court employs the rule of "common understanding":

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed. [*Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971), quoting Cooley, Constitutional Limitations (6th ed), p 81, and *May v Topping*, 65 W Va 656, 660; 64 SE 848 (1909) (quotation marks and emphasis omitted).]

The object of constitutional interpretation is to "ascertain and give effect to the intent of the people in adopting it." *Kearney v Bd of State Auditors*, 189 Mich 666, 671; 155 NW 510 (1915). In this endeavor, we may

consider both "the circumstances surrounding the adoption of a constitutional provision" as well as "the purpose sought to be accomplished." *Traverse City*, 384 Mich at 405.

A. LEGAL BACKGROUND

In 1970, the Legislature allocated funds to pay a portion of the salaries of lay teachers instructing secular subjects at nonpublic schools. 1970 PA 100. In *Advisory Opinion re Constitutionality of 1970 PA 100*, 384 Mich 82; 180 NW2d 265 (1970), this Court was asked to address whether this allocation of funds violated the Establishment Clause of the First Amendment of the United States Constitution or the analogous provision in Michigan's Constitution, Const 1963, art 1, § 4. We held that 1970 PA 100 violated neither.

In reaching this conclusion, we analogized Const 1963, art 1, § 4 to the First Amendment of the United States Constitution. The First Amendment, we noted, contains two parts: the Establishment Clause, "Congress shall make no law respecting an establishment of religion," and the Free Exercise Clause, "or prohibiting the free exercise thereof[.]" In the Michigan Constitution, Const 1963, art 1, § 4 provides:

> Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.

We read this as "an expanded and more explicit statement" of the federal analogue, with "the first and fourth sentences constituting the Free Exercise Clause, and the second and third sentences constituting the Establishment Clause." *Advisory Opinion*, 384 Mich at 105. Accordingly, we held that they are subject to similar interpretation. *Id*. Given this legal foundation, we observed that "[t]o adopt a strict 'no benefits, primary or incidental' rule would render religious places of worship and schools completely ineligible for all State services" and concluded that such a rule would violate "the posture of neutrality incumbent upon the State in its relation to sectarian institutions." *Id*. at 104. We added that "no part or portion of this opinion may be taken or construed" as resolving "any possible question" regarding a future constitutional amendment. *Id*. at 105.

1970 PA 100 proved controversial, and its opponents organized an initiative to amend Michigan's Constitution to prohibit public funding of nonpublic schools. The issue went on the ballot as Proposal C, and voters approved an amendment in November 1970, adding the following language to Const 1963, art 8, § 2:

> No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

Soon after the passage of this amendment, in *Traverse City*, this Court was asked to decide whether 1970 PA 100 conflicted with Const 1963, art 8, § 2. *Traverse City*, 384 Mich at 403. The procedural posture of that case is worth noting.

Prior to the voters weighing in on Proposal C, the Attorney General was asked to offer an advisory opinion "concerning [the] proper interpretation" of the proposed amendment. 1 OAG, 1970, No. 4,715, p 183, at 183 (November 3, 1970). The Attorney General first addressed the effect of Proposal C on 1970 PA 100, opining that "[i]t is clear that the language of the first sentence of the proposed amendment would prohibit such expenditures of public funds and the effect of adoption of this amendment would be to make this section of [1970 PA 100] unconstitutional." *Id*. at 185. The Attorney General went on to opine that transportation allocations would be constitutional, given the amendment's specific exception for the provision of transportation. Regarding shared-time programs,[1] the Attorney General noted that the amendment barred payment to support the attendance of any student or employment of any person "at 'any location or institution where instruction is offered in whole or *in part* to nonpublic school students' " and therefore shared-time programs would be prohibited. *Id*. at 186. Regarding auxiliary services[2] being offered to nonpublic-school students, the Attor-

[1] A shared-time program, as we discussed in *Traverse City*, is a program in which a public school makes some part of its curriculum available to students outside its school. *Traverse City*, 384 Mich at 411 n 3.

[2] Auxiliary services, as discussed in *Traverse City*, were "limited to those services enumerated in the Auxiliary Services Act." *Traverse City*, 384 Mich at 420. In "practical application," examples of auxiliary services received by nonpublic-school students included hearing tests, vision tests, physical examinations, availability of crossing guards, remedial reading services, and speech correction. *Id*. at 418 & n 4.

ney General opined that the amendment would bar these, too, given that "the language of the proposed amendment is phrased in broad terms which provide for the furnishing of transportation to and from any school as its only specific exception." *Id*. at 185.

The Traverse City School District brought a declaratory-judgment suit to test the validity of the Attorney General's opinion. *Traverse City*, 384 Mich at 403. This Court ordered the circuit court to certify seven questions. *Id*. at 403-404. With regard to 1970 PA 100, our discussion was brief. We observed that as amended, Const 1963, art 8, § 2 prohibited the use of public funds " 'directly or indirectly to aid or maintain' a nonpublic school." *Id*. at 406, quoting Const 1963, art 8, § 2. Given the common understanding of those words, the funding of teachers' salaries at nonpublic schools was unconstitutional. *Id*. at 406-407. In that regard, we agreed with the Attorney General and held that no future payments could be made pursuant to 1970 PA 100.

Regarding shared-time and auxiliary-services programs, we differed with the Attorney General. We reasoned that the Attorney General's application of Const 1963, art 8, § 2 would have violated the Free Exercise Clause of the First Amendment of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Id*. at 429-435. We reasoned that excluding nonpublic-school students from services otherwise available to the public required justification under strict scrutiny. *Id*. at 431. We emphasized that "[t]his does not mean that a public school district must offer shared time instruction or auxiliary services; it means that if it does offer them to public school children at the public school, nonpublic school students also have a right to receive them at the public school." *Id*. at 433.

Further, we noted that "[n]onpublic school students are not unconstitutionally discriminated against if shared time instruction is available at public schools but not at nonpublic schools so long as they have access to shared time instruction at the public school." *Id*. at 434.

To reconcile Const 1963, art 8, § 2 with these federal constitutional concerns, we struck the language " 'or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.' " *Id*. at 415. We applied an "alternative constitutional construction" of Const 1963, art 8, § 2 to shared-time and auxiliary services and held that those were permissible. *Id*. at 412, 436.

We next considered Const 1963, art 8, § 2 in *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41; 228 NW2d 772 (1975). There, we considered a program in which the State Board of Education would have purchased textbooks and supplies to loan or provide free of charge to children in public schools and nonpublic schools alike. We reaffirmed *Traverse City*, noting that shared-time and auxiliary-services programs might help a nonpublic school, but they were not "primary" elements necessary for the school's survival as an educational institution and were "not the type of services that flout the intent of the electorate expressed through Proposal C." *Id*. at 49. Textbooks, however, we held were a "primary" feature of the educational process, and therefore we held that providing funding for textbooks to nonpublic schools was barred by Const 1963, art 8, § 2. *Id*. at 50.

B. LEGISLATION AT ISSUE

At issue now is MCL 388.1752b, enacted in 2016 and amended in 2017 and 2018. The statute allocated up to

$2.5 million for 2017–2018 and $250,000 for 2018–2019 to "reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state." MCL 388.1752b(1). The scheme required the Department of Education to publish a form for nonpublic schools to report costs for reimbursement. MCL 388.1752b(2). Nonpublic schools were free to seek reimbursement or not, and the superintendent of public instruction was to distribute the allocated funds among applicants on a prorated or other equitable basis. MCL 388.1752b(2) to (5).

Regarding what constitutes an "actual cost," the statute specifies that the term includes "the hourly wage for the employee or employees performing a task or tasks required to comply with a health, safety, or welfare requirement under a law or administrative rule of this state . . . ." MCL 388.1752b(9). Further, reimbursable "actual costs" include "the actual cost incurred by a nonpublic school for taking daily student attendance" as well as "[t]raining fees, inspection fees, and criminal background check fees . . . ." MCL 388.1752b(10).

The statute also includes two provisions regarding the Legislature's intent in allocating the funds:

> (7) The funds appropriated under this section are for purposes related to education, are considered to be incidental to the operation of a nonpublic school, are noninstructional in character, and are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools and to reimburse nonpublic schools for costs described in this section.
>
> (8) Funds allocated under this section are not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, employ any person at a nonpublic school, support the attendance

> of any student at any location where instruction is offered to a nonpublic school student, or support the employment of any person at any location where instruction is offered to a nonpublic school student.

C. THE *TRAVERSE CITY* OPINION

Our task here is similar to our task in *Traverse City*, in which we considered the effect of Const 1963, art 8, § 2 on three categories of funding—1970 PA 100, shared-time services, and auxiliary services. Because our analysis here should operate as it did there, it is worth explicitly noting some of the implicit steps in the *Traverse City* analysis. The first step is to determine whether the statute at issue violates Const 1963, art 8, § 2 as the constitutional provision would be commonly understood. If the statute does violate Const 1963, art 8, § 2, the next step is to determine whether the application of Const 1963, art 8, § 2 would conflict with the federal Constitution. If there is no conflict, then the funding is prohibited. However, if application of Const 1963, art 8, § 2 would conflict with the federal Constitution, then we decide "whether there is an alternative constitutional construction . . . which also preserves the purpose of [Const 1963, art 8, § 2] . . . and, of course, is consonant with a common understanding of the language used in [Const 1963, art 8, § 2]." *Traverse City*, 384 Mich at 412-413. Our analysis from *Traverse City* tracks these steps with regard to 1970 PA 100, shared-time services, and auxiliary services.

In *Traverse City*, with regard to 1970 PA 100, our analysis was brief. We noted that the funding proposed under 1970 PA 100 violated Const 1963, art 8, § 2. We concluded that the funding was invalid without discussing whether the federal Constitution was implicated or applying any sort of alternative construction:

> In *Advisory Opinion re Constitutionality of PA 1970, No 100*, 384 Mich 82, 180 NW2d 265 (1970), we held that the Constitution of Michigan did not prohibit the purchase with public funds of secular educational services from a nonpublic school.
>
> Article 8, Sec. 2, as amended by Proposal C, now prohibits the use of public funds "directly or indirectly to aid or maintain" a nonpublic school. The language of this amendment, read in the light of the circumstances leading up to and surrounding its adoption, and the common understanding of the words used, prohibits the purchase, with public funds, of educational services from a nonpublic school.
>
> Accordingly, we hold Chapter 2, Act 100, P.A. 1970, unconstitutional as of December 19, 1970, the effective date of the amendment, and any credits accumulated on or after that date are invalid. [*Traverse City*, 384 Mich at 406-408.]

The necessary implication in our reasoning was that there was no federal constitutional problem, and therefore no alternate construction was needed.

With regard to shared-time programs, we first noted that the Attorney General had concluded that the newly amended Const 1963, art 8, § 2 prohibited funding of shared-time programs. *Traverse City*, 384 Mich at 412. Without commenting on whether that conclusion was correct as a textual matter, we reasoned that the conclusion would violate both the Free Exercise Clause and the Equal Protection Clause of the United States Constitution. *Id*. Therefore, we proceeded to ask whether there was "an alternative constitutional construction." *Id*. In doing so, we drew direct comparisons between shared-time services provided at public schools and payments under 1970 PA 100 to nonpublic schools that had already been struck down. We found important differences:

> First, under [1970 PA 100] the public funds are paid to a private agency whereas under shared time they are paid to a public agency. Second, [1970 PA 100] permitted the private school to choose and to control a lay teacher whereas under shared time the public school district chooses and controls the teacher. Thirdly, [1970 PA 100] permitted the private school to choose the subjects to be taught, so long as they are secular, whereas shared time means the public school system prescribes the public school subjects. [*Id*. at 413-414.]

We characterized these distinctions as "differences in control." *Id*. at 414. In opining whether a shared-time program could theoretically be located at a nonpublic school, we specified that "the ultimate and immediate control of the subject matter, the personnel and premises must be under the public school system authorities, and the courses open to all eligible to attend a public school." *Id*. at 415. We made clear that our analysis hinged on control, describing the discussion as "our 'control' construction of the amendment and the purposes . . . for which it was adopted." *Id*. at 416.

Similarly, we found no violation of Const 1963, art 8, § 2 with regard to auxiliary services given that "auxiliary services are similar to shared time instruction in that private schools exercise no control over them. They are performed by public employees under the exclusive direction of public authorities and are given to private school children by statutory direction, not by an administrative order from a private school." *Id*. at 420. We applied the same "alternative constitutional construction" or "control construction" we applied to shared-time services. Though we did not explicitly note the analytical predicates to application of the alternative construction, there, too, the Attorney General had concluded that as amended, Const 1963, art 8, § 2 prohibited funding of auxiliary services for nonpublic-

school students. 1 OAG, 1970, No. 4,715, at 185. Accordingly, for auxiliary services, the analysis was the same as with 1970 PA 100 and shared-time programs. Further, we specifically limited future applicability of our discussion of auxiliary services:

> Of course, what this Court holds regarding auxiliary services is limited to those services enumerated in the Auxiliary Services Act. The clause in the Act which states that auxiliary services shall include "such other services as may be determined by the legislature" does not give the legislature a blank check to make any service a health and safety measure outside the reach of Proposal C simply by calling it an auxiliary service. [*Traverse City*, 384 Mich at 420.]

D. MCL 388.1752b VIOLATES THE COMMON UNDERSTANDING OF CONST 1963, ART 8, § 2

As in *Traverse City*, our first step in this case is to determine whether MCL 388.1752b violates Const 1963, art 8, § 2 as the constitutional provision would be commonly understood. We conclude that it does.

MCL 388.1752b appropriates general-fund monies for the specific purpose of providing that money directly to nonpublic schools, and only to nonpublic schools, to compensate those schools for costs incurred in adhering to this state's general health, safety, and welfare laws. For a nonpublic school, or any other organization in Michigan, complying with general health, safety, and welfare laws is just a cost of doing business. The dissenting judge in the Court of Appeals was correct that MCL 388.1752b is merely paying the overhead of the nonpublic school:

> The voters understood that providing money for a private school's overhead is exactly the same thing as directly allocating aid and maintenance payments. It does not matter whether the overhead payments are intended to

> cover "education" or any of the myriad costs that a business must bear. [*Council of Organizations & Others for Ed About Parochiaid v Michigan*, 326 Mich App 124, 166; 931 NW2d 65 (2018) (GLEICHER, J., concurring in part and dissenting in part).]

Article 8, § 2 is explicit that "[n]o public monies or property shall be appropriated or paid . . . directly or indirectly to aid or maintain any . . . nonpublic, pre-elementary, elementary, or secondary school." Whatever else "aid or maintain" may include, it surely includes direct payments to offset a nonpublic school's overhead.

Further, the payments MCL 388.1752b calls for effectively function as payroll payments because the law reimburses nonpublic schools for the labor costs (based on the hours worked and the wage rate) of employing a person to "perform[] a task or tasks required to comply with a health, safety, or welfare requirement under a law or administrative rule of this state . . . ." MCL 388.1752b(9) (defining "actual costs"). In this way, the law not only violates the prohibition in Const 1963, art 8, § 2 on aid or maintenance to nonpublic schools; the law also allows for reimbursements that violate the constitutional directive that "[n]o payment . . . shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school . . . ." Applying the rule of common understanding to this language, we cannot see how paying any portion of the salaries of teachers at nonpublic schools does not "directly or indirectly . . . aid or maintain any . . . nonpublic, pre-elementary, elementary, or secondary school" or "directly or indirectly . . . support . . . the employment of any person at any such nonpublic school . . . ." In interpreting our Constitution, "we must presume that *words have been employed in their natu-*

ral and ordinary meaning. . . . This is but saying that no forced or unnatural construction is to be put upon their language[.]" Cooley, Constitutional Limitations (6th ed), p 73. To say that paying a portion of a teacher's salary does not support that teacher's employment is a "forced" construction, to say the least. This is sufficient to conclude that MCL 388.1752b violates Const 1963, art 8, § 2.

E. OUR DECISION IN *TRAVERSE CITY* DOES NOT REQUIRE A DIFFERENT RESULT

The opinion for affirmance apparently agrees with this much, acknowledging that "[r]ead literally, the state would be prohibited from providing any public benefits to nonpublic schools because doing so would at least presumably 'indirectly' aid the nonpublic school." But the opinion for affirmance then departs from this Court's method of analysis in *Traverse City*. It is clear that this legislation does *not* raise the same sort of overbreadth concerns that we discussed with regard to shared-time and auxiliary services in *Traverse City*, and we needn't search for a forced reading of Const 1963, art 8, § 2 to avoid the result that is dictated by a common understanding of the constitutional language.

In *Traverse City*, as explained earlier, we *did* apply Const 1963, art 8, § 2 literally to prospectively invalidate any funding 1970 PA 100 would have provided to pay teachers' salaries at nonpublic schools. We employed the alternative construction to shared-time and auxiliary-services programs only after concluding that the literal application of Const 1963, art 8, § 2 created a conflict with the federal Constitution. The opinion for affirmance glosses over the first and most straightforward holding of *Traverse City*, noting that applying Const 1963, art 8, § 2 to prohibit providing police and

fire services to nonpublic schools would "seemingly raise concerns under the Free Exercise Clause." This observation is not novel. We noted several times in *Traverse City* that the possible effect of applying Const 1963, art 8, § 2 to prohibit police and fire services had been a flash point in the public debate over Proposal C. *Traverse City*, 384 Mich at 406 n 2, 435 n 22. As discussed earlier, we recognized that a modification of the operation of Const 1963, art 8, § 2 is necessary *when there is a conflict with the federal Constitution*. But because there was no conflict with the federal Constitution in applying Const 1963, art 8, § 2 to 1970 PA 100, we applied Const 1963, art 8, § 2 without the alternative construction. The opinion for affirmance errs by applying an alternative construction of Const 1963, art 8, § 2 without first identifying a federal constitutional problem.

As we agree with the opinion for affirmance that MCL 388.1752b violates Const 1963, art 8, § 2, the next step is to determine whether the application of Const 1963, art 8, § 2 would conflict with the federal Constitution. The parties agree that there is no federal constitutional concern, although amici have argued that there is. The opinion for affirmance notes that there has been activity with regard to federal Free Exercise Clause jurisprudence since *Traverse City*. That is true, but recent jurisprudence reinforces the conclusion that there was no conflict between Const 1963, art 8, § 2 and the Free Exercise Clause as applied to 1970 PA 100, and there is no conflict between Const 1963, art 8, § 2 and the Free Exercise Clause as applied to MCL 388.1752b.

In its most recent decision on the subject, *Espinoza v Montana Dep't of Revenue*, 591 US ___, ___; 140 S Ct 2246, 2255; 207 L Ed 2d 679 (2020), the United States Supreme Court reviewed its precedents and stated that those precedents had been distilled "into the unremark-

able conclusion that disqualifying otherwise eligible recipients from a public benefit *solely because of their religious character* imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." (Quotation marks and citations omitted; emphasis added.) As *Espinoza* explained: "*A State need not subsidize private education*. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id*. at ___; 140 S Ct at 2261 (emphasis added). *Espinoza* and its predecessors are not implicated here because Const 1963, art 8, § 2 does not disqualify schools "solely because of their religious character" or indeed take account of their religious character at all. All nonpublic schools are prohibited from receiving public funding under Const 1963, art 8, § 2.

In fact, not even amici argue that Const 1963, art 8, § 2 fails the test of *Espinoza* as discriminating solely on the basis of a school's religious character. Rather, amici take two different tracks. First, they argue that Const 1963, art 8, § 2 violates the Free Exercise Clause because it disproportionately impacts religious schools. However, that argument is clearly foreclosed by *Zelman v Simmons-Harris*, 536 US 639, 658; 122 S Ct 2460; 153 L Ed 2d 604 (2002), in which the Court stated that "[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." It is true that *Zelman* dealt with an Establishment Clause challenge rather than a Free Exercise Clause challenge. But amici have not offered any reason why the principle of *Zelman* would not apply in this context, and maybe for good reason. Would the constitutionality of MCL 388.1752b be subject to annual review depending on the percentage of

applicants with religious affiliation? Or would the annual determination depend on the amounts requested by applicants rather than the number of applicants? We agree with the *Zelman* Court that this rule would be exceedingly cumbersome to enforce, and we would decline amici's invitation to break new ground here.

Second, amici argue that even if the language of Const 1963, art 8, § 2 does not discriminate based on religious character, it has discriminatory intent, relying on *Church of the Lukumi Babalu Aye, Inc v Hialeah*, 508 US 520; 113 S Ct 2217; 124 L Ed 2d 472 (1993). In *Lukumi*, a group of Santeria practitioners sought to more openly practice their faith in their community, including the practice of ritual animal sacrifice; in response, the local city council convened an "emergency public session" beginning a flurry of resolutions and ordinances. *Id*. at 526. Though the eventual ordinances the Court considered did not explicitly target the Santeria practitioners, one early resolution expressed " 'concern' " that " 'certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety.' " *Id*. Further, the resolution expressed a commitment on behalf of the city to " 'a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety.' " *Id*. Those and other facts were developed in a nine-day bench trial, at the conclusion of which the district court held that the purpose of the ordinance was to end the practice of animal sacrifice, for whatever reason practiced. *Id*. at 528-529. The *Lukumi* Court disagreed with that finding and held that although the ordinance was *facially* neutral, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . ." *Id*. at 533. The Court leaned heavily on the record from the

nine-day bench trial in reviewing the lower court's finding on intent, stating that "[n]o one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria." *Id*. at 535.

In contrast to *Lukumi*, in this case, there is no lower-court finding regarding intent for this Court to review. In fact, there is no record on this issue at all, and the parties do not even argue that they should be able to establish one. Amici would invite us to make findings of fact based on citations from the events of the amendment of Const 1963, art 8, § 2, which occurred 50 years ago.[3] This invitation evinces a misunderstanding of this Court's function, and therefore we would decline the invitation. Barring such an extraordinary effort, *Lukumi* has no relevance with regard to Const 1963, art 8, § 2.

Agreeing with the opinion for affirmance that MCL 388.1752b violates Const 1963, art 8, § 2, and having found no conflict with the federal Constitution, resolution of this case is simple. Just as we applied Const 1963, art 8, § 2 without using an alternative construction to invalidate funding through 1970 PA 100, we should apply it here to invalidate funding through MCL 388.1752b.

F. THE OPINION FOR AFFIRMANCE MISAPPLIES *TRAVERSE CITY*

Although we disagree that the "alternative construction" or "control construction" of Const 1963, art 8, § 2 should be applied in this case, because the opinion for

[3] In addition, how should we decide *whose* intent is relevant? Is it the intent of the proponents of the ballot proposal? The voters? And even assuming that some proponents and some voters may have been motivated by antireligious bigotry, can we fairly conclude that *all* or even *a majority* of voters shared that motivation when they cast their ballots in November 1970? We simply have no basis to reach such a conclusion.

affirmance engages in the alternative analysis, we do as well. However, we come to the opposite conclusion: application of such a construction would still invalidate funding through MCL 388.1752b.

Simply stated, the aid provided to nonpublic schools by MCL 388.1752b is of a "direct" nature. The legislation appropriates public monies for one specific purpose: to pay that money directly to nonpublic schools. None of this Court's precedents permits such a result. To the contrary, we stated in *Traverse City* that Const 1963, art 8, § 2, as amended by Proposal C, "above all else prohibits" another form of direct payment—the use of public funds to purchase educational services in a nonpublic school. *Traverse City*, 384 Mich at 435. Now, five decades later, the opinion for affirmance reasons that public monies *can* be paid directly to a nonpublic school to aid or maintain it. The justices who signed the majority opinion in *Traverse City* would be surprised at that result. In fact, one of the crucial distinctions that the Court drew between 1970 PA 100 and "shared time" was the recipient of the funds. *Id*. at 413 ("[U]nder [1970 PA 100] the public funds are paid to a private agency whereas under shared time they are paid to a public agency."). And with respect to "auxiliary services," we stated that "the prohibitions of Proposal C *which are keyed into prohibiting the passage of public funds into private school hands for purposes of running the private school operation* are not applicable to auxiliary services . . . ." *Id*. at 419-420 (emphasis added).

As discussed earlier, in *Traverse City* we employed an alternative construction to Const 1963, art 8, § 2 with regard to shared-time and auxiliary services. Necessarily, our discussion of each category focused on the particularities of those programs. But the dissent-

ing judge in the Court of Appeals correctly identified the common thread joining them:

> [T]he Supreme Court took great pains to draw a constitutional line between services provided to nonpublic schools funded by public dollars—forbidden under Proposal C—and those offered to nonpublic school students but funded entirely through payments to *public* schools; the latter could continue because the money stayed in the public fisc and was not "paid to a private agency." [*Council of Organizations & Others for Ed About Parochiaid*, 326 Mich App at 163 (GLEICHER, J., concurring in part and dissenting in part).]

When employing the alternative construction of Const 1963, art 8, § 2, we began by comparing shared-time services to 1970 PA 100, which we already concluded violated Const 1963, art 8, § 2. We outlined three ways in which these two schemes differed and noted that these were "differences in control":

> First, under [1970 PA 100] the public funds are paid to a private agency whereas under shared time they are paid to a public agency. Second, [1970 PA 100] permitted the private school to choose and to control a lay teacher whereas under shared time the public school district chooses and controls the teacher. Thirdly, [1970 PA 100] permitted the private school to choose the subjects to be taught, so long as they are secular, whereas shared time means the public school system prescribes the public school subjects. *These differences in control are legally significant.* [*Traverse City*, 384 Mich at 413-414 (emphasis added).]

In this case, MCL 388.1752b fails this test of control. MCL 388.1752b is identical to 1970 PA 100—the very statute Const 1963, art 8, § 2 was amended to prohibit. Like 1970 PA 100, under MCL 388.1752b, "the public funds are paid to a private agency." *Traverse City*, 384 Mich at 413. Like 1970 PA 100, MCL 388.1752b "per-

mit[s] the private school to choose and to control a lay teacher" or other staff to carry out the reimbursed function.[4] *Id*.

Our discussion of shared-time services provided at a nonpublic school further shows how far MCL 388.1752b falls outside the bounds of Const 1963, art 8, § 2. In *Traverse City*, we were clear that shared time could be provided at a nonpublic school "only under conditions appropriate for a public school," meaning conditions in which "the ultimate and immediate control of the subject matter, the personnel and premises must be under the public school system authorities, and the courses open to all eligible to attend a public school." *Traverse City*, 384 Mich at 415. *Only* under those conditions was this Court willing to say that such a program was permitted. *Id*. at 416. With regard to the prohibition in Const 1963, art 8, § 2 of public funds supporting "the employment of any person at any such nonpublic school," we were clear that "shared time supports the employment *of public school teachers* at the public school where they draw their check, and that the location where they perform some or all of their services for shorter or longer periods of time may be a nonpublic school under such conditions of control as a public school . . . ." *Id*. (emphasis added). Clearly MCL 388.1752b does not comply with any of this. MCL 388.1752b would convey funds directly to the nonpublic school to pay teachers and other staff under its control. Further, MCL 388.1752b would fund other portions of the overhead of the nonpublic school as identified on Department of Education forms. As already mentioned, nothing in *Traverse City* or this Court's subsequent jurisprudence allows for *direct* fi-

[4] With MCL 388.1752b, there is no subject matter relevant to the third comparison.

nancial payments of public money to "aid or maintain" nonpublic schools, and it is misleading to claim that invalidating MCL 388.1752b would require this Court to overrule any of the very specific holdings in *Traverse City*.

The opinion for affirmance turns the alternative construction of *Traverse City* on its head by focusing on the limited discussion regarding auxiliary services, which we explicitly limited to those services at issue in that case. Not only does the opinion for affirmance extend the discussion of auxiliary services beyond the explicit boundaries we set in *Traverse City*, it also exaggerates its import within those boundaries. In reading the opinion for affirmance, one would think that *Traverse City*, in discussing auxiliary services, approved any direct payment to a nonpublic school so long as the payment went toward "general health and welfare measures." That is decidedly not what we said in *Traverse City*. Rather, we discussed services *provided by public schools* and made available to nonpublic-school students:

> In addition auxiliary services are similar to shared time instruction in that *private schools exercise no control over them*. They are *performed by public employees* under the exclusive direction of public authorities and are given to private school children by statutory direction, not by an administrative order from a private school. [*Traverse City*, 384 Mich at 420 (emphasis added).]

Further, we explicitly limited the analysis to "those services enumerated in the Auxiliary Services Act" and cautioned that our analysis of those auxiliary services specifically enumerated by statute "does not give the legislature a blank check to make any service a health and safety measure outside the reach of Proposal C simply by calling it an auxiliary service." *Id*. To the

extent that this discussion is relevant to the interplay of Const 1963, art 8, § 2 and MCL 388.1752b, it should raise a cautionary flag to attempts to avoid Const 1963, art 8, § 2 by legislative labeling. Certainly, our discussion of auxiliary services did not state a general rule of how to apply Const 1963, art 8, § 2. Neither did our discussion of auxiliary services set out the alternative construction we applied to avoid conflict with the federal Constitution.

IV. CONCLUSION

We conclude that MCL 388.1752b violates Const 1963, art 8, § 2 under the common understanding of the constitutional provision. Because there is no conflict between Const 1963, art 8, § 2 and the federal Constitution as applied to MCL 388.1752b, no alternative construction of Const 1963, art 8, § 2 is required. But even if we did apply the alternative construction of *Traverse City* to MCL 388.1752b, its funding would still be prohibited.

MCCORMACK, C.J., and BERNSTEIN, J., concurred with CAVANAGH, J.

CLEMENT, J., did not participate because of her prior involvement as chief legal counsel for Governor Rick Snyder.

PEOPLE v HUGHES

Docket No. 158652. Argued on application for leave to appeal October 7, 2020. Decided December 28, 2020.

Following a jury trial, Kristopher A. Hughes was convicted in the Oakland Circuit Court, Hala Jarbou, J., of armed robbery, MCL 750.529, and was sentenced as a fourth-offense habitual offender, MCL 769.12, to 25 to 60 years in prison. On the evening of August 6, 2016, Ronald Stites was at his home with Lisa Weber, whom he had met earlier that day. Weber had agreed to spend the night with Stites and perform sexual acts in exchange for money. At some point during the evening, Weber called a drug dealer known as "K-1" or "Killer" in order to obtain drugs and asked him to come to Stites's residence. A man arrived at the residence, sold Stites and Weber crack cocaine, and departed. Later that night, the drug seller returned to Stites's home with a gun and stole a safe that was located in Stites's bedroom. Weber later identified defendant as the drug dealer and robber, but Stites was not able to identify the perpetrator. A detective submitted a warrant affidavit to search defendant's property for evidence related to separate allegations of drug trafficking. The affidavit included information from a criminal informant that defendant and another man were dealing drugs, and the detective asserted that drug traffickers commonly use mobile phones and other electronic equipment in the course of their activities. The district court, Cynthia Thomas Walker, J., concluded that there was sufficient probable cause to support a search warrant and authorized a warrant to search three properties and a vehicle connected with defendant. While executing a search at one of the addresses identified in the warrant, the police detained defendant and seized a cell phone found on his person. Another detective performed a forensic examination of the phone and extracted all of the phone's data. The extraction software separated the data into categories, including photographs, call logs, and text messages. According to the detective, the software also enabled police to search the data for search terms or specific phone numbers. About a month after the data was extracted, the prosecutor in the armed-robbery case against defendant asked the detective to conduct a second search of defendant's cell-phone data for contacts with the phone numbers of Stites and

Weber; for the names "Lisa," "Kris," or "Kristopher"; and for the word "killer." These searches revealed several calls and text messages between defendant and Weber on the night that Stites was robbed, including text messages from Weber to defendant indicating the location of Stites's home, that the home was unlocked, and that it had a flat-screen TV. After his conviction, defendant appealed, arguing that the phone records should have been excluded from the trial because the warrant that authorized the search of his phone's data permitted officers to search for evidence of drug trafficking, not armed robbery. Defendant also argued that trial counsel was ineffective for failing to object to the admission of the data on Fourth Amendment grounds. The Court of Appeals, TUKEL, P.J., and BECKERING and SHAPIRO, JJ., rejected these arguments and affirmed defendant's conviction in an unpublished per curiam opinion. Defendant sought leave to appeal in the Supreme Court, which ordered oral argument on the application. 505 Mich 855 (2019).

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

1. The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. Although a warrant is not always required before a search or seizure, there is a strong preference for searches conducted pursuant to a warrant, and the general rule is that police officers must obtain a warrant for a search to be reasonable under the Fourth Amendment. Under *Riley v California*, 573 US 373 (2014), general Fourth Amendment principles apply with equal force to searches of cell-phone data. In this case, the issue was whether officers violated the Fourth Amendment when they searched defendant's cell phone for *evidence of armed robbery* without obtaining a new warrant when the phone was seized pursuant to a warrant authorizing the search of the phone's data for *evidence of drug trafficking*. The prosecutor argued that defendant lost the reasonable expectation of privacy in his cell-phone data when the phone was seized and the data was searched pursuant to the drug-trafficking warrant. However, under *Riley*, citizens generally maintain a reasonable expectation of privacy in their cell-phone data that is not extinguished merely because a phone is seized during a lawful arrest. Further, the seizure and search of cell-phone data pursuant to a warrant does not extinguish an otherwise reasonable expectation of privacy in the entirety of the seized data. Rather, a warrant authorizing the police to seize and search cell-phone data allows officers to examine the seized data only to the extent reasonably consistent with the scope of the

warrant. In this case, the warrant authorized officers to search defendant's cell-phone data for evidence of drug trafficking as described by the warrant and affidavit. Any further review of the data beyond the scope of the warrant constituted a search that was presumptively invalid under the Fourth Amendment.

2. In considering the Fourth Amendment's requirements for a search of digital data authorized by a warrant, as with any other search conducted pursuant to a warrant, a search of digital data must be reasonably directed at uncovering evidence of the criminal activity alleged in the warrant. Any search that is directed instead toward finding evidence of other, unrelated criminal activity is beyond the scope of the warrant. Under the Fourth Amendment, a warrant must state with particularity not only the items to be searched and seized, but also the alleged criminal activity justifying the warrant. Although the prosecutor argued that the search for evidence of armed robbery fell within the scope of the warrant because the warrant authorized officers to review the entire report that represented the totality of defendant's cell-phone data, the warrant authorized a search of the data for evidence of drug trafficking, not armed robbery. Moreover, the affidavit supporting the warrant did not even mention armed robbery, let alone seek to establish probable cause that defendant committed that offense. While officers are not required, when executing a search of digital data, to review only digital content that a suspect has identified as pertaining to criminal activity, neither is it always reasonable for an officer to review the entirety of the seized digital data on the basis that incriminating information could conceivably be found anywhere on the device. Accordingly, an officer's search of seized digital data must be reasonably directed toward finding evidence of the criminal activity identified in the warrant. In this case, about a month after officers searched defendant's digital data for evidence of drug trafficking, the prosecutor in the armed-robbery case asked a detective to conduct a focused search of the data for terms pertaining to the armed-robbery case. There was no evidence that a search for these terms would uncover evidence relating to defendant's drug-trafficking activity, nor was there any evidence that defendant hid or manipulated his data to conceal evidence related to drug trafficking. Therefore, the second search of the data was not reasonably directed toward obtaining evidence of drug trafficking and exceeded the scope of the warrant. Accordingly, the second review of the data constituted a warrantless search that violated the Fourth Amendment, and the case had to be remanded to the Court of Appeals for that Court to reconsider

defendant's claim of ineffective assistance of counsel and to determine whether defendant was entitled to relief.

Reversed and remanded.

Justice VIVIANO, concurring, agreed with the majority that the second search of defendant's cell-phone data was unlawful under the Fourth Amendment but wrote separately to emphasize his view that a law enforcement officer's subjective intent when searching seized digital data should be included as a potentially dispositive factor when a court considers whether a search was reasonably directed at finding evidence of the criminal activity identified in the warrant. Justice VIVIANO argued that if the search was purposefully conducted to obtain evidence of a crime other than the one identified in the warrant, a court could not conclude that the search was reasonably directed at uncovering evidence of the criminal activity alleged in the warrant. In this case, Justice VIVIANO would find this factor dispositive since it was clear that the second search of defendant's cell-phone data was conducted to obtain evidence of a crime other than drug trafficking, the offense identified in the warrant. Therefore, before conducting the second search of defendant's cell phone, the officer should have obtained a second search warrant directed toward obtaining evidence of the armed-robbery offense. Because he did not, the second search was unlawful.

1. CONSTITUTIONAL LAW — FOURTH AMENDMENT — CELLULAR PHONES — DIGITAL DATA — EXPECTATION OF PRIVACY.

General Fourth Amendment principles apply with equal force to searches of cell-phone data as to a search of physical records; a citizen's reasonable expectation of privacy in their cell-phone data is not lost when the phone is seized pursuant to a lawful arrest, nor is the reasonable expectation of privacy lost with respect to the entirety of cell-phone data when the phone is searched pursuant to a warrant; rather, the search is reasonable and lawful only to the extent that it is reasonably consistent with the scope of the warrant; any search beyond the scope of the warrant is presumptively unreasonable under the Fourth Amendment (US Const, Am IV; Const 1963, art 1, § 11).

2. CONSTITUTIONAL LAW — FOURTH AMENDMENT — CELLULAR PHONES — DIGITAL DATA — SCOPE OF WARRANT.

A search of digital data, as with any other search conducted pursuant to a warrant, must be reasonably directed at uncovering evidence of the criminal activity alleged in the warrant; any search that is directed toward finding evidence of criminal activ-

ity not alleged in the warrant is beyond the scope of the warrant and constitutes a warrantless search that violates the Fourth Amendment (US Const, Am IV; Const 1963, art 1, § 11).

Jessica R. Cooper, Oakland County Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Joshua J. Miller*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jason R. Eggert* and *Lindsay Ponce*) for Kristopher A. Hughes.

Amicus Curiae:

Friedman Legal Solutions, PLLC (by *Stuart G. Friedman*) for Criminal Defense Attorneys of Michigan.

Daniel S. Korobkin for American Civil Liberties Union and American Civil Liberties Union of Michigan.

MARKMAN, J. The issue presented here is whether, when the police obtain a warrant to search digital data from a cell phone for evidence of a crime, they are later permitted to review that same data for evidence of another crime without obtaining a second warrant. We conclude—in light of the particularity requirement embodied in the Fourth Amendment and given meaning in the United States Supreme Court's decision in *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014) (addressing the "sensitive" nature of cell-phone data)—that a search of digital cell-phone data pursuant to a warrant must be reasonably directed at obtaining evidence relevant to the criminal activity alleged in *that* warrant. Any search of digital cell-phone data that is not so directed, but instead is directed at uncovering evidence of criminal activity not

identified in the warrant, is effectively a warrantless search that violates the Fourth Amendment absent some exception to the warrant requirement. Here, the officer's review of defendant's cell-phone data for incriminating evidence relating to an armed robbery was not reasonably directed at obtaining evidence regarding drug trafficking—the criminal activity alleged in the warrant—and therefore the search for that evidence was outside the purview of the warrant and thus violative of the Fourth Amendment. Accordingly, we reverse the judgment of the Court of Appeals and remand to that Court to determine whether defendant is entitled to relief based upon the ineffective assistance of counsel.[1]

I. FACTS & HISTORY

The circumstances of this case arise from concurrent criminal prosecutions against defendant Kristopher Hughes, one related to drug trafficking and the other related to armed robbery. MCL 750.529. Defendant pleaded no contest to the drug-trafficking charges and these pleas are not the subject of this appeal.[2] Defen-

[1] Because we conclude that the Fourth Amendment was breached when officers searched a cell phone for evidence of *armed robbery* without having obtained a second warrant when the phone had been seized based upon a warrant for *drug trafficking*, we need not decide (a) whether the warrant affidavit sufficiently connected defendant's cell phone to his drug trafficking or (b) the broader question as to what evidence set forth in an affidavit sufficiently connects a cell phone to alleged criminal activity to support the issuance of a warrant to search the phone's digital contents. We only address the proper manner of searching digital data when such data has been seized pursuant to a valid warrant.

[2] On February 2, 2017, defendant pleaded no contest to two counts of delivery and manufacture of a controlled substance, second or subsequent offense, MCL 333.7401(2)(b)(ii), possession of marijuana, MCL 333.7403(2)(d), possession of suboxone, MCL 333.7403(2)(b)(ii), possession of alprazolam, MCL 333.7403(2)(b)(ii), and possession of dihydro-

dant went to trial on the armed-robbery charge, and after two mistrials due to hung juries, he was convicted of the armed robbery of Ronald Stites.

On August 6, 2016, Stites was going for a walk when he met Lisa Weber. The two talked, and Stites invited Weber back to his home. At Stites's residence, Weber offered to stay with Stites all night and to perform sexual acts in exchange for $50. Stites agreed, and Weber followed him into his bedroom, where he opened a safe containing $4,200 in cash and other items and pulled out a $50 bill that he agreed to give her after the night was over. Stites then performed oral sex on Weber. Afterward, Weber went to the store to get something to drink. Approximately 15–20 minutes later, she called a drug dealer, who went by the name of "K-1" or "Killer," and asked that he come over and sell drugs to her and Stites. Sometime thereafter, a man arrived at Stites's home, sold Weber and Stites crack cocaine, and then departed. Weber and Stites consumed some of the drugs and continued their sexual activities. Later in the evening, the man who had sold the drugs returned to the home with a gun and stole Stites's safe at gunpoint. Stites testified that Weber assisted in the robbery and departed the home with the robber, while Weber asserted that she did not assist in the robbery and only complied with the robber's demands to avoid being harmed. Weber identified defendant as the perpetrator, while Stites could not identify defendant as the perpetrator.

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codeine pills, MCL 333.7403(2)(b)(ii), as a habitual fourth offender. He was sentenced to concurrent prison terms of 36 months to 30 years, 12 to 24 months, and 24 months to 15 years. Defendant appealed and the Court of Appeals denied his application for lack of merit. *People v Hughes*, unpublished order of the Court of Appeals, entered September 28, 2017 (Docket No. 339858). Defendant did not seek leave to appeal in this Court.

On August 11, 2016, Detective Matthew Gorman submitted a warrant affidavit to search defendant's property for evidence related to separate criminal allegations of drug trafficking. Detective Gorman's affidavit included information from a confidential informant that defendant and an associate named Patrick Pankey were dealing drugs. The warrant affidavit also asserted that as a product of Detective Gorman's experience and training, "drug traffickers commonly use electronic equipment to aid them in their drug trafficking activities. This equipment includes, but is not limited to, . . . mobile telephones . . . ." The warrant affidavit contained no information indicating that Weber was involved in defendant's drug trafficking and did not refer to the previous week's armed robbery at Stites's residence.

The district court judge concluded that there was probable cause for the warrant based upon the attached affidavit and thereby issued a warrant authorizing the police to search three residences that were connected with defendant and his vehicle for further evidence of drug trafficking. As relevant here, the warrant provided:

> [A]ny cell phones or . . . other devices capable of digital or electronic storage seized by authority of this search warrant shall be permitted to be forensically searched and or manually searched, and any data that is able to be retrieved there from shall be preserved and recorded.

The warrant also contained the following limitation:

> Therein to search for, seize, secure, tabulate and make return according to law, the following property and things:
>
> Crack Cocaine, and any other illegally possessed controlled substances; any raw material, product, equipment or drug paraphernalia for the compounding, cutting, exporting, importing, manufacturing, packaging, process-

> ing, storage, use or weighing of any controlled substance; proofs of residence, such as but not limited to, utility bills, correspondence, rent receipts, and keys to the premises; proofs as to the identity of unknown suspects such as but not limited to, photographs, certificates, and/or diplomas; prerecorded, illegal drug proceeds and *any records pertaining to the receipt, possession and sale or distribution of controlled substances including but not limited to documents, video tapes, computer disks, computer hard drives, and computer peripherals*; other mail receipts, containers or wrappers; currency, property obtained through illegal activity, financial instruments, safety deposit box keys, money order receipts, bank statements and related records; firearms, ammunition, and all occupants found inside. [Emphasis added.]

On August 12, 2016, police were executing a search at one of the addresses set forth in the warrant when they detained defendant and seized a phone that was on his person. On August 17, 2016, defendant was arraigned on the charge of armed robbery.

On August 23, 2016, Detective Edward Wagrowski performed a forensic examination of the phone that was seized from defendant, and all of its data was extracted using Cellebrite, software used for extracting digital data. Upon extraction, Cellebrite separated and sorted the device's data into relevant categories by, for example, placing all of the photographs together in a single location. The extraction process resulted in a 600-page report of defendant's cellphone data, which included more than 2,000 call logs, more than 2,900 text messages, and more than 1,000 photographs. Detective Wagrowski testified at trial that Cellebrite enabled police to enter search terms to isolate data from specific phone numbers or that contained specific words or phrases. If there were no contacts between a searched number and the device being searched, the searcher would receive no results

and the software would show a blank screen. It is unclear from the record whether and to what extent the data extracted from the cell phone was reviewed for evidence of defendant's drug trafficking.

A month or so after the initial extraction, at the request of the prosecutor in defendant's armed-robbery case, Detective Wagrowski conducted further searches of the cell-phone data for: (a) contacts with the phone numbers of Weber and Stites and (b) the name "Lisa," variations on the word "killer" (defendant's nickname), and the name "Kris/Kristopher" (defendant's actual name). These searches uncovered 19 calls between defendant and Weber on the night of the robbery and 15 text messages between defendant and Weber between August 5, 2016 and August 10, 2016. Weber's texts to defendant leading up to the robbery included communications indicating where Stites's home was located, that the home was unlocked, and that there was a flat-screen TV in the home. Defendant sent texts to Weber on the night of the robbery asking her to "[t]ext me or call me" and to "open the doo[r]." None of the text messages with the words "killer" or "Kris" were from Weber's number. The prosecutor acknowledged that the results of these searches served as evidence at defendant's armed-robbery trials. Defense counsel objected to the admission of this evidence, arguing that it was "not relevant" and "stale," but the trial court overruled his objection.

Defendant's first two trials on the armed-robbery charge resulted in mistrials due to hung juries. A juror note from the first trial explained that the jury was divided and could not reach a verdict because "Mr. Stites was not able to positively ID Mr. Hughes" and "Mrs. Weber's testimony was not credible (according to some) and she was the only one to positively identify Mr. Hughes from that night." Similarly, a juror note

from the second trial listing the jurors' concerns about the evidence stated that "100% of Lisa W[eber's] testimony is untrue" and further noted the "d[i]screpancy of [defendant's] description by Ron Stites." At defendant's third trial, the prosecutor—while acknowledging that the jury might have "concerns" regarding Weber's credibility as a "disputed accomplice" to the armed robbery—argued during both opening and closing statements that the text messages and phone calls discovered on defendant's cell phone bolstered her testimony and established a link between defendant and the armed robbery. The jury at defendant's third trial convicted him of armed robbery, and he was sentenced to 25 to 60 years in prison.

Defendant appealed his conviction, arguing in relevant part that (a) the phone records should have been excluded from trial because the warrant supporting a search of the data only authorized a search for evidence of drug trafficking and not armed robbery and (b) trial counsel had been ineffective in failing to object to the data's admission under the Fourth Amendment. The Court of Appeals rejected these arguments and affirmed defendant's conviction. *People v Hughes*, unpublished per curiam opinion of the Court of Appeals, issued September 25, 2018 (Docket No. 338030). Defendant then sought leave to appeal in this Court, and we ordered oral argument on the application. *People v Hughes*, 505 Mich 855 (2019).[3]

II. STANDARD OF REVIEW

Questions of constitutional law are reviewed de novo. *People v Hall*, 499 Mich 446, 452; 884 NW2d 561 (2016). Defendant did not object to the admission of the evidence from his cell phone under the Fourth Amend-

[3] The Court asked the parties to address specifically:

ment, so this issue is unpreserved. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Unpreserved constitutional claims are reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).[4] Defendant does not argue that he is entitled to relief under this standard but rather argues that trial counsel was ineffective for failing to object under the Fourth Amendment. The standards for "plain error" review and ineffective assistance of counsel are distinct, and therefore, a defendant can obtain relief for ineffective assistance of counsel even if he or she cannot demonstrate plain error. See generally *People v Randolph*, 502 Mich 1; 917 NW2d 249 (2018).

III. ANALYSIS

A. FOURTH AMENDMENT

The Fourth Amendment of the United States Constitution provides:

> (1) whether the probable cause underlying the search warrant issued during the prior criminal investigation authorized police to obtain all of the defendant's cell phone data; (2) whether the defendant's reasonable expectation of privacy in his cell phone data was extinguished when the police obtained the cell phone data in a prior criminal investigation; (3) if not, whether the search of the cell phone data in the instant case was within the scope of the probable cause underlying the search warrant issued during the prior criminal investigation; (4) if not, whether the search of the cell phone data in the instant case was lawful; and (5) whether trial counsel was ineffective for failing to challenge the search of the cell phone data in the instant case on Fourth Amendment grounds. [*People v Hughes*, 505 Mich 855 (2019).]

[4] "To avoid forfeiture under the 'plain error' rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines*, 460 Mich at 763. If these requirements are satisfied, a court must exercise its discretion and should reverse only if the "forfeited error resulted in the conviction of an actually innocent defendant or

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [US Const, Am IV.][5]

As indicated by the Fourth Amendment's text, "reasonableness is always the touchstone of Fourth Amendment analysis." *Birchfield v North Dakota*, 579 US 438, 477; 136 S Ct 2160; 195 L Ed 2d 560 (2016). Thus, a search warrant is not always required before search-

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when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (quotation marks and brackets omitted).

[5] Similarly, the Michigan Constitution has provided:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. . . . [Const 1963, art 1, § 11.]

This provision was recently amended to explicitly protect "electronic data." See Graham, Michigan Radio, *Election 2020: Michigan Voters Approve Proposal 2, Protecting Electronic Data* <https://www.michiganradio.org/post/election-2020-michigan-voters-approve-proposal-2-protecting-electronic-data> (posted November 4, 2020) (accessed November 6, 2020) [https://perma.cc/54KC-6XJY]; 2020 Enrolled Senate Joint Resolution G. "In interpreting our Constitution, we are not bound by the United States Supreme Court's interpretation of the United States Constitution, even where the language is identical." *People v Goldston*, 470 Mich 523, 534; 682 NW2d 479 (2004). However, we have recognized that, at least before its recent amendment, the Michigan Constitution generally has afforded the same protections as those secured by the Fourth Amendment. *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011). This is true even though the Michigan Constitution since 1936 has contained an express limitation on the application of the exclusionary rule to violations of Article 1, Section 11. See *Goldston*, 470 Mich at 535 n 8. Defendant, however, has not argued that the Michigan Constitution affords greater protections than the Fourth Amendment in the present context, and therefore our analysis here does not address the recent amendment.

ing or seizing a citizen's personal effects. See, e.g., *Brigham City v Stuart*, 547 US 398, 403; 126 S Ct 1943; 164 L Ed 2d 650 (2006). However, there is a "strong preference for searches conducted pursuant to a warrant," *Illinois v Gates*, 462 US 213, 236; 103 S Ct 2317; 76 L Ed 2d 527 (1983), and the general rule is that officers must obtain a warrant for a search to be reasonable under the Fourth Amendment. See, e.g., *Riley*, 573 US at 382.

In *Riley v California*, the Supreme Court of the United States held that officers must generally obtain a warrant before conducting a search of cell-phone data. *Riley*, 573 US at 386. In so holding, the Court rejected, with respect to cell-phone data, application of the "search incident to a lawful arrest" exception to the warrant requirement, which generally allows police to search and seize items (including closed containers) located on a person during a lawful arrest. *Id*. at 382-386; *United States v Robinson*, 414 US 218, 234-236; 94 S Ct 467; 38 L Ed 2d 427 (1973). The Court reasoned that the justifications provided in *Chimel v California*, 395 US 752, 762-763; 89 S Ct 2034; 23 L Ed 2d 685 (1969), for this exception to the warrant requirement—potential harm to officers and the destruction of evidence—are less compelling in the context of digital data. *Riley*, 573 US at 386.

The Court also noted that a "search incident to a lawful arrest" is justified, at least in part, by "an arrestee's reduced privacy interests upon being taken into police custody." *Id*. at 391. However, it rejected the proposition that an arrestee loses all expectation of privacy, asserting that "when 'privacy-related concerns are weighty enough' a 'search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.' " *Id*. at 392, quoting *Maryland v*

King, 569 US 435, 463; 133 S Ct 1958; 186 L Ed 2d 1 (2013). The Court held that a warrant was required to search the contents of a cell phone seized during a lawful arrest notwithstanding this reduced expectation of privacy because "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person":

> [I]t is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate. Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.
>
> Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building.
>
> Mobile application software on a cell phone, or "apps," offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible on the phone indefinitely. There are over a million apps available in each of the two major app

> stores; the phrase "there's an app for that" is now part of the popular lexicon. The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life. [*Riley*, 573 US at 393, 395-396 (quotation marks and citations omitted).]

Riley makes clear that, in light of the extensive privacy interests at stake, general Fourth Amendment principles apply with equal force to the digital contents of a cell phone. See *id*. at 396-397 ("[A] cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.").

With this constitutional background in mind, the issue posed in this case is whether officers violated the Fourth Amendment when they searched defendant's cell-phone data in pursuit of evidence that defendant committed an armed robbery when the phone was seized pursuant to a warrant authorizing the search of this data for evidence of unrelated drug trafficking.[6]

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[6] Defendant also argues that the district court judge lacked probable cause to authorize the search and seizure of his cell-phone data for evidence of drug trafficking because the probable cause underlying the warrant failed to establish the required nexus between his alleged criminal activity and his cell phone. See *Warden, Maryland Penitentiary v Hayden*, 387 US 294, 307; 87 S Ct 1642; 18 L Ed 2d 782 (1967). He contends that Detective Gorman's opinion, grounded in his training and expertise, that drug traffickers commonly use cell phones to aid in their criminal enterprise was insufficient to provide probable cause that his cell phone would contain evidence of drug trafficking. Cf. *United States v Brown*, 828 F3d 375, 384 (CA 6, 2016) ("[I]f the affidavit fails to include facts that directly connect the residence with the suspected drug dealing activity, . . . it cannot be inferred that drugs will be found in the defendant's home—even if the defendant is a known drug dealer."). In light of the pervasiveness of modern cell-phone use recognized by *Riley*, defendant thus raises a not-unreasonable concern as to the issuance of

The prosecutor makes two principal arguments in support of the officer's search of defendant's cell-phone data for evidence of the armed robbery: (a) the warrant to seize and search defendant's cell-phone data for evidence of drug trafficking extinguished defendant's reasonable expectation of privacy in all of his data and therefore no search occurred under the Fourth Amendment and (b) the search for evidence of the armed robbery fell within the scope of the warrant issued to search for evidence of drug trafficking because the warrant authorized officers to review all of defendant's data for evidence of drug trafficking and Weber allegedly bought drugs from defendant before the armed robbery. We respectfully find neither argument persuasive.

1. EXPECTATION OF PRIVACY

The first issue is whether defendant lost the reasonable expectation of privacy in his cell-phone data when

a warrant to search and seize cell-phone data based solely on the nature of the crime alleged. See *Riley*, 573 US at 399 ("It would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone."). On the other hand, there is caselaw to suggest that allegations of drug trafficking are distinct from other alleged criminal activities because cell phones are well-recognized tools of the trade for drug traffickers. See, e.g., *United States v Hathorn*, 920 F3d 982, 985 (CA 5, 2019) ("Cell phones, computers, and other electronic devices are vital to the modern-day drug trade."). Because we conclude that the officer here violated the Fourth Amendment when he searched defendant's cell-phone data for evidence of armed robbery without having obtained a second warrant, we need not decide whether the warrant affidavit provided a sufficient nexus between defendant's drug trafficking and his cell phone. More specifically, we need not decide whether cell phones constitute tools of the trade for drug traffickers such that an affidavit that establishes probable cause of drug trafficking necessarily establishes the required nexus between a suspect's cell phone and the alleged criminal activity.

the cell phone was seized and the data was searched pursuant to the warrant issued in the drug-trafficking case. As this Court has explained:

> A search for Fourth Amendment purposes occurs only when "an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984). "If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant Clause." *Illinois v Andreas*, 463 US 765, 771; 103 S Ct 3319; 77 L Ed 2d 1003 (1983). If a person has no reasonable expectation of privacy in an object, a search of that object for purposes of the Fourth Amendment cannot occur. [*Minnesota v Dickerson*, 508 US 366, 375; 113 S Ct 2130; 124 L Ed 2d 334 (1993)]; *People v Brooks*, 405 Mich 225, 242; 274 NW2d 430 (1979). [*People v Custer*, 465 Mich 319, 333; 630 NW2d 870 (2001).]

It is clear that under *Riley*, citizens maintain a reasonable expectation of privacy in their cell-phone data and this reasonable expectation of privacy does not altogether dissipate merely because a phone is seized during a lawful arrest. The question here is whether the seizure and search of cell-phone data pursuant to a warrant extinguishes that otherwise reasonable expectation of privacy in the entirety of that seized data. We conclude that it does not. Rather, a warrant authorizing the police to seize and search cell-phone data allows officers to examine the seized data only to the extent reasonably consistent with the scope of the warrant.

The prosecutor argues the seizure of defendant's cell-phone data pursuant to the search warrant eliminated his reasonable expectation of privacy in that data, permitting officers to review all such data without implicating the Fourth Amendment. This argument "overlooks the important difference between searches and seizures." *Horton v California*, 496 US

128, 133; 110 S Ct 2301, 2306; 110 L Ed 2d 112 (1990). "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." *Id*. The authority to seize an item does not necessarily eliminate one's expectation of privacy in that item and therefore allow the police to search that item without limitation. See *Jacobsen*, 466 US at 114 ("Even when government agents may lawfully seize . . . a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package."); *United States v Chadwick*, 433 US 1, 13 n 8; 97 S Ct 2476; 53 L Ed 2d 538 (1977) ("[T]he [lawful] seizure [of respondents' footlocker] did not diminish respondents' legitimate expectation that the footlocker's contents would remain private."); *Custer*, 465 Mich at 342 ("[W]e do not conclude that, once the police lawfully seize an object from an individual, that individual's reasonable expectation of privacy in that object is altogether lost.") (emphasis omitted). This distinction was also implicitly recognized in *Riley* when the Court held that officers could *seize* a cell phone on a person incident to a lawful arrest but they could not *search* the contents of that phone without a warrant. *Riley*, 573 US at 388, 401. While it may have been reasonable for officers to seize all of defendant's cell-phone data pursuant to the warrant to prevent the destruction of evidence and to isolate incriminating material from nonincriminating material, it was not necessarily reasonable for police to review that data without limitation.

The prosecutor's reliance on cases holding that a suspect loses all expectation of privacy in items seized from his person during a lawful arrest is inapt. The prosecutor cites *United States v Edwards*, 415 US 800, 801-802, 806; 94 S Ct 1234; 39 L Ed 2d 771 (1974), in

which the Supreme Court held that the search and seizure of a suspect's clothes the morning after his arrest was reasonable. The Court recognized that officers could have searched and seized the clothes the defendant wore at the time of his arrest immediately after the arrest and held that a reasonable delay in doing so did not render the search and seizure unreasonable. *Id*. at 805. The Court further commented, "[I]t is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest." *Id*. at 806. Relying on *Edwards*, some courts have held that an arrestee lacks any reasonable expectation of privacy in items seized during a lawful arrest and therefore a later examination of those items, even for evidence of a crime other than the crime of arrest, is not a search under the Fourth Amendment. See, e.g., *Wallace v State*, 373 Md 69, 90-94; 816 A2d 883 (2003).

These cases are inapplicable here, as *Riley* distinguished cell-phone data from other items subject to a search incident to a lawful arrest in terms of the privacy interests at stake. See *Riley*, 573 US at 393. *Riley* thus stands for the proposition that seizure of a phone and its digital contents—unlike a seizure of other items on a person—does not entirely extinguish one's right to privacy in that data. Moreover, *Edwards* itself did not hold that the mere fact an item was lawfully seized eliminated a suspect's reasonable expectation of privacy; rather, it recognized that a lawful search of an item on an arrestee's person immediately after arrest was *already* reasonable under the exception to the warrant requirement for searches incident to a lawful arrest and that a reasonable delay in conducting that permissible search did not render the search unreasonable. *Edwards*, 415 US at 805. In

other words, the police "did no more [at the police station] than they were entitled to do incident to the usual custodial arrest and incarceration." *Id*. Thus, assuming that this caselaw is pertinent in the instant context, it reinforces our conclusion that the later review of defendant's cell-phone data for evidence of an armed robbery was only lawful if this review was permissible in the first instance, i.e., if it was within the scope of the warrant issued to search for evidence of drug trafficking. See *State v Betterley*, 191 Wis 2d 406, 418; 529 NW2d 216 (1995) (holding that, based on *Edwards*, "the permissible extent of the second look [at items seized by police incident to a lawful arrest] is defined by what the police could have lawfully done without violating the defendant's reasonable expectations of privacy during the first search, even if they did not do it at that time").

The prosecutor also argues that because the search warrant authorized officers to search defendant's cell-phone data for evidence of drug trafficking, defendant no longer had a reasonable expectation of privacy in all of his data. Both the prosecutor and the Court of Appeals relied on *United States v Jacobsen* for the proposition that defendant lost all expectation of privacy in his cell-phone data when the search warrant authorized a search of that data for drug trafficking. In *Jacobsen*, the employees of a private freight carrier opened a damaged package and discovered a long tube. *Jacobsen*, 466 US at 111. The employees cut open the tube and discovered plastic bags filled with a white powdery substance. *Id*. The employees summoned a federal agent who, without obtaining a warrant, removed the bags from the tube, took a small amount of the powder out of the bags, and tested the powder to determine whether it was cocaine. *Id*. at 111-112. The Court noted that a private party's search of an item

does not implicate the Fourth Amendment and held that "[t]he agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment." *Id*. at 119-120. The Court explained:

> Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information. . . . The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated. [*Id*. at 117.]

Accordingly, the Court held that "[t]he additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search." *Id*. at 115. The Court concluded that the agent's removal of the plastic bags from the tube and his visual inspection of the contents of the bags "infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment" because this action did not enable the officer to learn anything that had not previously been uncovered during the private search. *Id*. at 120.[7]

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[7] *Jacobsen* proceeded to consider aspects of the officer's actions that exceeded the scope of the private search: the seizure of the plastic bags containing white powder and the testing of the white powder to determine whether it was cocaine. The Court held that the removal of the plastic bags from the box constituted a seizure because the officer had asserted "dominion and control over the package and its contents," *id*. at 120, but that the seizure nonetheless was reasonable under the Fourth Amendment because "it was apparent that the tube and plastic bags contained contraband and little else." *Id*. at 121-122. It further held that testing the powder did not constitute a search because the test "merely disclose[d] whether or not [the] particular substance [was] cocaine." *Id*. at 123. However, the Court noted that the test of the powder involved destruction of some of that powder and that this deprivation of the defendant's possessory interest constituted a seizure under the Fourth Amendment. *Id*. at 124-125. The Court concluded that this

Jacobsen, in our judgment, does not advance the prosecutor's argument. *Jacobsen* addressed the degree to which a private party's search of otherwise private items permits the state to review those items. But there was no private search here. While *Jacobsen* is consistent with the general proposition that one lacks a legitimate expectation of privacy in items that are exposed publicly, see, e.g., *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967), it says little about the extent to which the search of an item pursuant to a search warrant eliminates a citizen's legitimate expectation of privacy.[8] The prosecutor cites no caselaw indicating that the issuance of a warrant eliminates entirely one's reasonable expectation of privacy in the place or property to be searched.[9] To the contrary, it is well established that a search warrant allows the state to examine property only to the extent authorized by the warrant. See, e.g., *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*,

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seizure was reasonable because it had a *de minimis* impact on defendant's property interest and that "the suspicious nature of the material made it virtually certain that the substance tested was in fact contraband." *Id*. at 125.

[8] Moreover, the other searches and seizures in *Jacobsen*—specifically, the officer's reexamination of the contents of the package and seizure of the plastic bags, as well as the field test to determine whether the seized substance was cocaine—have no analogue in the instant case. The search here did not merely duplicate the previous search, and there was no simple test performed to determine whether the data confirmed illegal activity.

[9] Indeed, the prosecutor cites no caselaw indicating that the issuance of a search warrant eliminates *at all* one's reasonable expectation of privacy in the items to be searched rather than merely permitting officers *temporarily* to compromise that reasonable expectation of privacy. We need not resolve this semantic difference here because, regardless of how it is framed, the result would be the same—a warrant only permits police to review an item or area to the extent that such review lies within the scope of the warrant.

403 US 388, 394 n 7; 91 S Ct 1999; 29 L Ed 2d 619 (1971) ("[T]he Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant."). "If the scope of the search exceeds that permitted by the terms of a validly issued warrant . . . , the subsequent seizure is unconstitutional without more." *Horton*, 496 US at 140. Thus, a search conducted pursuant to a search warrant—unlike a private search—is necessarily limited to the scope of the warrant.

To the extent that *Jacobsen* is relevant in the present context, its reasoning further reinforces our conclusion that the issuance of a search warrant does not eliminate entirely one's reasonable expectation of privacy but only allows a search consistent with the scope of the warrant. As the United States Court of Appeals for the Sixth Circuit explained in applying *Jacobsen* to the search of a laptop, "[f]or the review of [the defendant's] laptop to be permissible, *Jacobsen* instructs us that [the officer's] search had to stay within the scope of [the] initial private search." *United States v Lichtenberger*, 786 F3d 478, 488 (CA 6, 2015). The court therefore concluded that the officer's search exceeded the scope of the warrant because there was "no virtual certainty that [the officer's] review [of the defendant's digital data] was limited to the photographs from" the earlier private search. *Id.*; see also *United States v Sparks*, 806 F3d 1323, 1336 (CA 11, 2015) ("While [the] private search of the cell phone might have removed certain information from the Fourth Amendment's protections, it did not expose every part of the information contained in the cell phone."), overruled on other grounds by *United States v Ross*, 963 F3d 1056 (CA 11, 2020); *State v Terrell*, 372 NC 657, 669, 670; 831 SE2d 17 (2019) ("We cannot agree that the mere opening of a thumb drive and the

viewing of as little as one file automatically renders the entirety of the device's contents 'now nonprivate information' no longer [to be] afforded any protection by the Fourth Amendment. . . . [T]he extent to which an individual's expectation of privacy in the contents of an electronic storage device is frustrated depends upon the extent of the private search and the nature of the device and its contents.").[10] As applied to the instant situation, under *Jacobsen*, the scope of the officer's search of defendant's data for evidence of armed robbery was limited to the scope of the initial lawful intrusion, i.e., the breadth of the warrant in the drug-trafficking case. Accordingly, *Jacobsen* does not support the proposition that defendant lost entirely his expectation of privacy in all of his cell-phone data once the cell phone was seized and the data searched pursuant to a warrant.[11]

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[10] At least two federal courts of appeals have held that under *Jacobsen*, once there is a private search of any part of a suspect's digital data, police officers are permitted to review all the data on that device without a warrant, comparing digital data to a closed container that when opened loses all expectation of privacy. *United States v Runyan*, 275 F3d 449, 464 (CA 5, 2001); *Rann v Atchison*, 689 F3d 832, 836-837 (CA 7, 2012). For the reasons stated below, we find unpersuasive, in light of the United States Supreme Court's subsequent decision in *Riley*, the analogy of a digital device to a closed container and thus find these cases unpersuasive.

[11] While not cited by the prosecutor, we recognize that the Minnesota Court of Appeals in *State v Johnson*, 831 NW2d 917, 924 (Minn App, 2013), reached the opposite conclusion to that we reach here, holding that "the execution of the warrant 'frustrated' and terminated appellant's expectation of privacy in the hard drive and the digital contents identified in the warrant." *Johnson* relied on *Illinois v Andreas*, in which the United States Supreme Court held that "the subsequent reopening of [a] container is not a 'search' within the intendment of the Fourth Amendment" and that "absent a substantial likelihood that the contents have been changed, there is no legitimate expectation of privacy in the contents of a container previously opened under lawful authority." *Andreas*, 463 US at 772-773. However, *Andreas*'s holding regarding the

In summary, the search and seizure of defendant's cell-phone data pursuant to a warrant in the drug-trafficking case did not altogether eliminate his reasonable expectation of privacy in that data. Rather, the police were permitted to seize and search that data, but only to the extent authorized by the warrant. Any further review of the data beyond the scope of that warrant constitutes a search that is presumptively invalid under the Fourth Amendment, absent some exception to that amendment's warrant requirement. See *Horton*, 496 US at 140. The remaining question is whether the review of defendant's data for evidence of an armed robbery fell within the scope of the warrant issued in the drug-trafficking case.

2. SCOPE OF THE WARRANT

This Court has yet to specifically address the Fourth Amendment requirements for a search of digital data

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opening of a closed container, as with those holdings cited in note 10 of this opinion, is also inapplicable to searches of cell-phone data in light of *Riley*'s subsequent recognition that privacy interests in digital data may greatly exceed those with regard to more mundane physical objects. *Riley*, 573 US at 393, 397 (holding that comparing a search of physical objects to a search of digital data is "like saying a ride on horseback is materially indistinguishable from a flight to the moon," and noting that "[t]reating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained"). See also Kerr, *Searches and Seizures in a Digital World*, 119 Harv L Rev 531, 555 (2005) (arguing that "[a] computer is like a container that stores thousands of individual containers"). Numerous courts since *Riley* have similarly interpreted that decision, as we believe it must be interpreted, as rejecting an analogy between searches of digital data and searches of closed containers. See, e.g., *Lichtenberger*, 786 F3d at 487 ("[S]earches of physical spaces and the items they contain differ in significant ways from searches of complex electronic devices under the Fourth Amendment."); *United States v Jenkins*, 850 F3d 912, 920 n 3 (CA 7, 2017); *Terrell*, 372 NC at 669; *United States v Lara*, 815 F3d 605, 610 (CA 9, 2016). Accordingly, we respectfully find *Johnson* to be unpersuasive and decline to adopt its reasoning in light of *Riley*.

from a cell phone authorized by a warrant. In considering this issue, we are guided by two fundamental sources of relevant law: (a) the Fourth Amendment's "particularity" requirement, which limits an officer's discretion when conducting a search pursuant to a warrant and (b) *Riley*'s recognition of the extensive privacy interests in cellular data. In light of these legal predicates, we conclude that as with any other search conducted pursuant to a warrant, a search of digital data from a cell phone must be "reasonably directed at uncovering" evidence of the criminal activity alleged in the warrant and that any search that is not so directed but is directed instead toward finding evidence of *other* and *unrelated* criminal activity is beyond the scope of the warrant. *United States v Loera*, 923 F3d 907, 917, 922 (CA 10, 2019); see also *Horton*, 496 US at 140-141.

The Fourth Amendment requires that search warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." US Const, Am IV. A search warrant thus must state with particularity not only the items to be searched and seized, but also the alleged criminal activity justifying the warrant. See *Berger v State of New York*, 388 US 41, 55-56; 87 S Ct 1873; 18 L Ed 2d 1040 (1967); *Andresen v Maryland*, 427 US 463, 479-480; 96 S Ct 2737; 49 L Ed 2d 627 (1976); *United States v Galpin*, 720 F3d 436, 445 (CA 2, 2013) ("[A] warrant must identify the specific offense for which the police have established probable cause."). That is, some context must be supplied by the affidavit and warrant that connects the particularized descriptions of the venue to be searched and the objects to be seized with the criminal behavior that is suspected, for even particularized descriptions will not always speak for themselves in evidencing criminality. See *Hayden*, 387 US at 307 ("There must, of course, be a nexus . . . between the item to be seized and criminal

behavior. Thus . . . , probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required.").

> The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. [*Maryland v Garrison*, 480 US 79, 84; 107 S Ct 1013; 94 L Ed 2d 72 (1987); see also, e.g., *Horton,* 496 US at 139.]

While "officers do not have to stop executing a search warrant when they run across evidence outside the warrant's scope, they must nevertheless reasonably direct their search toward evidence specified in the warrant." *Loera*, 923 F3d at 920; see also *United States v Ramirez*, 523 US 65, 71; 118 S Ct 992; 140 L Ed 2d 191 (1998) ("The general touchstone of reasonableness . . . governs the method of execution of the warrant."). For example, a warrant authorizing police to search a home for evidence of a stolen television set would not permit officers to search desk drawers for evidence of drug possession. See *Horton*, 496 US at 140-141.[12] This particularity requirement defines the

[12] As noted by *Riley*, a home and a cell phone are similarly situated, at least to the extent that a search of either may result in a significant intrusion into an individual's private affairs. *Riley*, 573 US at 396-397 ("In 1926, [Judge] Hand observed . . . that it is 'a totally different thing to search a man's pockets and use against him what they contain, [than to] ransack[] his house for everything which may incriminate him.' If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell-phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains

permissible scope of a search pursuant to a warrant, and any deviation from that scope is a warrantless search that is unreasonable absent an exception to the warrant requirement. *Id*. at 140. More specifically, in connection with the present case the state exceeds the scope of a warrant where a search is not reasonably directed at uncovering evidence related to the criminal activity identified in the warrant, but rather is designed to uncover evidence of criminal activity *not* identified in the warrant. See, e.g., *United States v Carey*, 172 F3d 1268, 1272-1273 (CA 10, 1999); *Loera*, 923 F3d at 922; *United States v Nasher-Alneam*, 399 F Supp 3d 579, 593-594 (SD W Va, 2019).

In this regard, we first address the prosecutor's argument that the search for evidence of armed robbery fell within the scope of the warrant because the warrant authorized officers to review the entire 600-page report containing the apparent totality of defendant's cell-phone data, as any segment of this data may have contained evidence of drug trafficking and digital data can be manipulated to hide incriminating content.[13] We are cognizant that a criminal suspect will

in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.") (citation omitted).

[13] Implicit in this argument is the assumption that an officer's subjective intention to look for evidence related to a crime not identified in the warrant is immaterial so long as the search is objectively authorized by the scope of the warrant. In other words, the prosecutor's argument seems premised on the proposition that so long as it was objectively reasonable to review *all* of defendant's data for evidence of drug trafficking, it is irrelevant that the genuine purpose of the search was to secure evidence of an armed robbery. The facts that the prosecutor in the armed-robbery case asked Detective Wagrowski—a month or so after the initial extraction of the data—to conduct a further search of defendant's cell-phone data using search terms related to the armed robbery and that this evidence was eventually admitted in the armed-robbery trials suggests that this search was not designed to

not always store or organize incriminating information on his or her digital devices in the most obvious way or in a manner that facilitates the location of that information. See, e.g., *United States v Mann*, 592 F3d 779, 782 (CA 7, 2010) ("Unlike a physical object that can be immediately identified as responsive to the warrant or not, computer files may be manipulated to hide their true contents."). We do not hold or imply here that officers in the execution of a search of digital data must review only digital content that a suspect deigns to identify as pertaining to criminal activity. See *United States v Burgess*, 576 F3d 1078, 1093-1094 (CA 10, 2009). Such an approach would undermine legitimate law enforcement practices and unduly restrict officers well beyond the dictates of the Fourth Amendment.

However, at the same time, we decline to adopt a rule that it is always reasonable for an officer to review the entirety of the digital data seized pursuant to a warrant on the basis of the mere possibility that evidence may conceivably be found anywhere on the device or that evidence might be concealed, mislabeled, or manipulated. Such a per se rule would effectively

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obtain evidence related to drug trafficking, but rather to bolster the prosecutor's case in the armed-robbery trial. Some courts have held that an officer's subjective intention to find evidence of a crime not identified in the warrant constitutes a relevant factor in determining whether a search of digital data falls outside the scope of the warrant, while others have held that this is a purely objective inquiry. Compare *Loera*, 923 F3d at 919 & n 3 (holding that the subjective intention of the officer to discern evidence of a crime not identified in the warrant is a relevant factor in determining whether the search exceeded the scope of the warrant), with *United States v Williams*, 592 F3d 511, 522 (CA 4, 2010) ("[T]he scope of a search conducted pursuant to a warrant is defined objectively by the terms of the warrant and the evidence sought, not by the subjective motivations of an officer.") (emphasis omitted). Because the search here was objectively beyond the scope of the warrant, we need not decide whether an officer's subjective intention is a relevant consideration.

nullify the particularity requirement of the Fourth Amendment in the context of cell-phone data and rehabilitate an impermissible *general warrant* that "would in effect give 'police officers unbridled discretion to rummage at will among a person's private effects.' " *Riley*, 573 US at 399, quoting *Arizona v Gant*, 556 US 332, 345; 129 S Ct 1710; 173 L Ed 2d 485 (2009); see also *People v Herrera*, 357 P3d 1227, 1228, 1233; 2015 CO 60 (Colo, 2015) (holding that allowing a search of an entire device for evidence of a crime based upon the possibility that evidence of the crime could be found anywhere on the phone and that the incriminating data could be hidden or manipulated would "render the warrant a general warrant in violation of the Fourth Amendment's particularity requirement"). This result would be especially problematic in light of *Riley*'s observations concerning the sheer amount of information contained in cellular data and the highly personal character of much of that information. *Riley*, 573 US at 394-396; see also *United States v Otero*, 563 F3d 1127, 1132 (CA 10, 2009) ("The modern development of the personal computer and its ability to store and intermingle a huge array of one's personal papers in a single place increases law enforcement's ability to conduct a wide-ranging search into a person's private affairs, and accordingly makes the particularity requirement that much more important."); *Galpin*, 720 F3d at 447 ("There is . . . a serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant. This threat demands a heightened sensitivity to the particularity requirement in the context of digital searches.") (quotation marks and citation omitted). Accordingly, an officer's search of seized digital data, as with any other search conducted pursuant to a warrant, must be reasonably directed at

finding evidence of the criminal activity identified within the warrant. *Loera*, 923 F3d at 921-922.

Specifically in the digital context, this requires that courts and officers consider "whether the forensic steps of the search process were reasonably directed at uncovering the evidence specified in the search warrant." *Id*. at 917. Whether a search of seized digital data that uncovers evidence of criminal activity not identified in the warrant was reasonably directed at finding evidence relating to the criminal activity alleged in the warrant turns on a number of considerations, including: (a) the nature of the criminal activity alleged and the type of digital data likely to contain evidence relevant to the alleged activity;[14] (b) the evidence provided in the warrant affidavit for establishing probable cause that the alleged criminal acts have occurred;[15] (c) whether nonresponsive files are

[14] For example, in the absence of contrary case-specific information, it is unlikely that evidence relating to tax fraud would be discovered by reviewing the images on a digital device. See *Carey*, 172 F3d at 1275 n 8 ("Where a search warrant seeks only financial records, law enforcement officers should not be allowed to search through telephone lists or word processing files absent a showing of some reason to believe that these files contain the financial records sought.") (quotation marks and citation omitted); Gershowitz, *The Post-Riley Search Warrant: Search Protocols on Particularity in Cell Phone Searches*, 69 Vanderbilt L Rev 585, 630-638 (2016) (arguing that criminals engaged in simpler types of street crimes, such as drug trafficking, are more likely to use cell phones and less likely to "mislabel . . . or bury evidence" than criminals engaged in crimes like child pornography and financial misconduct and therefore searches of cell phones for evidence of these simpler crimes should be more limited in scope than searches of computers for evidence of child pornography or financial misconduct).

[15] "The fact that [a warrant] application adequately described the 'things to be seized' does not save [a] warrant from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." *Groh v Ramirez*, 540 US 551, 557; 124 S Ct 1284; 157 L Ed 2d 1068 (2004) (emphasis omitted).

segregated from responsive files on the device;[16] (d) the timing of the search in relation to the issuance of the warrant and the trial for the alleged criminal acts;[17]

However, the particularity requirement of the Fourth Amendment can be satisfied by an affidavit that the warrant incorporates by reference. See, e.g., *United States v Hamilton*, 591 F3d 1017, 1025 (CA 8, 2010). "[M]ost Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Groh*, 540 US at 557-558. The prosecutor argues that the warrant here incorporated the warrant affidavit by reference. The warrant stated, "THE ATTACHED AFFIDAVIT, having been sworn to by the affiant, Detective Matthew Gorman, before me this day, based upon facts stated therein, probable cause having been found in the name of the people of the State of Michigan, I command that you enter the following described places and vehicles[.]" The warrant affidavit in this case accompanied the warrant, but it is unclear whether the warrant used "appropriate words of incorporation." We need not resolve this issue here except to say that regardless of whether a warrant incorporates the affidavit by reference, consideration of the evidence provided in the warrant affidavit for establishing probable cause is relevant to whether a search of digital data was reasonably directed at discovering evidence of the crime alleged in the warrant. Cf. *State v Goynes*, 303 Neb 129, 142; 927 NW2d 346 (2019) ("[A] warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search."); Dennis, *Regulating Search Warrant Execution Procedure for Stored Electronic Communications*, 86 Fordham L Rev 2993, 3012 (2018) (noting that it is relevant to a search's reasonableness "whether the government subjected the materials to subsequent searches based on new information and theories developed about the case. In these instances, courts have expressed concern about continued searches for evidence under new theories of the case or more expansive areas not initially included in the warrant"), citing *United States v Wey*, 256 F Supp 3d 355, 406 (SDNY, 2017); *People v Thompson*, 28 NYS3d 237, 255 (2016).

[16] See *Loera*, 923 F3d at 919.

[17] See *Nasher-Alneam*, 399 F Supp 3d 579 (holding that a second search of digital data for evidence of fraud 15 months after the records were seized to be searched for evidence of distribution of a controlled substance and after the defendant had already gone to trial once exceeded the scope of the warrant); *United States v Metter*, 860 F Supp 2d 205, 209, 211, 215 (EDNY, 2012) (holding that a fifteen-month delay in the government's review of seized devices violated the Fourth

(e) the technology available to allow officers to sort data likely to contain evidence related to the criminal activity alleged in the warrant from data not likely to contain such evidence without viewing the contents of the unresponsive data and the limitations of this technology;[18] (f) the nature of the digital device being searched;[19] (g) the type and breadth of the search

Amendment); *United States v Keszthelyi*, 308 F3d 557, 568-569 (CA 6, 2002) ("[A] single search warrant may authorize more than one entry into the premises identified in the warrant, as long as the second entry is a reasonable continuation of the original search;" "the subsequent entry must indeed be a continuation of the original search, and not a new and separate search."). But see *United States v Johnston*, 789 F3d 934, 941-943 (CA 9, 2015) (holding that a search of seized data five years after the initial seizure was reasonable where the search was for evidence of the same criminal conduct alleged in the warrant).

[18] "[L]aw enforcement officers can generally employ several methods to avoid searching files of the type not identified in the warrant: observing files types and titles listed on the directory, doing a key word search for relevant terms, or reading portions of each file stored in the memory." *Carey*, 172 F3d at 1276; see also Baron-Evans, *When the Government Seizes and Searches Your Client's Computer*, 18 No. 7 White-Collar Crime Rep 2 (2004); 2004 WL 635186 at 7 ("Various technical means are available to enable the government to confine the search to the scope of probable cause, including searching by filename, directory or subdirectory; the name of the sender or recipient of e-mail; specific key words or phrases; particular types of files as indicated by filename extensions; and/or file date and time."). The availability of such methods does not necessarily foreclose a more general search of the data. See Perldeiner, *Total Recall: Computers and the Warrant Clause*, 49 Conn L Rev 1757, 1777-1779 (2017) (noting four situations in which searching for and isolating data is difficult: (a) when metadata is deleted, (b) when data is encrypted, (c) when data is stored off-site, and (d) when searching for images); see also *Rosa v Commonwealth*, 48 Va App 93, 101; 628 SE2d 92 (2006) ("[F]ile extensions may be misleading and may not give accurate descriptions of the material contained in the file."). However, the use and availability of such technology is relevant to whether a more general search of the data is reasonable.

[19] See Note, *What Comes After "Get a Warrant": Balancing Particularity and Practicality in Mobile Device Search Warrants Post*-Riley, 101 Cornell L Rev 187, 204-208 (2015) (arguing that a reasonable search method of cell-phone data will differ from a reasonable search of

protocol employed;[20] (h) whether there are any indications that the data has been concealed, mislabeled, or manipulated to hide evidence relevant to the criminal activity alleged in the warrant, such as when metadata is deleted or when data is encrypted;[21] and (i) whether, after reviewing a certain number of a particular type of data, it becomes clear that certain types of files are not likely to contain evidence related to the criminal activity alleged in the warrant.[22]

To be clear, a court will generally need to engage in such a "totality-of-circumstances" analysis to determine whether a search of digital data was reasonably directed toward finding evidence of the criminal activities alleged in the warrant only if, while searching digital data pursuant to a warrant for one crime, officers discover evidence of a different crime without

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computer data because "(1) there are different forensic steps involved with mobile device searches compared to computer searches and (2) mobile phones are functionally different from computers").

[20] "To undertake any meaningful assessment of the government's search techniques [of digital data], [a court] would need to understand what protocols the government used, what alternatives might have reasonably existed, and why the latter rather than the former might have been more appropriate." *United States v Christie*, 717 F3d 1156, 1167 (CA 10, 2013). See also *Loera*, 923 F3d at 920.

[21] *Total Recall*, 49 Conn L Rev at 1777-1779; see also *Herrera*, 357 P3d at 1233 (concluding that the "abstract possibility" that files could be hidden or manipulated is insufficient to justify searching the entire phone and noting that the prosecutor "did not present a shred of evidence to suggest, nor did [he] attempt to argue," that the defendant in that case hid or manipulated his files).

[22] See *Carey*, 172 F3d at 1274 ("[E]ach of the files containing pornographic material was labeled 'JPG' and most featured a sexually suggestive title. Certainly after opening the first file and seeing an image of child pornography, the searching officer was aware—in advance of opening the remaining files—what the label meant. When he opened the subsequent files, he knew he was not going to find items related to drug activity as specified in the warrant . . . .").

having obtained a second warrant and a prosecutor seeks to use that evidence at a subsequent criminal prosecution. Courts should also keep in mind that in the process of ferreting out incriminating digital data it is almost inevitable that officers will have to review *some* data that is unrelated to the criminal activity alleged in the authorizing warrant. *United States v Richards*, 659 F3d 527, 539 (CA 6, 2011) ("[O]n occasion in the course of a reasonable search [of digital data], investigating officers may examine, 'at least cursorily,' some 'innocuous documents . . . in order to determine whether they are, in fact, among those papers authorized to be seized.' "), quoting *Andresen*, 427 US at 482 n 11. The fact that some data reviewed turns out to be related to criminal activity not alleged in the authorizing warrant does not render that search per se outside the scope of the warrant. So long as it is reasonable under all of the circumstances for officers to believe that a particular piece of data will contain evidence relating to the criminal activity identified in the warrant, officers may review that data, even if that data ultimately provides evidence of criminal activity not identified in the warrant.

In this case, the warrant authorized officers to search defendant's digital data for evidence of drug trafficking, or more specifically, for evidence of "any records pertaining to the receipt, possession and sale or distribution of controlled substances including but not limited to documents, video tapes, computer disks, computer hard drives, and computer peripherals." The affidavit did not even mention Weber or the armed robbery of Stites, let alone seek to establish probable cause that defendant committed armed robbery. As a result, the warrant did not authorize a search of defendant's data for evidence related to the armed robbery.

A month or so after the initial extraction of the data, the prosecutor in the armed-robbery case asked Detective Wagrowski to use Cellebrite to conduct a focused review of the seized data for (a) contacts with phone numbers of Weber and Stites and (b) data containing the words "Lisa," "killer" (and variations thereof), and "Kristopher." The data obtained from this review was admitted into evidence against defendant at his trials for armed robbery.

There was nothing in the warrant or affidavit to suggest that either Weber or Stites was implicated in defendant's drug trafficking or that reviewing data with Weber's name or contacts with her phone number would lead to evidence regarding defendant's drug trafficking. Similarly, there was nothing in the warrant or affidavit to suggest that reviewing defendant's data for the word "killer" or defendant's name would uncover evidence of drug trafficking. Furthermore, there was no evidence that defendant hid or manipulated his files to conceal evidence related to his drug trafficking or that a review of all defendant's data to discover evidence of drug trafficking was reasonable in light of the use and availability of Cellebrite to isolate relevant data. Therefore, this review was not reasonably directed toward obtaining evidence of drug trafficking and exceeded the scope of the warrant.

The prosecutor argues that this review was not beyond the scope of the warrant because defendant allegedly was selling drugs to Weber around the time of the robbery. The prosecutor reasons that defendant's contacts with Weber were rooted in the same illicit activity the warrant had targeted, i.e., drug trafficking. However, any connection between Weber and defendant's drug trafficking was not derived from the warrant or its supportive affidavit. Rather, probable cause

that defendant was dealing drugs was based on the tip from a confidential informant that defendant and Pankey were dealing drugs. Therefore, a keyword search of the data for drug references, drug-related items, or contacts with Pankey would certainly have been reasonably directed at finding evidence of drug trafficking and would have fallen well within the scope of the warrant.[23] But there was no indication in the warrant or its affidavit that the review conducted would uncover evidence of defendant's drug trafficking.[24] Rather, the keyword searches were directed toward obtaining evidence that defendant committed an armed robbery based on evidence obtained while

[23] This list is merely illustrative and is not intended to identify *all* of the potential search terms that would have fallen within the scope of the warrant. Nor is this list intended to imply that officers were only permitted to review defendant's data using search terms rather than employing different search protocols or manually searching the data using other criteria that were reasonably directed in light of the warrant and its affidavit toward finding evidence related to drug trafficking.

[24] We do not mean to hold or imply that police officers are categorically precluded from reviewing cell-phone contacts with a particular person merely because that person has not been explicitly identified in the warrant or supportive affidavit. The evidence set forth for establishing probable cause is but one consideration in determining whether a search of cell-phone data was "reasonably directed" at uncovering evidence related to the crime alleged in the warrant. Therefore, other considerations may well support an officer's review of contacts despite the absence of an express reference to that person in the warrant or affidavit. For example, if, while searching cell-phone data for specific drug-related terms or references used by the defendant, an officer discovers those terms or references within cell-phone contacts, these may of course be reviewed. Further, if an officer were to uncover evidence that digital files containing contacts with a particular person had been hidden, manipulated, or encoded in a manner intended to conceal the contacts, the officer might also be justified in suspecting that there was evidence of criminal activity within those contacts regardless of whether that person was referred to in the warrant or affidavit. However, we discern no such considerations in the instant case that would justify the searches of Weber or Stites.

investigating that armed robbery. Because the warrant did not authorize a search of defendant's data for evidence of armed robbery, these searches fell beyond the scope of the warrant.

To summarize, the officer's review of defendant's cell-phone data for evidence relating to the armed robbery was beyond the scope of the warrant because there was no indication in either the warrant or the affidavit that this review, conducted well after the initial extraction of the data, would uncover evidence of drug trafficking. Additionally, a review of the entirety of defendant's data was unreasonable in light of the lack of evidence that data concerning the drug activity was somehow hidden or manipulated and in light of the officer's ability to conduct a more focused review of the data using Cellebrite to isolate and separate responsive and unresponsive materials. This is not a circumstance in which the officer was reasonably reviewing data for evidence of drug trafficking and happened to view data implicating defendant in other criminal activity. If such were the case and the data's "incriminating character [was] immediately apparent," the plain-view exception would likely apply and permit the state to use the evidence of criminal activity not alleged in the warrant at a subsequent criminal prosecution. *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996), citing *Horton*, 496 US 128.[25] Rather, this review was directed exclusively

[25] The exception is not implicated in this case because "an essential predicate of the plain view doctrine is that the initial intrusion not violate the Fourth Amendment" and the officer's search here *did* violate the Fourth Amendment because it was not reasonably directed at uncovering evidence of the criminal activities alleged in the warrant. *Galpin*, 720 F3d at 451 (quotation marks omitted); see also *United States v Gurczynski*, 76 MJ 381, 388 (2017) ("A prerequisite for the application of the plain view doctrine is that the law enforcement

toward finding evidence related to the armed-robbery charge, and it was grounded in information obtained during investigation into *that* crime. Accordingly, this review constituted a warrantless search that was unlawful under the Fourth Amendment.[26]

B. INEFFECTIVE ASSISTANCE OF COUNSEL

The final issue is whether trial counsel was ineffective when he failed to object under the Fourth Amend-

officers must have been conducting a lawful search when they stumbled upon evidence in plain view. As noted, the officers in this case were not [doing so] because the execution of the warrant was constitutionally unreasonable.").

[26] Defendant contends the warrant was overly broad because it allowed officers to search his cell phone for evidence of drug trafficking without limitation. In light of the privacy interests implicated in digital data, some magistrates have been placing more specific limitations upon a warrant to search digital data, such as "by (1) instituting time limits on completion [of the search], (2) mandating return or deletion of non-responsive materials, or (3) enumerating specific search protocol to be utilized during execution." *Regulating Search Warrant Execution*, 86 Fordham L Rev at 3001-3011; see also *In re Search of 3817 W West End, First Floor Chicago, Illinois 60621*, 321 F Supp 2d 953, 961 (ND Ill, 2004) (requiring the government to provide a specific search protocol of digital data to satisfy the particularity requirement of the Fourth Amendment). There is much debate regarding the propriety and constitutionality of *ex ante* limitations on the manner in which officers may search digital data for evidence. Compare *The Post-Riley Search Warrant*, 69 Vanderbilt L Rev at 638 ("Imposing restrictions on search warrants—in the form of ex ante search protocols and geographic restrictions on the applications police can search—is the best way to ensure that cell phone warrants do not become the reviled general warrants the Fourth Amendment's particularity requirement was designed to prevent."), with Kerr, Abstract, *Ex Ante Regulation of Computer Search and Seizure*, 96 Va L Rev 1241, 1242, 1265, 1267-1268 (2010) ("[E]x ante restrictions on the execution of computer warrants are constitutionally unauthorized and unwise."), citing *United States v Grubbs*, 547 US 90, 98; 126 S Ct 1494; 164 L Ed 2d 195 (2006) ("Nothing in the language of the Constitution or in this Court's decisions . . . suggests that . . . search warrants . . . must include a specification of the precise manner in which they are to be executed.") (quotation marks omitted). But see *In re Search Warrant*, 193 Vt 51, 69; 71 A3d 1158

ment to the admission of the evidence obtained from defendant's cell-phone data. The Court of Appeals rejected out-of-hand defendant's claim of ineffective assistance of counsel based on its conclusion that an objection under the Fourth Amendment would have been futile. *Hughes*, unpub op at 3 n 2. We find it appropriate to remand to the Court of Appeals to reconsider defendant's claim in light of this opinion. When making this determination, the Court of Appeals should consider whether the violation of defendant's Fourth Amendment rights entitled defendant to exclusion of the unlawfully searched data from his armed-robbery trial. See *Kimmelman v Morrison*, 477 US 365, 375; 106 S Ct 2574; 91 L Ed 2d 305 (1986).[27]

IV. CONCLUSION

The ultimate holding of this opinion is simple and straightforward—a warrant to search a suspect's digi-

(2012) (holding that, although *ex ante* restrictions are not required, such restrictions on searches of digital data "are sometimes acceptable mechanisms for ensuring the particularity of a search"). "[G]iven the unique problem encountered in computer searches, and the practical difficulties inherent in implementing universal search methodologies, the majority of federal courts have eschewed the use of a specific search protocol and, instead, have employed the Fourth Amendment's bedrock principle of reasonableness on a case-by-case basis . . . ." *Richards*, 659 F3d at 538 (citations omitted). We need not decide here whether the warrant was overly broad because "putting aside for the moment the question what limitations the Fourth Amendment's particularity requirement should or should not impose on the government *ex ante*, the Amendment's protection against 'unreasonable' searches surely allows courts to assess the propriety of the government's search methods . . . *ex post* in light of the specific circumstances of each case." *Christie*, 717 F3d at 1166, citing *Ramirez*, 523 US at 71. We conclude that, regardless of whether the warrant itself was overly broad, the search of the data pursuant to that warrant was unreasonable and therefore violated the Fourth Amendment.

[27] The general rule is that evidence obtained in violation of the Fourth Amendment cannot be used against a defendant at a subsequent trial.

tal cell-phone data for evidence of one crime does not enable a search of that same data for evidence of another crime without obtaining a second warrant. Nothing herein should be construed to restrict an officer's ability to conduct a reasonably thorough search of digital cell-phone data to uncover evidence of the criminal activity alleged in a warrant, and an officer is not required to discontinue a search when he or she discovers evidence of other criminal activity while reasonably searching for evidence of the criminal activity alleged in the warrant. However, respect for the Fourth Amendment's requirement of particularity and the extensive privacy interests implicated by cell-phone data as delineated by the United States Supreme Court's decision in *Riley v California* requires that officers reasonably limit the scope of their searches to evidence related to the criminal activity alleged in the warrant and not employ that authorization as a basis for seizing and searching digital data in the manner of a *general warrant* in search of evidence of any and all criminal activity. We hold that, as with

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See, e.g., *United States v Council*, 860 F3d 604, 608-609 (CA 8, 2017); *Mapp v Ohio*, 367 US 643, 655; 81 S Ct 1684; 6 L Ed 2d 1081 (1961) (applying the exclusionary rule to the states). However, the exclusionary rule is a judicially created remedy that does not apply to every Fourth Amendment violation. See, e.g., *Utah v Strieff*, 579 US 232, 234-235; 136 S Ct 2056; 195 L Ed 2d 400 (2016). The prosecutor argues in this Court that if the warrant affidavit failed to establish a sufficient nexus between defendant's criminal activity and his cell phone, see note 6 of this opinion, the exclusionary rule does not apply because the officers relied in good faith on the district court judge's finding of probable cause. See *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984) (holding that the exclusionary rule does not apply if officers rely in good faith on a magistrate's finding of probable cause to issue a warrant). The prosecutor does not specifically argue that if the searches at issue exceeded the scope of the warrant any exception to the exclusionary rule applies. The parties may develop this issue further on remand.

any other search, an officer must limit a search of digital data from a cell phone in a manner reasonably directed to uncover evidence of the criminal activity alleged in the warrant. We hereby reverse the judgment of the Court of Appeals and remand to that Court to address whether defendant is entitled to relief based upon the ineffective assistance of counsel.

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

VIVIANO, J. (*concurring*). I concur in the majority's holding but write separately because I take issue with one aspect of its reasoning. The majority identifies several factors that a court must consider to determine whether a police officer's search of seized digital cell-phone data is reasonably directed at finding evidence of the criminal activity identified in the warrant. See *ante* at 543-546. I do not take issue with the factors identified by the majority, at least to the extent that they may apply in the cases to which they might be relevant.[1] But I believe the list is incomplete without the addition of another potentially dispositive factor: the officer's subjective intention in conducting the search. If the search was purposefully conducted to obtain evidence of a crime other than the one identified in the warrant, I do not see how we can conclude that same search was " 'reasonably directed at uncovering' evidence of the criminal activity alleged in the warrant." *Ante* at 538.

Citing conflicting caselaw from the federal circuit courts, the majority expressly declines to address

[1] It is worth pointing out that, with the exception of Factor (h), the majority does not reference the factors or apply them in its analysis.

whether the officer's subjective intention is relevant to the inquiry. See note 13 of the majority opinion (comparing *United States v Loera*, 923 F3d 907 (CA 10, 2019), and *United States v Williams*, 592 F3d 511 (CA 4, 2010)). In *Loera*, the court persuasively explained why such a restriction is needed in the context of searches of electronic storage devices:

> The general Fourth Amendment rule is that investigators executing a warrant can look anywhere where evidence described in the warrant might conceivably be located.
>
> * * *
>
> This limitation works well in the physical-search context to ensure that searches pursuant to warrants remain narrowly tailored, but it is less effective in the electronic-search context where searches confront what one commentator has called the "needle-in-a-haystack" problem. Given the enormous amount of data that computers can store and the infinite places within a computer that electronic evidence might conceivably be located, the traditional rule risks allowing unlimited electronic searches.
>
> To deal with this problem, rather than focusing our analysis of the reasonableness of an electronic search on "what" a particular warrant permitted the government agents to search (i.e., "a computer" or "a hard drive"), we have focused on "how" the agents carried out the search, that is, the reasonableness of the search method the government employed. Our electronic search precedents demonstrate a shift away from considering what digital location was searched and toward considering whether the forensic steps of the search process were reasonably directed at uncovering the evidence specified in the search warrant. Shifting our focus in this way is necessary in the electronic search context because search warrants typically contain few—if any—restrictions on where within a computer or other electronic storage

> device the government is permitted to search. Because it is "unrealistic to expect a warrant prospectively [to] restrict the scope of a search by directory, filename or extension or to attempt to structure search methods," our [*ex post*] assessment of the propriety of a government search is essential to ensuring that the Fourth Amendment's protections are realized in this context. [*Loera*, 923 F3d at 916-917 (citations and emphasis omitted; first alteration in original).]

Later, in a footnote, the court acknowledged that inadvertence was abandoned as a necessary condition for a legitimate plain-view seizure in *Horton v California*, 496 US 128, 130, 139; 110 S Ct 2301; 110 L Ed 2d 112 (1990), but explained that it persisted in "includ[ing] inadvertence as a factor to consider when deciding whether an electronic search fell within the scope of its authorizing warrant or outside of it [because of] . . . [t]he fundamental differences between electronic searches and physical searches, including the fact that electronic search warrants are less likely prospectively to restrict the scope of the search . . . ." *Loera*, 923 F3d at 920 n 3.

A different approach was taken by the court in *Williams*, which was decided prior to *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014). In that case, in examining the plain-view exception, the court held that a warrant authorizing a search of a computer and digital storage device "impliedly authorized officers to open each file on the computer and view its contents, at least cursorily, to determine whether the file fell within the scope of the warrant's authorization . . . ." *Williams*, 592 F3d at 521. See also *id*. at 522 ("Once it is accepted that a computer search must, by implication, authorize at least a cursory review of each file on the computer, then the criteria for applying the plain-view exception

are readily satisfied."). Citing *Horton*, the court concluded that "[i]nadvertence focuses incorrectly on the subjective motivations of the officer in conducting the search and not on the objective determination of whether the search is authorized by the warrant or a valid exception to the warrant requirement." *Id*. at 523. The court made it very clear that it would not adopt new rules to govern the search and seizure of electronic files: "At bottom, we conclude that the sheer amount of information contained on a computer does not distinguish the authorized search of the computer from an analogous search of a file cabinet containing a large number of documents." *Id*. at 523.

Williams's approach is less persuasive in light of *Riley*. As the majority notes, "*Riley* distinguished cell-phone data from other items subject to a search incident to a lawful arrest in terms of the privacy interests at stake." *Ante* at 531, citing *Riley*, 573 US at 393. In *Riley*, the government argued that a search of all data stored on a cell phone is "materially indistinguishable" from searches of other items found on an arrestee's person. *Riley*, 573 US at 393. Apparently not impressed with this argument, the Court responded tartly: "That is like saying a ride on horseback is materially indistinguishable from a flight to the moon." *Id*. The Court observed that "[o]ne of the most notable distinguishing features of modern cell phones is their immense storage capacity," noting that "[t]he current top-selling smart phone has a standard capacity of 16 gigabytes . . . [which] translates to millions of pages of text, thousands of pictures, or hundreds of videos." *Id*. at 393-394 (citation omitted). The rule adopted in *Loera*, which was decided after *Riley*, accounts for the realities of modern electronic storage devices. These privacy concerns are only heightened when it comes to the types and

volume of data contained on modern smart phones, as the majority ably explains. See *ante* at 525-527, quoting *Riley*, 573 US at 393, 395-396.

Following the approach in *Loera*, I would adopt inadvertence as a factor to consider when deciding whether an electronic search fell within the scope of its authorizing warrant. Here, I would find that factor dispositive since it was clear that the second search of defendant's cell phone was conducted to obtain evidence of a crime other than the drug-trafficking offense identified in the warrant. At the time of the second search, the only crime defendant was charged with arising out of the August 6 incident was armed robbery. The prosecutor assigned to the armed-robbery case requested that the second search be conducted to obtain evidence to support that charge. Therefore, for this separate reason, I agree with the majority that the second search was beyond the scope of the warrant because it was not "reasonably directed at uncovering" evidence of drug trafficking.

Instead of relying on the lack of inadvertence, however, the majority focuses on whether there was any indication in the warrant or affidavit that that the searches performed would uncover evidence of defendant's drug transactions with Weber or Stites. See *ante* at 548 ("There was nothing in the warrant or affidavit to suggest that either Weber or Stites was implicated in defendant's drug trafficking or that reviewing data with Weber's name or contacts with her phone number would lead to evidence regarding defendant's drug trafficking."); *ante* at 548 ("[A]ny connection between Weber and defendant's drug trafficking was not derived from the warrant or its supportive affidavit."). But I do not believe that a search warrant or the affidavit supporting it has to

specify the participants of each drug transaction for that evidence to be within the scope of a drug-trafficking warrant.[2] Such a requirement would go well beyond prospectively "considering whether the forensic steps of the search process were reasonably directed at uncovering the evidence specified in the search warrant." *Loera*, 923 F3d at 917.[3]

Under the circumstances of this case, before conducting another search of defendant's cell phone, the officer should have obtained a second search warrant directed toward obtaining evidence of the armed-rob-

[2] See *United States v Castro*, 881 F3d 961, 966 (CA 6, 2018) (citation omitted) ("Officers may conduct a more detailed search of an electronic device after it was properly seized so long as the later search does not exceed the probable cause articulated in the original warrant and the device remained secured."). If, for example, defendant had been charged with or was being investigated for a drug crime arising out of the August 6 incident, in my view, nothing would have precluded law enforcement officers from conducting a more detailed search of the properly seized cell-phone data using the new information they obtained concerning this additional instance of drug trafficking. See *id*. ("It is sometimes the case, as it was the case here, that law enforcement officers have good reason to revisit previously seized, and still secured, evidence as new information casts new light on the previously seized evidence."). As the prosecutor points out, defendant's interactions with Weber and Stites on August 6 included the purchase and sale of illegal drugs. And once the evidence has been properly obtained, there is nothing that would prevent it from being used to prove a separate crime. See *Williams*, 592 F3d at 520, quoting *United States v Phillips*, 588 F3d 218, 224 (CA 4, 2009) (" 'Courts have never held that a search is overly broad merely because it results in additional criminal charges.' "). But we are not confronted with that situation. Instead, it is clear that the second search was conducted to obtain evidence of the alleged armed robbery.

[3] The majority's reliance on this factor is perplexing for an additional reason: it is not one of the factors identified by the majority for determining whether a search is beyond the scope of the warrant. And I fear that it may lead to confusion about whether the absence of such details will constitute grounds to challenge the search and seizure of any drug-trafficking evidence that is not specifically referred to in the search warrant or affidavit.

bery offense. Because he did not, I concur with the majority that the second search was unlawful under the Fourth Amendment.[4]

[4] It appears that a plausible claim could be made that the government would have inevitably discovered the evidence contained on defendant's cell phone through lawful means given that the cell phone was lawfully in the government's possession. See *Loera*, 923 F3d at 928 ("When evidence is obtained in violation of the Fourth Amendment, that evidence need not be suppressed if agents inevitably would have discovered it through lawful means independent from the unconstitutional search."). But since no such claim has been raised, I decline to consider it further.

LEAGUE OF WOMEN VOTERS OF MICHIGAN
v SECRETARY OF STATE
SENATE v SECRETARY OF STATE

Docket Nos. 160907 and 160908. Argued on application for leave to appeal March 11, 2020. Decided December 29, 2020.

In Docket No. 160907, the League of Women Voters of Michigan (LWV), three individual voters, and Michiganders for Fair and Transparent Elections (MFTE) (collectively, the LWV plaintiffs) filed a complaint in the Court of Claims for declaratory and injunctive relief against the Secretary of State regarding 2018 PA 608, which made three sets of changes to the statutory procedures governing petition drives. First, it amended the standards in MCL 168.471 for determining the validity of a petition by requiring that not more than 15% of the signatures to be used could be those of registered electors from any one congressional district, and it also amended MCL 168.477 to prohibit the Board of State Canvassers from counting signatures of registered electors in a congressional district that exceeded the 15% limitation. Second, it amended MCL 168.482(7) to require that petitions include checkboxes to clearly indicate whether the circulator of the petition is a paid signature gatherer or a volunteer signature gatherer. Third, it amended MCL 168.482a to provide that anyone paid to gather signatures must, before circulating the petition, file an affidavit with the Secretary of State indicating that he or she is a paid signature gatherer. A few months after these amendments took effect, the Attorney General issued a written opinion that the amendments violated the state and federal Constitutions. Thereafter, the LWV plaintiffs sued the Secretary of State, seeking a declaratory judgment that the amendments were unconstitutional along the same lines as the Attorney General suggested. A few weeks after the LWV plaintiffs brought their action, in Docket No. 160908, the Michigan Senate and House of Representatives (the Legislature) also brought an action against the Secretary of State, requesting a declaratory judgment that the amendments were constitutional. The two cases were consolidated in the Court of Claims. The Secretary of State, represented by the Attorney General, did not dispute that some of the amendments were unconstitutional, and she also suggested that the Legislature

might lack standing to bring its case. The Court of Claims, CYNTHIA D. STEPHENS, J., agreed that the Legislature did not have standing but nonetheless treated its submissions as amicus briefs because the Secretary of State was declining to defend the constitutionality of the amendments. On the merits, the Court of Claims held that the paid-circulator-affidavit requirement was constitutional but that the geographic-distribution and checkbox requirements were not. The LWV plaintiffs filed a bypass application in the Supreme Court, and the Legislature sought to intervene. The Supreme Court denied the bypass and the motion to intervene, and the case went to the Court of Appeals for expedited consideration. In a published decision, the Court of Appeals, SERVITTO, P.J., and GADOLA, J. (BOONSTRA, J., concurring in part and dissenting in part), affirmed the Court of Claims' rulings that the Legislature lacked standing and that the geographic-distribution and checkbox requirements were unconstitutional, but it reversed on the affidavit requirement, holding that that amendment was unconstitutional as well. 331 Mich App 156 (2020). None of the parties in the LWV case sought to appeal, but the Legislature applied for leave to appeal both its own action and the LWV action. The Supreme Court docketed both cases but informed the Legislature's counsel that it would need to file a motion to intervene in the LWV case to become a party to that action. The motion was subsequently filed, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 505 Mich 988 (2020). It then came to the Supreme Court's attention that MFTE had terminated its petition drive. Consequently, the Supreme Court sought supplemental briefing on, among other things, whether this development mooted the LWV case as to MFTE, whether the remaining LWV plaintiffs had standing, and whether, if the case was moot as to MFTE and no other plaintiff had standing, the Supreme Court should vacate the lower courts' judgments in the LWV case. 505 Mich 988 (2020).

In an opinion by Justice VIVIANO, joined by Chief Justice MCCORMACK and Justices BERNSTEIN and CAVANAGH, the Supreme Court *held*:

The Legislature has standing to appeal when it intervenes in a case in which the Attorney General fails to defend a statute against constitutional attack in court. However, in Docket No. 160907, the case was moot as to the lead plaintiff, MFTE, because it was no longer pursuing its ballot initiative, and no other plaintiff had standing to pursue the appeal. Accordingly, the lower-court decisions in that case were vacated. As a result, any

interest the Legislature might have had to provide it with standing had dissipated and thus the matter was moot. Further, extending the standing doctrine to find that the Legislature had suffered harm based on the Attorney General opinion was unwarranted. The Court of Appeals' holding that the Legislature has no standing in its case against the Secretary of State, Docket No. 160908, was thus affirmed on alternative grounds, and both cases were remanded to the Court of Claims for dismissal.

1. In order to intervene in an action, a person must meet the standards of MCR 2.209(B), which requires that the applicant's claim or defense and the main action have a question of law or fact in common; and to intervene in order to appeal, the person must also be an aggrieved party so that a justiciable controversy exists under *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286 (2006). In *Federated*, there was no justiciable controversy because neither of the losing parties below filed a timely appeal and because the Attorney General, who sought to intervene, was not an aggrieved party. *Federated* did not hold that there would be no justiciable controversy if the losing parties below failed to file a timely appeal but a party with appellate standing filed a timely motion to intervene, leaving open the possibility that there may be a justiciable controversy in such circumstances. An entity that otherwise is aggrieved and therefore has appellate standing should not be prohibited from intervening before a lower-court judgment becomes final, i.e., before the deadline to file an application for leave to appeal, and the court rule does not require a motion to intervene to be filed any sooner. Unlike the Attorney General in *Federated*, the Legislature is aggrieved. Under the holding in *Federated*, 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 that 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. In this case, the Legislature suffered a concrete and particularized injury arising from the actions of the lower courts, which not only concluded that the Legislature had no standing to pursue its case, they also considered and rejected the Legislature's arguments that certain portions of 2018 PA 608 were constitutional in the LWV case. Failing to permit the Legislature's intervention in such circumstances would enable the executive branch to nullify the Legislature's work by declining to contest a lower-court ruling that a challenged statute is unconstitutional, thereby precluding any

ultimate judicial determination of the issue, which would pose risks to Michigan's constitutional structure and disrupt the proper functioning of the adversary system. In light of these considerations, the Legislature had a sufficient interest in defending its own work and could fill the breach left by the Attorney General. In sum, when the Attorney General does not defend a statute against a constitutional challenge by private parties in court, the Legislature is aggrieved and, upon intervening, has standing to appeal.

2. When the LWV plaintiffs filed their complaint, they stated that MFTE intended to circulate petitions in 2019 or possibly 2020. However, MFTE subsequently suspended its petition efforts because of the COVID-19 pandemic, which raised the question whether the case had become moot as to MFTE. Although there was no binding precedent on point, the relevant cases from other jurisdictions were in uniform agreement that the voluntary abandonment of a petition drive renders a case moot. Because MFTE is no longer circulating its petition, a judgment on the merits of the case would be a decision in advance about a right before it has been actually asserted and contested or a judgment that could not have any practical legal effect upon a then-existing controversy. A decision would only serve to instruct MFTE as to the law in this area should MFTE choose to pursue a petition in the future. Because MFTE no longer had anything at stake in the dispute, the case was moot as to MFTE.

3. LWV and the individual-voter plaintiffs lacked standing to challenge the constitutionality of 2018 PA 608. The individual-voter plaintiffs and the LWV's members sought to exercise their rights as Michigan registered voters to support placement of proposals on the general election ballot by signing petitions, and they requested a declaratory judgment and injunctive relief. Under *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010), if a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. MCR 2.605(A)(1) provides that in a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment. An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights. Though a court is not precluded from reaching issues before actual injuries or losses have occurred, there still must be a present legal controversy, not one that is merely hypothetical or anticipated in the future. As the remaining LWV plaintiffs admitted, and the Secretary of

State agreed, they could not show a present legal controversy rather than a hypothetical or anticipated one. A declaratory judgment was not needed to guide the LWV plaintiffs' future conduct. The individual-voter plaintiffs only asked for a declaratory judgment because it might be needed in the future should they decide to sign some initiative; they had no current plans to sign any. Therefore, because the LWV plaintiffs did not meet the requirements of MCR 2.605, they did not have standing. Although cases have held that the bar for standing is lower when a case concerns election law, those cases did not stand for the proposition that any citizen could bring an action for declaratory judgment regarding the constitutionality of any election law that might affect his or her interests in the future.

4. Generally, when a case is determined to be moot on appeal, the lower-court judgments are vacated. Because this practice is rooted in equity, the decision whether to vacate turns on the conditions and circumstances of the particular case. In this case, the Attorney General declined to defend the constitutionality of 2018 PA 608, the Legislature began its own action in the Court of Claims rather than intervening, the Court of Claims adjudicated a dispute with no "actual controversy" contrary to MCR 2.605(A), and the Court of Appeals issued a published opinion when no appealing party was aggrieved by the lower-court judgment. As a result, portions of 2018 PA 608 were held unconstitutional in a precedential opinion that no original party wished to appeal because they all agreed that the disputed portions of the act were unconstitutional. The fact that the Court of Appeals decision was effectively unreviewable, as well as being the product of a bizarre mix of blunders, counseled in favor of vacating both it and the Court of Claims' decision below and ordering dismissal of the case.

5. Generally, standing is assessed at the outset of the case. Under *Lansing Sch Ed Ass'n*, standing is a limited, prudential doctrine that assesses whether a litigant's interest in the issue is sufficient to ensure sincere and vigorous advocacy. A litigant has standing if there is a legal cause of action and the litigant meets the requirements of MCR 2.605. If a cause of action is not provided at law, a court should determine whether the litigant has standing because of a special injury, special right, or substantial interest that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. The party's interest must persist as the case goes forward; if it does not, the case becomes moot. In this case, when

the Legislature filed its complaint, it had two potential sources of interest in the case. One was the ongoing litigation in the LWV case, which involved the possibility that the Secretary of State would not defend the statutes. However, given that the lower-court decisions in the LWV case were being vacated and the case was being ordered to be dismissed, any interest the Legislature might have had has dissipated. Consequently, to the extent that any such interest could have justified conferring standing on the Legislature when the case was filed, the matter is now moot. The second possible source of standing was the Attorney General opinion that concluded the statute at issue is unconstitutional. A conclusion that the Legislature has standing on this basis would require a very generous view of legislative standing, and the Legislature cited no authority to support this view. To extend the standing doctrine in this manner was unwarranted given that a private party could challenge the Attorney General opinion.

Lower-court judgments in Docket No. 160907 vacated; Court of Appeals judgment in Docket No. 160908 affirmed on alternative grounds; both cases remanded to the Court of Claims for dismissal.

Justice CLEMENT, concurring in part, concurring in the judgment in part, and dissenting in part, fully agreed with the Court's decision to grant the Legislature's motion to intervene in Docket No. 160907 and with the analysis supporting that decision. However, she would have reached the merits of the issues presented, and she therefore dissented from the Court's decision to conclude that the dispute in Docket No. 160907 was moot, both for the reasons offered by Justice ZAHRA as well as because the allegations made by MFTE and the individual-voter plaintiffs remained live concerns that needed judicial resolution. Not having prevailed on the question of whether the dispute in Docket No. 160907 was moot, she concurred with the result of the Court's disposition of the Legislature's original action for a declaratory judgment in Docket No. 160908. However, she did not join the Court's analysis, because she would have provided a definitive answer regarding why the Legislature could not obtain a judicial declaration to compel an executive official to implement a statutory enactment—namely, that although the Legislature satisfied the test for standing under Const 1963, art 6, § 1 that requires sincere and vigorous advocacy, its claims were nonjusticiable. The purported injury suffered by the Legislature—the practical nullification through executive nonimplementation of a law the Legislature has enacted—is not one that the judiciary has recognized in the past, for the reason that it would threaten the

separation of powers and risk injecting the Supreme Court into political disputes between its coequal branches of government rather than allowing the legislative and executive branches to resolve their disputes through the political process. She contended that a party's litigation posture cannot, if unfavorable to some nonparty to the case, give the nonparty standing to file a separate action, noting that this was a problem that the procedural mechanism of intervention was designed to solve, and she disagreed that the Attorney General opinion in this matter was relevant to the analysis. She asserted that neither the Secretary of State's litigation position nor the Attorney General opinion was the sine qua non of the Legislature's declaratory-judgment action, and therefore rejecting them as theories for the Legislature's standing elided the actual question presented: whether the Legislature has recourse to the judiciary to compel the executive to enforce a law.

Justice MARKMAN, joined by Justice ZAHRA, dissenting, would have denied the Legislature's motion to intervene in the LWV case because, given that neither party filed a timely appeal, there was no longer a justiciable controversy in which the Legislature could intervene. He would have held that the Legislature possessed standing in its own right in its case against the Secretary of State under the unique circumstances of this case, which were that the Attorney General, at the request of the Secretary of State, issued an opinion in which she asserted that the challenged statutory provisions are unconstitutional; that in the LWV case, although the Legislature did not file a motion to intervene in either lower court and both lower courts held that the Legislature lacked standing, both lower courts proceeded nonetheless to treat the Legislature as if it were a party; and that, absent the Legislature's participation, there would have been no actual controversy because the Legislature was the only one arguing in favor of the constitutionality of the statutory provisions at issue, given that the Attorney General refused to do so. Justice MARKMAN would have resolved the substantive questions of law in that case, in particular, the constitutionality of the checkbox and precirculation-affidavit requirements as well as the 15% cap on ballot-proposal signatures per congressional district. He noted that the majority not only left unresolved questions it was asked to resolve by the Legislature, but it left those matters in a state of disarray and confusion for citizens concerned about the proper procedures for placing constitutional and legislative measures on the ballot. He also agreed with Justice ZAHRA that the LWV case was not moot for the reasons Justice ZAHRA explained.

Justice ZAHRA, joined by Justice MARKMAN, dissenting, stated that although he would deny the Legislature's untimely motion to intervene in Docket No. 160907 and dismiss that case altogether, he would not have reached the question of whether that case is moot. Instead, for the reasons stated by Justice MARKMAN, he would have recognized the Legislature's standing in Docket No. 160908 and would have proceeded to decide the merits of that dispute. Justice ZAHRA disagreed with the majority that the issues presented in that case were rendered moot by the postponement of MFTE's ballot-initiative efforts because those issues were of great public significance and were likely to recur, yet evade meaningful judicial review. He explained that given the condensed timeline for collecting signatures on a petition initiating legislation or proposing a voter-initiated constitutional amendment, it would be unreasonable to expect a timely ruling in cases where a specific ballot proposal is at issue, much less a facial challenge to an election law affecting all ballot proposals. He noted that this case was begun more than a year and a half ago and still has not resulted in a final disposition on the challenged provisions, thus presenting an example of the difficulty in obtaining timely relief in ballot-initiative cases. Further, it appeared that MFTE was merely postponing its initiative efforts until the November 2022 election, not abandoning them altogether. Finally, he noted that MFTE's suspension of its petition drive did not change the circumstances under which plaintiffs brought this lawsuit. Various petition drives, apparently relying on the Attorney General's advisory opinion, began collecting signatures on petitions that did not comply with 2018 PA 608 because the Board of State Canvassers instructed those launching petition drives to prepare petition sheets that conformed to the opinion of Attorney General. He stated that the majority opinion's decision added to the uncertainty among those seeking to exercise their rights to engage in direct democracy and that, as a result, petition drives would be caught between either complying with 2018 PA 608, risking rejection early on by the Board of State Canvassers, or complying with the Attorney General's advisory opinion, risking invalidation later by a decision from this Court.

1. ACTIONS — APPEALS — INTERVENTION — TIMING.

MCR 2.209(B) sets the requirements for permissive intervention; the rule requires that the applicant's claim or defense and the main action have a question of law or fact in common; to pursue an appeal as an intervenor, the person must also be an aggrieved party so that a justiciable controversy exists; an entity that otherwise is aggrieved and therefore has appellate standing

should not be prohibited from intervening before a lower-court judgment becomes final, i.e., before the deadline to file an application for leave to appeal.

2. ACTIONS — APPEALS — INTERVENTION — STANDING.

To have standing on appeal, a litigant must have suffered a concrete and particularized 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.

3. ACTIONS — APPEALS — INTERVENTION — STANDING — LEGISLATIVE STANDING.

When the Attorney General does not defend a statute against a constitutional challenge by private parties in court, the Legislature is aggrieved and, upon intervening, has standing to appeal.

4. CONSTITUTIONAL LAW — BALLOT PROPOSALS — PETITION DRIVES — MOOTNESS.

The voluntary abandonment of a petition drive to place a proposal on the ballot renders a case relating to the legal requirements for submitting the petition moot.

5. DECLARATORY JUDGMENTS — BALLOT PROPOSALS — PETITION DRIVES — VOTER STANDING.

Voters lack standing to bring an action for declaratory judgment under MCR 2.605 concerning the constitutionality of legal requirements for submitting a ballot petition when they do not allege plans to sign such a petition and seek a judgment on the basis that guidance regarding ballot petitions might be needed in the future.

6. DECLARATORY JUDGMENTS — BALLOT PROPOSALS — PETITION DRIVES — LEGISLATIVE STANDING.

The Legislature lacks standing to pursue a declaratory judgment on the basis of a formal opinion by the Attorney General that a statute is unconstitutional.

Goodman Acker, PC (by *Mark Brewer*), *Nickelhoff & Widick, PLLC* (by *Andrew Nickelhoff*), and *Cummings & Cummings Law Group, PLLC* (by *Mary Ellen Gurewitz*) for the League of Women Voters of Michigan, Michiganders for Fair and Transparent Elections, Henry Mayers, Valeriya Epshteyn, and Barry Rubin.

Bursch Law PLLC (by *John J. Bursch*) and *Dickinson Wright PLLC* (by *Charles R. Spies* and *Ariana D. Pellegrino*) for the Michigan Senate and House of Representatives.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Heather S. Meingast* and *Erik A. Grill*, Assistant Attorneys General, for the Secretary of State.

Amici Curiae:

Doster Law Offices, PLLC (by *Eric E. Doster*) for the Michigan Chamber of Commerce.

Samuel R. Bagenstos, *Eli Savit*, *Daniel S. Korobkin*, and *Sharon Dolente* for the American Civil Liberties Union.

Miller, Canfield, Paddock and Stone, PLC (by *Paul D. Hudson* and *Michael C. Simoni*) for the Michigan Manufacturers Association.

Baker & Hostetler LLP (by *Lee A. Casey*) for the State Government Leadership Foundation.

VIVIANO, J. These consolidated cases involve constitutional challenges to recent amendments of the Election Law, MCL 168.1 *et seq*. But we cannot address the merits of the issues in these cases unless they are presented in a justiciable controversy. In these cases, we conclude they are not.

We grant the Legislature's motion to intervene in *League of Women Voters of Mich v Secretary of State*, Docket No. 160907, and hold that the Legislature has standing to appeal when the Attorney General abandons her role in defending a statute against constitu-

tional attack in court. Next, we conclude that the case, now properly before us, is moot as to the lead plaintiff, Michiganders for Fair and Transparent Elections (MFTE), because it is no longer pursuing its ballot initiative. As no other plaintiff has standing to pursue the appeal, we vacate the lower-court decisions. Finally, in light of this analysis, we affirm on alternative grounds the Court of Appeals' holding that the Legislature has no standing in its case against the Secretary of State, Docket No. 160908. Accordingly, we remand both cases to the trial court so they can be dismissed.

I. FACTS AND PROCEDURAL HISTORY

Under our Constitution, "[a]ll political power is inherent in the people." Const 1963, art 1, § 1. Although the people have granted the Legislature lawmaking authority, Const 1963, art 4, § 1, they have retained for themselves three paths to directly exercise that authority: the "referendum," through which the people have "the power to approve or reject laws enacted by the legislature," Const 1963, art 2, § 9; the "initiative," by which the people can "propose laws and . . . enact and reject laws," *id*.; and the proposal of constitutional amendments, Const 1963, art 12, § 2. Each of these three methods of direct democracy requires the submission of petitions containing a certain number of signatures. *Id*.; Const 1963, art 2, § 9.

The Legislature is not absent from the process. It is charged with implementing the constitutional provisions for referenda and initiatives, Const 1963, art 2, § 9, and with prescribing the form and manner of signing and circulating petitions proposing constitutional amendments, Const 1963, art 12, § 2. The Election Law, MCL 168.1 *et seq*., regulates these matters.

In 2018, the Legislature amended the Election Law, making three sets of changes to procedures governing petition drives. 2018 PA 608. First, it amended the standards for "determin[ing] the validity of a petition" by requiring that "[n]ot more than 15% of the signatures to be used . . . shall be of registered electors from any 1 congressional district." MCL 168.471. As part of this change, the Legislature also amended MCL 168.477 to prohibit the Board of State Canvassers from counting signatures of registered electors in a congressional district that exceed the 15% limitation. In other words, only 15% of the countable signatures could come from any one congressional district. Second, it required that petitions include checkboxes "to clearly indicate whether the circulator of the petition is a paid signature gatherer or a volunteer signature gatherer." MCL 168.482(7). Third, anyone paid to gather signatures must, before circulating the petition, file an affidavit with the Secretary of State indicating that he or she is a paid signature gatherer. MCL 168.482a.

A few months after these amendments took effect, the Attorney General issued a written opinion that they violated the state and federal Constitutions. OAG, 2019-2020, No. 7,310, p ___ (May 22, 2019). Thereafter, plaintiffs—League of Women Voters of Michigan (LWV), MFTE, Henry Mayers, Valeriya Epshteyn, and Barry Rubin (collectively, the LWV plaintiffs)—sued the Secretary of State, seeking a declaratory judgment that the amendments were unconstitutional along the same lines as the Attorney General suggested. As explained in the complaint, LWV is a nonpartisan group focused on voting and democratic rights. The individual plaintiffs are Michigan voters and MFTE is a ballot-question committee that, at the time the complaint was filed, intended to circulate petitions to amend the Constitution.

A few weeks after the LWV plaintiffs brought their action, the Legislature also filed suit against the Secretary of State, requesting a declaratory judgment that the amendments were constitutional. The two cases were consolidated in the Court of Claims. The Secretary of State, represented by the Attorney General, did not dispute that some of the amendments were unconstitutional, and she also suggested that the Legislature might lack standing to bring its case. In its subsequent opinion, the court agreed that the Legislature had no standing but nonetheless treated its submissions defending the statutes as amicus briefs because the Secretary of State was declining to offer any such defense. On the merits, the court held that the paid-circulator-affidavit requirement was constitutional but the geographic-distribution and checkbox requirements were not.

Plaintiffs in the *League of Women Voters* case filed a bypass application in this Court, and the Legislature sought to intervene. We denied the bypass and motion to intervene, and the case went to the Court of Appeals for expedited consideration. In a published decision, the Court affirmed the trial court's holding that the Legislature lacked standing and that the geographic-distribution and checkbox requirements were unconstitutional; it reversed on the affidavit requirement, finding that amendment to be unconstitutional as well. In a partial dissent, Judge BOONSTRA would have held that the Legislature had standing and that the checkbox requirement was constitutional. *League of Women Voters of Mich v Secretary of State*, 331 Mich App 156; 952 NW2d 491 (2020).

None of the parties in the *League of Women Voters* case sought to appeal, but the Legislature filed an application for leave to appeal listing both its own

action and the *League of Women Voters* action as the cases being appealed. We docketed both cases, but our Court clerk informed the Legislature's counsel that it would need to file a motion to intervene in the *League of Women Voters* case to become a party to that action. The motion was subsequently filed and the Court heard argument.

It then came to the Court's attention that MFTE had terminated its petition drive. Consequently, we sought supplemental briefing on, among other things, whether this development mooted the *League of Women Voters* case as to MFTE, whether the remaining LWV plaintiffs had standing, and whether, if the case was mooted as to MFTE and no other plaintiff had standing, the Court should vacate the lower courts' judgments in the *League of Women Voters* case.

II. STANDARD OF REVIEW

Questions of law, such as those at issue here, are reviewed de novo.[1]

III. ANALYSIS

In consolidated cases with this much procedural complexity, our analysis of the various issues is necessarily layered. A roadmap is therefore useful: We begin with the Legislature's motion to intervene in *League of Women Voters of Mich v Secretary of State*, Docket No. 160907, which we grant. Next, we hold that this case is moot as to MFTE and that none of the other plaintiffs have standing to maintain the action. Consequently, we dismiss the *League of Women Voters* case and vacate the constitutional holdings below. This leaves the Leg-

[1] *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 59; 921 NW2d 247 (2018).

islature's appeal in its original action, *Senate v Secretary of State*, Docket No 160908. Because the lower courts' decisions on the merits have been vacated, we conclude the Legislature lacks standing to pursue its own case.

A. THE MOTION TO INTERVENE

MCR 2.209(B) sets out the requirements for permissive intervention. It states, in relevant part, "On timely application a person may intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common."[2] The Legislature undoubtedly meets this standard—the parties in *League of Women Voters* seek a declaratory judgment as to the constitutionality of certain portions of 2018 PA 608, as does the Legislature.

In addition to meeting this standard, however, the Legislature must be an aggrieved party. In *Federated Ins Co v Oakland Co Rd Comm*, we stated that the "case ceased to be an 'action' when the losing parties below (plaintiffs) failed to file a timely application for leave to appeal in this Court. Once plaintiffs' deadline for filing a timely application for leave to appeal expired, the case ceased to be a justiciable controversy."[3] However, *Federated* held that

> to pursue such an appeal as an intervenor there must be a justiciable controversy, which in this case requires an appeal by an "aggrieved party." Because neither of the losing parties below filed a timely appeal, and because the

[2] MCR 2.209(B)(2). It is unnecessary to consider whether the Legislature may intervene as of right under MCR 2.209(A) because it can intervene under MCR 2.209(B).

[3] *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 294; 715 NW2d 846 (2006), dismissing appeal from 263 Mich App 62 (2004).

> Attorney General does not represent an aggrieved party for purposes of this case, there is no longer a justiciable controversy.[4]

In other words, *Federated* held that there was no justiciable controversy because neither of the losing parties below filed a timely appeal and because the Attorney General was not an aggrieved party. *Federated* never held that there would be no justiciable controversy if the losing parties below failed to file a timely appeal but a party with appellate standing filed a timely motion to intervene (i.e., before the deadline to file an application for leave to appeal). Therefore, *Federated* left open the possibility that there may be a justiciable controversy in such circumstances.[5] This rule makes sense—we see no reason why an entity that otherwise is aggrieved and therefore has appellate standing should be prohibited from intervening before a lower-court judgment becomes final, i.e., before the deadline to file an application for leave to appeal.[6]

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[4] *Id*. at 288.

[5] *Federated* stated that "there [was] no justiciable controversy because the Attorney General [did] not represent an aggrieved party and because neither of the losing parties below chose to file a timely application for leave to appeal." *Id*. at 297. Although *Federated* went on to say that had the losing parties timely applied for leave to appeal there would have been a justiciable controversy, *id*., this is dicta, as those facts were not presented in *Federated*.

[6] Cf. 7C Wright, Miller & Kane, Federal Practice & Procedure (3d ed), § 1916, pp 571-576 ("[I]n a significant number of cases intervention has been allowed even after judgment. One reason for allowing this is so that the intervenor can prosecute an appeal that the existing party has determined not to take."). We recognize that the Legislature did not file its motion to intervene before the deadline for an application for leave to appeal here. But it did file a timely application for leave to appeal under the expedited timeline established by this Court. See *League of Women Voters v Secretary of State*, 505 Mich 931 (2019). Moreover, the Legislature had filed a motion to intervene earlier when the LWV plaintiffs sought to bypass the Court of Appeals and, after the Court of Appeals

Moreover, the court rule does not require a motion to intervene to be filed any sooner.[7]

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issued its decision, we explicitly permitted the Legislature to file another motion to intervene after the expedited deadline for appealing had expired, which we were authorized to do under MCR 7.316(B) ("When, under the practice relating to appeals or stay of proceedings, a nonjurisdictional act is required to be done within a designated time, the Court may at any time, on motion and notice, permit it to be done after the expiration of the period on a showing that there was good cause for the delay or that it was not due to the culpable negligence of the party or attorney.").

[7] By contrast, for example, a motion for a stay pending appeal "may not be filed in the Court of Appeals unless such a motion was decided by the trial court." MCR 7.209(A)(2). Nothing similar appears in MCR 2.209(B), which requires only that the motion to intervene be "timely," such that intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." In a case like the present one, where the proposed intervenors participated in some capacity below but did not move to intervene, a motion to intervene filed for the first time in this Court poses no threat of delay or prejudice. Indeed, it is functionally equivalent to an appeal from a lower court's denial of a motion to intervene. That is, the case is in nearly the same posture now as it would be if the Legislature had unsuccessfully moved to intervene below and were now appealing that ruling. To be clear, not every such motion, initially filed on appeal, will be deemed timely. Cf. *Amalgamated Transit Union Int'l, AFL-CIO v Donovan*, 248 US App DC 411, 412 (1985) (noting that under the similar federal rule, "[a] court of appeals may allow intervention at the appellate stage where none was sought in the district court 'only in an exceptional case for imperative reasons' ") (citation omitted). In this case, however, given the Legislature's participation below and our invitation to it to file a motion to intervene, we deem the motion timely. Cf. *Univ of Notre Dame v Sebelius*, 743 F3d 547, 558 (CA 7, 2014) (granting motion to intervene filed on appeal when the district court failed to rule on the motion below), vacated on other grounds by *Univ of Notre Dame v Burwell*, 575 US 901 (2015).

In deeming the Legislature's motion untimely, the dissents ignore several inconvenient points: the Legislature attempted to intervene when plaintiffs first filed a motion to bypass before the Court of Appeals' decision; the Court, including the dissenters themselves, expressly invited the Legislature to file its motion to intervene after the deadline for applications for leave to appeal had passed; and we have the ability under MCR 7.316(B) to waive deadlines.

Unlike the Attorney General in *Federated*, the Legislature is aggrieved. As *Federated* stated:

> 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.[8]

The Legislature has suffered a concrete and particularized injury arising from the actions of the lower courts. Not only did those courts conclude that the Legislature had no standing to pursue its case, they also considered and rejected the Legislature's arguments that certain portions of 2018 PA 608 were constitutional in the *League of Women Voters* case.

More importantly, failure to permit the Legislature's intervention in such circumstances would enable the executive branch to nullify the Legislature's work by declining to contest a lower-court ruling that a challenged statute is unconstitutional, thereby precluding any ultimate judicial determination of the issue.[9] An

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[8] *Federated*, 475 Mich at 291-292.

[9] The United States Supreme Court has articulated these principles in the context of legislative intervention. See *United States v Windsor*, 570 US 744, 762; 133 S Ct 2675; 186 L Ed 2d 808 (2013) ("The Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma. . . . [W]ith respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court."); *Immigration & Naturalization Serv v Chadha*, 462 US 919, 940; 103 S Ct 2764; 77 L Ed 2d 317 (1983) ("We have long held that Congress is the proper

executive's nondefense of statutes thus poses grave risks to our constitutional structure.[10] It also greatly disrupts the proper functioning of our adversary system.[11] In these circumstances, as our Court of Appeals recently observed, "[t]he Legislature, as a body made up of the elected representatives of the citizens of Michigan, is essentially taking the place of defendants in this case to ensure an actual controversy with robust contrary arguments."[12] In light of these considerations, we agree the Legislature has a sufficient "interest in defending its own work" and can fill the breach left by the Attorney General.[13] Therefore, when the Attorney General does not defend a statute against a constitutional challenge by private parties in court, the Legislature is aggrieved and, upon intervening, has standing to appeal. The Legislature accordingly has appellate standing in the *League of Women Voters* case.

B. MOOTNESS IN *LEAGUE OF WOMEN VOTERS v SECRETARY OF STATE*

As noted, plaintiffs in *League of Women Voters v Secretary of State* are LWV, MFTE, and various Michigan voters. When plaintiffs filed their complaint, they stated:

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party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."); see also *Priorities USA v Nessel*, 978 F3d 976, 980-981 (CA 6, 2020) ("Denying the legislature standing to defend its own law would allow the state executive to nullify a state statute without any ultimate judicial determination.").

[10] See *League of Women Voters of Mich v Secretary of State*, 506 Mich 905, 909 (2020) (*LWV II*) (VIVIANO, J., concurring).

[11] *Id*.

[12] *Mich Alliance for Retired Americans v Secretary of State*, 334 Mich App 238, 251; 964 NW2d 816 (2020).

[13] *LWV II*, 506 Mich at 911 n 1 (MCCORMACK, C.J., dissenting).

> [MFTE] intends to circulate petitions for a constitutional amendment to strengthen and reform Michigan's campaign finance reporting and disclosure requirements. [MFTE] is drafting its proposal and intended to begin its campaign in the summer of 2019, but because of the uncertainty regarding PA 608 and anticipated additional costs, [MFTE] may need to raise additional financial support and may not be able to circulate petitions for its proposal until 2020.

As plaintiffs' counsel acknowledged to the Court and confirmed in the supplemental briefing, MFTE has suspended its petition efforts because of the COVID-19 pandemic. This development raises the question whether the case has become moot as to MFTE.

As this Court explained in *Anway v Grand Rapids R Co*:[14]

> "It is universally understood by the bench and bar . . . that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. The only way a disputed right can ever be made the subject of judicial investigation is, first, to exercise it, and then, having acted, to present a justiciable controversy in such shape that the disputed right can be passed upon in a judicial tribunal, which can pronounce the right and has the power to enforce it."[15]

We have not addressed mootness in the context of a voluntarily abandoned ballot-question petition drive, but the relevant cases we discovered from other jurisdictions are in uniform agreement that the voluntary abandonment of a petition drive renders a case moot.

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[14] *Anway v Grand Rapids R Co*, 211 Mich 592; 179 NW 350 (1920).

[15] *Id*. at 610, quoting *Ex parte Steele*, 162 F 694, 701 (ND Ala, 1908).

In *Personhood Nevada v Bristol*, the respondents challenged a proposed initiative drive.[16] While the case was on appeal in the Nevada Supreme Court, the deadline for obtaining initiative signatures passed without the backers having submitted any.[17] Like our Court did here, the Nevada Supreme Court ordered the parties to brief whether the case was moot. The initiative proponents argued, among other things, that the court could reach the merits because they planned to file the same petition two years later.[18] The court, citing numerous decisions from other states, had no trouble concluding that "addressing a potential future initiative at this point would be speculative and lead to an improper advisory opinion."[19]

Another instructive case is *Poulton v Cox*.[20] There, the petitioners backed an initiative to introduce legis-

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[16] *Personhood Nevada v Bristol*, 126 Nev 599; 245 P3d 572 (2010).

[17] *Id*.

[18] *Id*. at 603.

[19] *Id*. See also *id*. at 604 ("[O]ther courts have dismissed appeals under similar circumstances. *See Ulmer v. Alaska Restaurant & Beverage Ass'n*, 33 P.3d 773 (Alaska 2001) (dismissing an appeal because the question regarding a proposed initiative petition's summary became moot when its sponsors failed to file the petition by the deadline and no exception to the mootness doctrine applied, since that court typically resolves such issues in time, the initiative might not be proposed again, and the issue was not so important as to warrant discussion despite lacking a current controversy); *Asher v. Carnahan*, 268 S.W.3d 427 (Mo. Ct. App. 2008) (dismissing an appeal challenging the language of a ballot summary that became moot when the proponents of the initiative petition failed to submit signatures by the deadline, since no guarantee existed that the language at issue would be used again in the future by both the secretary of state and the lower court); *Kerr v. Bradbury*, 340 Or. 241, 131 P.3d 737 (2006) (dismissing as moot a petition for review when the proponents of a ballot measure failed to collect sufficient signatures).").

[20] *Poulton v Cox*, 368 P3d 844; 2016 UT 9 (2016).

lation; when the Lieutenant Governor rejected their application, they sought an order requiring the Lieutenant Governor to reverse his action.[21] After filing the petition with the Utah Supreme Court, the petitioners "[p]ublicly and formally ceased 'efforts to place the proposed initiative on the ballot.' "[22] Thus, the issue evaded review "only because" the ballot proponents ended their efforts.[23] The court held that the petition was moot because effective relief no longer was possible.[24]

We agree with the reasoning of *Personhood Nevada*, *Poulton*, and the other cases cited above, and we believe that such reasoning applies with equal force here. The original parties to the case conclude likewise, arguing to the Court in their supplemental briefing that the case is moot as to MFTE. Because MFTE is no longer circulating its petition with the intent to put it on this year's ballot, a judgment on the merits of the case would be "a decision in advance about a right before it has been actually asserted and contested, or a judgment . . . which . . . cannot have any practical legal effect upon a then existing controversy."[25] Our decision would only serve to instruct MFTE as to the law in this area should MFTE choose to pursue a petition in the future.[26] But MFTE does not, at present,

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[21] *Id*. at 844-845.

[22] *Id*. at 845.

[23] *Id*. at 846.

[24] *Id*.

[25] *Anway*, 211 Mich at 610.

[26] The Court may hear an otherwise moot case if the issue is "one of public significance that is likely to recur, yet evade judicial review." *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002), abrogated on other grounds by *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463; 719 NW2d 19 (2006)

have anything at stake in this dispute.[27] It would be, too, a singular decision: we have failed to discover any

(emphasis added). In arguing that the case is not moot, Justice ZAHRA's dissent relies heavily on a footnote in *Meyer v Grant*, 486 US 414, 417 n 2; 108 S Ct 1886; 100 L Ed 2d 425 (1988). In that case, the Court concluded the matter was capable of repetition yet evading review because it was unlikely that a proponent of a ballot initiative could ever obtain a judgment and gather enough signatures within the required time period, which was six months. *Id*. But the present case does not satisfy either prong of the exception to mootness: it is not likely to recur or to evade review.

With regard to the former prong, the Court in *Meyer* noted that the initiative proponents continued to advocate for the initiative and "plan[ned] future attempts" to have it passed. *Meyer*, 486 US at 418 n 2. Here, as noted above, MFTE has not asserted to this Court that it intends to resume the petition drive later, nor is there any record evidence suggesting it will. And, when asked to brief the question, MFTE agreed the case is moot, thus signaling that it is abandoning its claim for relief in this case. As a result, we cannot conclude the issue is likely to recur.

Nor is there any reason to believe that, even if this issue were likely to recur, it would somehow evade judicial review. This case is moot only because of MFTE's decision to drop the ballot drive. Although the time frame for the ballot drive here is similar to the one in *Meyer*, that case clearly did not involve an issue that could have been fully and finally litigated through all appellate levels in a timely manner. In fact, by the time the case was heard, the election at which the initiative was to appear on the ballot was years past. *Id*. By contrast, we heard and could easily have decided the present case before the relevant election. Indeed, plaintiffs, including MFTE, concede that there is ample time for the issue to receive full appellate review. It has evaded review only because of MFTE's voluntary action. See *Poulton*, 368 P3d at 846 ("The issue did evade review this time, but only because the Petitioners, 'less than one month before oral argument, . . . issued a press release publicly announcing that' " the initiative efforts were ending, and therefore the issue was not likely to evade review). See also *Personhood Nevada*, 126 Nev at 602-604 (determining that the case did not "involve[] a matter of widespread importance that is capable of repetition, yet evading review"). Thus, although election cases sometimes require dispatch, nothing inherent in the current case or the issues it presents suggests that it could not receive a timely decision on the merits. It is not, therefore, an issue that will evade judicial review were it to arise again in the future.

[27] We recently considered the issue of mootness in the election context in *Paquin v City of St Ignace*, 504 Mich 124; 934 NW2d 650 (2019).

case involving ballot initiatives that does not concern an actual ballot initiative.[28] For these reasons, we hold that the case is moot as to MFTE.

C. STANDING AS TO THE OTHER PLAINTIFFS IN *LEAGUE OF WOMEN VOTERS*

Because the issue of whether 2018 PA 608 is constitutional is moot as it pertains to MFTE, the question

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There, the Court refused to declare sua sponte that the case was moot. In *Paquin*, the Court reasoned that the case was not moot because though the disputed election had already occurred, the defendant was barred from public office for 20 years after his 2010 felony conviction, and he said he planned to run for office in the future. *Id*. at 131 n 4. If MFTE intends to pursue a ballot initiative in 2022, the facts of this case would seem similar. But the situations are distinguishable. In *Paquin*, the defendant was disabled from running for office. That prohibition, paired with his intent to seek office during the period of the disability, created an existing controversy regarding which the Court's judgment could have a practical legal effect. But in the instant case, even if MFTE intends to pursue its ballot initiative in the future, it would not be disqualified from doing so based on 2018 PA 608. Instead, MFTE's only remaining claim would be that, if it proceeds in 2022, the act will make it more difficult to do so. A live controversy is not presented by the speculative difficulties potentially arising from a party's possible intent to someday do something. Cf. *Lujan v Defenders of Wildlife*, 504 US 555, 564; 112 S Ct 2130; 119 L Ed 2d 351 (1992) ("And the affiants' profession of an 'inten[t]' to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.").

[28] Justice ZAHRA and Justice CLEMENT fault us for failing to go further than the parties request with regard to mootness. Justice ZAHRA, for example, questions why we do not consider providing plaintiffs relief that they do not ask for: remanding the matter "for further factual development as to whether it is reasonable to expect that the same controversy will recur leading up to the November 2022 election." *Post* at 634 n 13. MFTE clearly had the opportunity in its supplemental briefing on mootness to present any argument concerning its future

arises whether the other plaintiffs have standing to challenge the constitutionality of 2018 PA 608. The remaining plaintiffs are LWV, Mayers, Epshteyn, and Rubin. LWV's members, according to their complaint, "wish to exercise their rights as Michigan registered voters to support placement of proposals on the general election ballot by signing petitions." Mayers, Epshteyn, and Rubin also "wish to exercise their rights as Michigan registered voters to support placement of proposals on the general election ballot by signing petitions."[29]

Plaintiffs requested a declaratory judgment and injunctive relief. As this Court stated in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*,[30] "[W]henever a litigant meets the requirements of MCR 2.605, it is sufficient to

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plans. In light of this, we see no reason to speculate about MFTE's plans or to conscript it to continue this litigation merely so that the Court can reach an issue that it might like to opine on. In our adversary system, it is no small matter that the plaintiffs are no longer pursuing relief and agree that their victories below should be vacated. In neither *Meyer* nor any of the other cases cited by Justice ZAHRA did the parties themselves acknowledge their lack of a continuing interest in the litigation and request vacatur and dismissal of the case. See *post* at 634-635 n 14.

Like Justice ZAHRA, Justice CLEMENT ignores MFTE's supplemental briefing that implicitly concedes that it no longer has an interest in this case. Instead of looking to MFTE's recent briefing that reflects the further developments in the case and MFTE's current position on the issue, her analysis only considers allegations in the complaint filed at the outset of this case. Relying on MFTE's supplemental briefing, we cannot conclude that MFTE needs an answer now to preserve its rights since MFTE has not indicated it has any plans to renew its ballot drive and has not informed us of an intention to begin any other drive. Any answer we gave would therefore be purely hypothetical.

[29] Epshteyn and Rubin also "live in congressional districts within a densely populated metropolitan area," so they are more likely not to have their signatures counted as a result of the 15% geographic-distribution requirement.

[30] *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010).

establish standing to seek a declaratory judgment."[31] MCR 2.605(A)(1) states: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights.[32] Though "a court is not precluded from reaching issues before actual injuries or losses have occurred," there still must be "a present legal controversy, not one that is merely hypothetical or anticipated in the future."[33]

As the remaining plaintiffs now admit, and the Secretary of State agrees, they cannot show a present legal controversy rather than a hypothetical or anticipated one. A declaratory judgment is not *needed* to guide plaintiffs' future conduct. Plaintiffs only ask for a declaratory judgment because it perhaps may be needed in the future should they decide to sign some initiative. They have no plans now to sign any. There-

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[31] *Id*. at 372. MCR 2.605 incorporates the doctrine of standing, as well as ripeness and mootness. *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012) (*UAW*).

[32] *UAW*, 295 Mich App at 495.

[33] *Van Buren Charter Twp v Visteon Corp*, 503 Mich 960, 965 n 16 (2019) (VIVIANO, J., dissenting), citing Borchard, Declaratory Judgments (1934), p 40 ("When the complaint on these tests is considered premature, the dismissal may be explained by any one of a series of labels, e.g., that there is as yet no 'controversy,' that the issue is hypothetical, that the result would be only an advisory opinion, etc."); 26 CJS, Declaratory Judgment, § 28, p 66 ("[A] controversy is justiciable, such that a declaratory judgment action may be maintained, when present legal rights are affected, not when a controversy is merely anticipated.").

fore, because plaintiffs do not meet the requirements of MCR 2.605, they do not have standing.[34]

It is true that the bar for standing is lower when a case concerns election law. The Court of Appeals noted in *Deleeuw v State Bd of Canvassers* that "[e]lection cases are special . . . because without the process of elections, citizens lack their ordinary recourse. For this reason we have found that ordinary citizens have standing to enforce the law in election cases."[35] *Deleeuw* cited *Helmkamp v Livonia City Council*,[36] which similarly stated, " '[I]n the absence of a statute to the contrary, . . . a private person . . . may enforce by mandamus a public right or duty relating to elections without showing a special interest distinct from the interest of the public.' "[37]

However, these cases should not be interpreted as allowing any citizen to bring an action for declaratory judgment regarding the constitutionality of any election law that might affect his or her interests in the future. In *Deleeuw*, the plaintiffs, petition signers, sought to have Ralph Nader put on the 2004 ballot as an independent candidate for president. In *Helmkamp*, the plaintiffs, residents and electors of Livonia, filed a complaint for a declaratory judgment and an order of mandamus compelling defendants, the City Council of Livonia and the Election Commission of Livonia, to call a special election to elect a mayor.

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[34] Justice CLEMENT treats the individual plaintiffs the same way she does MFTE: she ignores their supplemental briefing in which they affirm their lack of standing.

[35] *Deleeuw v State Bd of Canvassers*, 263 Mich App 497, 505-506; 688 NW2d 847 (2004), citing *Helmkamp v Livonia City Council*, 160 Mich App 442, 445; 408 NW2d 470 (1987).

[36] *Helmkamp*, 160 Mich App 442.

[37] *Id*. at 445 (citation omitted).

In both of these situations, the facts demonstrated that there was a present legal controversy. In *Deleeuw* there was a candidate whom the plaintiffs claimed should be placed on the upcoming ballot, and in *Helmkamp* there was an election that the plaintiffs claimed should be held. Not so here, where there is no such controversy because MFTE is not currently pursuing a ballot initiative and the other plaintiffs have not alleged that they have any concrete plans to sign any other petition (much less shown that their signatures would not be counted due to 2018 PA 608).[38] There is no specific circumstance that plaintiffs claim should be different—they only want instruction going forward. And nothing in the relevant caselaw gives any voter standing to challenge any election-related laws at any time. At the least, as noted above, we have found no case dealing with ballot-proposal laws *sans* any actual ballot proposal being supported or challenged. In any event, plaintiffs do not meet the requirements of MCR 2.605, and therefore under *Lansing Sch* they have no standing.

D. VACATUR OF THE LOWER-COURT DECISIONS IN *LEAGUE OF WOMEN VOTERS*

Having determined that the case is moot and that no other plaintiff has standing to pursue the case, we must now consider whether to vacate the lower-court opinions in *League of Women Voters v Secretary of State*. The United States Supreme Court normally vacates lower-court judgments in moot cases.[39] We

[38] Whether we should reconsider the election-law standing in light of *Lansing Sch* is another question. *Deleeuw* relies on caselaw that was overruled in *Lansing Sch*, 487 Mich at 378. There is no need to address this issue here.

[39] *Alvarez v Smith*, 558 US 87, 94; 130 S Ct 576; 175 L Ed 2d 447 (2009), citing *United States v Munsingwear, Inc*, 340 US 36; 71 S Ct 104; 95 L Ed 36 (1950).

have followed this general practice.[40] "Because this practice is rooted in equity, the decision whether to vacate turns on 'the conditions and circumstances of the particular case.' "[41]

Here, the equitable considerations weigh in favor of vacating the lower-court decisions. This case has been

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[40] See *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 489 Mich 884, 884 (2011) (vacating this Court's and the Court of Appeals' opinions because the issue was moot), quoting *Munsingwear*, 340 US at 39-40 ("The established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below . . . . When that procedure is followed, the rights of all parties are preserved . . . .").

[41] *Azar v Garza*, 584 US ___; 138 S Ct 1790, 1792; 201 L Ed 2d 118 (2018), quoting *United States v Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 US 466, 478; 36 S Ct 212; 60 L Ed 387 (1916). See also *US Bancorp Mtg Co v Bonner Mall Partnership*, 513 US 18, 25; 115 S Ct 386; 130 L Ed 2d 233 (1994) (referring to the "equitable tradition of vacatur").

This Court has also vacated Court of Appeals opinions as a result of mootness. See, e.g., *People v Smith*, 502 Mich 624, 632; 918 NW2d 718 (2018) (vacating as moot the part of the Court of Appeals' judgment holding a resignation provision to be invalid because the defendant had resigned from office prior to the Court of Appeals' decision); *In re Investigative Subpoenas*, 488 Mich 1032 (2011) (vacating the Court of Appeals' judgment when a subsequent decision of the United States Supreme Court rendered it moot). Other courts have also vacated lower-court decisions when cases have been rendered moot. See, e.g., *Freeman v Burrows*, 141 Tex 318, 319; 171 S2d 863 (1943) ("When a cause becomes moot on appeal, all previous orders and judgments should be set aside and the cause, not merely the appeal, dismissed."); *Van Schaack Holdings, Ltd v Fulenwider*, 798 P2d 424, 431 (Colo, 1990) (affirming "the court of appeals determination that the trial court's judgment should be vacated"); *Dep't of Human Resources, Child Care Admin v Roth*, 398 Md 137, 143; 919 A2d 1217 (2007) (" 'Where there might be some effects from the trial court's decision in a moot case we vacate the judgments below and order that the trial court dismiss the action.' "), quoting *In re Kaela C*, 394 Md 432, 452; 906 A2d 915 (2006); *Aquacultural Research Corp v Austin*, 88 Mass App 631, 631; 41 NE3d 418 (2015) ("We conclude that the case is moot and vacate all of the unreviewed decisions.").

a procedural mess from the beginning—with the Attorney General declining to defend the constitutionality of 2018 PA 608, the Legislature beginning its own action in the Court of Claims rather than intervening, the Court of Claims adjudicating a dispute with no "actual controversy" as required by MCR 2.605(A), and the Court of Appeals issuing a published opinion when no appealing party was aggrieved by the lower-court judgment. Portions of 2018 PA 608 have now been held unconstitutional in a precedential opinion—an opinion that no original party wishes to appeal to this Court because they all agree that the disputed portions of the act are unconstitutional. Leaving aside the merits of the Court of Appeals decision, that it is effectively unreviewable, as well as the product of such a bizarre mix of blunders, counsels in favor of vacating both it and the Court of Claims' decision below and ordering dismissal of the case.

E. STANDING AND MOOTNESS IN THE LEGISLATURE'S CASE

Generally, standing is assessed at the outset of the case.[42] Under *Lansing Sch*, standing is "a limited, prudential doctrine,"[43] the purpose of which "is to assess whether a litigant's interest in the issue is sufficient to 'ensure sincere and vigorous advocacy.' "[44] *Lansing Sch* spelled out that "a litigant has standing whenever there is a legal cause of action" and "whenever a litigant meets the requirements of MCR 2.605 . . . ."[45] In addition,

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[42] See *Girard v Wagenmaker*, 437 Mich 231, 243-244; 470 NW2d 372 (1991); see also *Already, LLC v Nike, Inc*, 568 US 85, 90-91; 133 S Ct 721; 184 L Ed 2d 553 (2013).

[43] *Lansing Sch*, 487 Mich at 372.

[44] *Id*. at 355, quoting *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995).

[45] *Id*. at 372.

> [w]here a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.[46]

The party's interest must persist as the case goes forward—if it does not, the case becomes moot.[47]

At the time the Legislature filed its complaint here, it had two potential sources of interest in the case.[48]

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[46] *Id*.

[47] See *Already*, 568 US at 91 ("A case becomes moot . . . 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' ") (citation omitted); *Mich Chiropractic Council v Comm'r of Office of Fin & Ins Serv*, 475 Mich 363, 371 n 15; 716 NW2d 561 (2006) (same), overruled on other grounds by *Lansing Sch*, 487 Mich 349. As the United States Supreme Court has explained, "[m]ootness has been described as ' "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." ' " *Arizonans for Official English v Arizona*, 520 US 43, 68 n 22; 117 S Ct 1055; 137 L Ed 2d 170 (1997) (citations omitted). Or, as another court put it, "Mootness . . . 'is akin to saying that, although an actual case or controversy once existed, changed circumstances have intervened to destroy standing.' . . . [S]tanding applies at the sound of the starting gun, and mootness picks up the baton from there." *Sumpter v Wayne Co*, 868 F3d 473, 490 (CA 6, 2017) (citation omitted).

[48] Of course, the Legislature has standing to appeal the lower courts' determinations that it lacks standing in its own case. The Legislature is certainly aggrieved as to those decisions. *Federated Ins Co*, 475 Mich at 291-292 ("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.").

The first was the ongoing litigation in *League of Women Voters v Secretary of State*—it was, at the very least, possible at the time of filing that defendant in that case would not defend the statutes. The question thus arises whether an executive officer's actual or threatened nondefense of legislation in a private lawsuit gives the Legislature a sufficient interest to bring its own action against those officers.

This is a complicated issue.[49] Views on legislative standing are wide-ranging, with those such as the late Justice Scalia on the one hand, who vehemently opposed expansion of legislative standing as an encroachment on the separation of powers.[50] On the other hand

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[49] See generally Hall, Abstract, *Making Sense of Legislative Standing*, 90 S Cal L Rev 1, 1 (2016) ("Legislative standing doctrine is neglected and under-theorized. There has always been a wide range of opinions on the Supreme Court about the proper contours of legislative standing doctrine . . . ."). Justice CLEMENT asserts that "the Legislature does not provide a single example of a legislative body maintaining a declaratory-judgment action against an executive officer." *Post* at 607. However, there are cases in which this has occurred. See, e.g., *Romer v Colorado Gen Assembly*, 810 P2d 215, 218-219 (Colo, 1991) (concluding that the governor had standing to sue the legislature and noting the court's past holdings that the legislature "had standing to bring [a declaratory-judgment] action against the governor to challenge a particular construction given certain statutes by the governor" and "to challenge the constitutional validity of gubernatorial vetoes"); see also *Wisconsin Legislature v Palm*, 391 Wis 2d 497, 513 (2020) (holding that the legislature had standing to challenge regulations issued by the Secretary-designee of the Department of Health Services). We take no position on whether these cases were correctly decided.

[50] See *Windsor*, 570 US at 786 (Scalia, J., dissenting) ("[I]f what we say is true some Presidential determinations that statutes are unconstitutional will not be subject to our review. That is as it should be, when both the President and the plaintiff agree that the statute is unconstitutional."); *id*. at 788-789 ("JUSTICE ALITO would create a system in which Congress can hale the Executive before the courts not only to vindicate its own institutional powers to act, but to correct a perceived inadequacy in the execution of its laws. This would lay to rest Tocqueville's praise of our judicial system as one which 'intimately bind[s] the case made for

are views such as those of Justice Alito, who would conclude that "in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so."[51] And of course there are views

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the law with the case made for one man,' one in which legislation is 'no longer exposed to the daily aggression of the parties,' and in which '[t]he political question that [the judge] must resolve is linked to the interest' of private litigants. A. de Tocqueville, Democracy in America 97 (H. Mansfield & D. Winthrop eds. 2000). That would be replaced by a system in which Congress and the Executive can pop immediately into court, in their institutional capacity, whenever the President refuses to implement a statute he believes to be unconstitutional, and whenever he implements a law in a manner that is not to Congress's liking.") (alterations in *Windsor*).

See also Grove, *Justice Scalia's Other Standing Legacy*, 84 U Chi L Rev 2243, 2251 (2017) ("Justice Scalia opposed the expansion of government standing for many of the same reasons that he advocated limits on private-party standing. To Scalia, standing was a way to constrain the federal courts and prevent them from usurping the authority of the political branches."). Judge Bork also advocated strongly for this view in his dissent in *Barnes v Kline*, 245 US App DC 1, 26 (1984), judgment vacated sub nom *Burke v Barnes*, 479 US 361 (1987) (Bork, J., dissenting) ("But the transformation this court has wrought in its own powers necessarily runs much farther than that. If Congress, its Houses, or its members can sue the President for a declaration of abstract legal right, it must follow that the President may, by the same token, sue Congress."); *id*. at 51 ("Gradually inured to a judiciary that spreads its powers to ever more aspects of governance, the people and their representatives may come to accept courts that usurp powers not given by the Constitution, courts that substitute their discretion for that of the people's representatives. Perhaps this outcome is also the more likely . . . because excesses such as this court's governmental standing rationale, shrouded as they are in technical doctrine, are not so visible as to excite alarm. This case represents a drastic rearrangement of constitutional structures, one that results in an enormous and uncontrollable expansion of judicial power. I have tried to make that fact visible. There is not one shred of support for what the majority has done, not in the Constitution, in case law, in logic, or in any proper conception of the relationship of courts to democracy. I have tried to make that fact visible, too.").

[51] *Windsor*, 570 US at 807 (Alito, J., dissenting). The majority in *Windsor* stated:

in the middle, such as those expressed by the United States Supreme Court in *Coleman v Miller*,[52] in which the Court held that members of the Legislature had standing when their votes had "been overridden and virtually held for naught[,] although if they are right in their contentions their votes would have been sufficient to defeat ratification."[53]

> [I]f the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. This would undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is. Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court. [*Id*. at 762 (opinion of the Court) (quotation marks, citations, and brackets omitted).]

But this was in the context of allowing the Bipartisan Legal Advisory Group of the House of Representatives to intervene to defend the constitutionality of the Defense of Marriage Act, not allowing them to have standing to initiate their own action every time the Executive declares a law unconstitutional.

[52] *Coleman v Miller*, 307 US 433; 59 S Ct 972; 83 L Ed 1385 (1939).

[53] *Id*. at 438. In other words, the Court held that these allegations established "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id*. See also *Raines v Byrd*, 521 US 811, 823; 117 S Ct 2312; 138 L Ed 2d 849 (1997) ("It is obvious, then, that our holding in *Coleman* stands (at most, see n. 8, *infra*) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."); *Ariz State Legislature v Ariz Indep Redistricting Comm*, 576 US 787, 804; 135 S Ct 2652; 192 L Ed 2d 704 (2015) (concluding that the Arizona Legislature had standing when the disputed proposition and the state constitution "would 'nul-

Ultimately, we do not need to resolve this thorny matter in the present case. In light of the above analysis vacating the lower-court decisions in the *League of Women Voters* case and ordering its dismissal, any interest the Legislature may have had in the past has now dissipated. Consequently, to the extent that any such interest could have justified standing when the case was filed, the matter is now moot.[54]

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lif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan' "), quoting *Raines*, 521 US at 823-824 (alteration in *Ariz State Legislature*). There are also other theories of legislative standing and other factors that the United States Supreme Court and other courts have referenced when determining whether the Legislature, or members of the Legislature, have standing. See, e.g., *Judiciary Comm of the US House of Representatives v McGahn*, 445 US App DC 293 (2020), aff'd in part and remanded in part 968 F3d 755 (2020) (Rogers, J., dissenting) (listing the following factors, which are derived from *Raines*, as relevant to whether the Legislature had standing: "(1) the individual plaintiffs alleged an institutional injury that was 'wholly abstract and widely dispersed'; (2) plaintiffs' 'attempt to litigate th[eir] dispute at this time [wa]s contrary to historical experience'; (3) the plaintiffs 'ha[d] not been authorized to represent their respective Houses of Congress . . . , and indeed both Houses actively oppose[d] their suit'; and (4) dismissing the lawsuit 'neither deprive[d] Members of Congress of an adequate remedy . . . , nor foreclose[d] the Act from constitutional challenge.") (alterations in *Judiciary Comm*).

[54] In reaching the standing issue, Justice MARKMAN's dissent crafts a rule tailor-made for this case and, apparently, this case alone. Standing was appropriate, according to the dissent, given various "unique circumstances" it finds in the present case: the Attorney General's formal opinion declaring the statute unconstitutional, the Legislature's failure to file a motion to intervene in the courts below, the lower courts' holdings that the Legislature lacked standing, the lower courts' treatment of the Legislature "*as if* it were a party [to the [*League of Women Voters* case]," and the fact that "absent the Legislature's participation, there would have been no 'actual controversy . . . ." *Post* at 622. This medley of facts ignores that standing is determined at the time the complaint is filed. See *Girard*, 437 Mich at 243-244. Except for the formal opinion, none of these "unique circumstances" existed at the time

The second source potentially giving rise to standing is the formal Attorney General opinion that concluded the statute at issue is unconstitutional. That opinion was, as noted, issued before the Legislature filed its lawsuit and it remains in place now. Thus, the only way to hold that the Legislature has standing to pursue its case would be to conclude that any time the Attorney General issues a formal opinion concluding that an act is unconstitutional, the Legislature has been harmed in such a way that it has standing to bring an action for declaratory judgment. Such a conclusion would be an outlier, going far beyond even

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the Legislature brought its suit. And, as we explain below, the formal opinion is not enough to confer standing.

The dissent also points to the injury the Legislature suffers from the "lack of enforcement" of the statute. *Post* at 626. Presumably, this could have occurred before the Legislature filed, but the dissent's meaning is unclear. Does it intend to suggest that any time the executive fails to *enforce* a statute, the Legislature can step in to fill the void? That would constitute a radical reshaping of the justice system and raise serious separation-of-powers concerns. Under this view, for example, every time a police officer fails to fine a speeding driver on a state road, the Legislature could initiate a prosecution. To the extent the dissent means to say that the Legislature has a sufficient injury whenever the executive fails to *defend* the constitutionality of a statute in court, problems still exist with the dissent's argument. Specifically, when the Legislature filed its case, had the executive branch communicated that it would not defend the statute in court? The dissent does not say. Instead, it falls back upon postfiling events to establish the Legislature's standing at the time of filing, namely the fact that a judicial decision striking down a statute would injure the Legislature by impairing the "effectiveness of its votes . . . ." *Post* at 626. But that threat is present in every case challenging the constitutionality of a statute, whether the executive vigorously defends the law or not. So, under the dissent's theory, can the Legislature file its own case any time a statute is challenged in private litigation? That, too, would represent a significant reworking of the present system.

In short, we believe that by granting the Legislature's motion to intervene, our opinion addresses the concerns raised by the dissent, but in a more measured fashion.

Justice Alito's view that Congress may step in to defend the constitutionality of an act that has already been struck down by a court when the Executive refuses to do so.[55] It would require a very generous view of legislative standing to allow the Legislature to initiate a declaratory-judgment action whenever the Executive declines to enforce an act it believes unconstitutional, relying on a formal opinion by the Attorney General.[56] Those formal opinions, it should be noted, do not bind the courts.[57] Despite arguing that the Attorney General opinion causes harm giving rise to standing, the Legislature has cited no authority supporting this view.[58] Such an extension of standing is unwar-

[55] Justice MARKMAN contends that the Legislature not only has standing due to the unique circumstances of this case under *Lansing Sch*, but also would have standing under *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992). But *Lujan* set forth the standard for standing generally; it did not take into account the specific considerations regarding legislative standing. He cites *Chadha*, 462 US 919, and *Windsor*, 570 US 744, to support his conclusion, but both of those cases involved intervention in a suit already initiated by a private party, not standing for the Legislature itself to initiate a suit. Additionally, legislative standing made more sense in *Chadha*, in which a specific prerogative granted to the Congress via statute—the legislative veto—was threatened.

[56] As noted above, this would pose separation-of-powers concerns. See note 54 of this opinion.

[57] See *Danse Corp v Madison Hts*, 466 Mich 175, 182 n 6; 644 NW2d 721 (2002). We have left open the question whether the formal opinions bind even other governmental agencies. *Id*. See also *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 8 n 5; 740 NW2d 444 (2007).

[58] In *State ex rel Howard v Okla Corp Comm*, 614 P2d 45; 1980 OK 96 (1980), the Oklahoma Supreme Court held that members of the legislature had standing to sue a governmental agency to force it to comply with a statute that the attorney general had deemed unconstitutional in a formal opinion. Although the court mentioned the legislature's interest in defending its work, the plaintiffs did not sue in an institutional capacity; rather, they brought the case as " 'citizens and taxpayers of the

ranted where a private party could challenge the Attorney General's opinion. Thus, the Legislature had no standing to pursue its case on the basis of the Attorney General opinion.[59]

IV. CONCLUSION

We can recall few cases that have been so divorced from the factual circumstances giving rise to them as the cases the Court now considers—so much so that the lower-court opinions do not even recount the facts giving rise to the action. But once the underlying

State of Oklahoma and members of either the Oklahoma Senate or House of Representatives . . . .' " *Id*. at 51. The court determined that the underlying legal issue was one of public concern to the citizens of the state. *Id*. The plaintiffs' status as citizens, in other words, sufficed for standing. *Id*. at 52 ("[W]here the main object of the suit is to vindicate a public right, a court may rightfully take jurisdiction upon the . . . relation of a private citizen in the name of the State."). In a subsequent case the same court again determined that individual members of the legislature had standing to challenge an attorney general—but the issue was whether the Legislature needed to follow the attorney general opinion because such opinions had been deemed binding on state officials. *State ex rel York v Turpen*, 681 P2d 763, 765; 1984 OK 26 (1984). *Turpen* held that those opinions—i.e., ones that concluded a statute was unconstitutional—were no longer binding and the court therefore declined to reach the merits, *id*. at 767, and in a later case the court held that an attorney general opinion "provides no basis upon which original jurisdiction need be assumed," *Keating v Johnson*, 918 P2d 51, 58; 1996 OK 61 (1996). There is no argument here that the Legislature itself must adhere to the Attorney General's opinion. Thus, even Oklahoma's approach does not appear to support standing in this case.

[59] Justice CLEMENT assails our opinion for not answering the question of whether the Legislature can ever bring an action for declaratory judgment in these circumstances. However, for the reasons discussed in this opinion, we do not believe it is necessary for us to reach this issue. See *PDK Labs Inc v US Drug Enforcement Agency*, 360 US App DC 344, 357 (2004) (Roberts, J., concurring) ("This is a sufficient ground for deciding this case, and the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further.").

circumstances are examined and the MFTE's suspension of its ballot proposal is considered, it becomes patently clear that any decision by this Court on the merits would be purely advisory.[60] In granting the Legislature's motion to intervene, we hold that the Legislature meets the requirements of our court rules for intervention and has appellate standing in order to defend a statute that the Attorney General has left undefended in court. But we further hold that the *League of Women Voters* case is moot as to MFTE and that no other party has standing. Therefore we vacate the lower-court decisions in that case. Given these holdings, we affirm on alternate grounds the Court of Appeals' conclusion that the Legislature has no standing to pursue its own case. We therefore remand both cases to the trial court for entry of dismissal orders.

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

CLEMENT, J. (*concurring in part, concurring in the judgment in part, and dissenting in part*). I concur in full with the Court's decision to grant the Legislature's motion to intervene in Docket No. 160907 and with the Court's analysis of why it is granting that motion. However, having granted intervention, I would reach the merits of the issues presented, and I therefore

[60] The dissents express great concern that this resolution leaves important legal questions concerning the constitutionality of the statute unanswered. We agree that, when it is appropriate, this Court has an obligation to say what the law is. But we cannot let this desire for stability overcome the limits of our role. The judiciary cannot "simply scan the horizon for important legal issues to opine on—we address such issues only as they arise in the genuine controversies between adverse parties that come before us." *LWV II*, 506 Mich at 907 (VIVIANO, J., concurring). Because such a case is not before us, we are constrained from reaching the underlying merits.

dissent from the Court's decision to conclude that the dispute in Docket No. 160907 is moot, both for the reasons offered by Justice ZAHRA[1] as well as further reasons I will explain. That said, not having prevailed on the question of whether the dispute in Docket No. 160907 is moot, I further concur with the result of the Court's disposition of the Legislature's other effort at bringing this dispute before the courts: its original action for a declaratory judgment in Docket No. 160908. I cannot join the Court's analysis, however, as I disagree that "we do not need to resolve this thorny matter [of legislative standing] in the present case"—in my view, if we are to close the courthouse door to the Legislature (a decision with which I agree), we owe a definitive answer as to why.

I. MOOTNESS

I agree with Justice ZAHRA that the issues raised in Docket No. 160907 fall, at minimum, within the exception to the mootness doctrine allowing courts to adjudicate issues which are capable of repetition, yet likely to otherwise evade judicial review. I further believe that there is not even a need to apply an exception to the mootness doctrine, because at least the allegations made by plaintiff Michiganders for Fair and Transparent Elections (MFTE), as well as those made by the individual-voter plaintiffs, remain live concerns that need judicial resolution.[2] Consequently, I dissent from the Court's holding that the complaint in Docket No. 160907 is now moot.

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[1] I am unable to join Justice ZAHRA's dissent in full for the narrow reason that he concludes that the Legislature should be granted relief in its original action against the Secretary of State, and I disagree. Absent that qualification, I agree with his mootness analysis.

[2] In response to a request for supplemental briefing from this Court,

First, as to MFTE, it alleges in its complaint that it "intends to circulate petitions for a constitutional amendment to strengthen and reform Michigan's campaign finance reporting and disclosure requirements." It has not recanted its intent to do that; rather, it abandoned its efforts to collect signatures to place the proposal on the 2020 ballot. But nothing has happened that would change its interest in its proposal—it is not as though some other, similar constitutional amendment was ratified (or even voted on) in 2020, nor has the Legislature enacted legislation that mollifies MFTE's concerns. Taking its complaint at face value, I believe MFTE still retains an interest in knowing whether it must satisfy the requirements of 2018 PA 608.

The majority contends that any decision here "would only serve to instruct MFTE as to the law in this area should MFTE choose to pursue a petition in the future." In a certain literal sense, this is true. Until a ballot-question committee actually gathers the requisite number of signatures, submits them to the Board of State Canvassers, and has those petitions rejected by the board on the ground of being improper in form, there will always be some degree of speculation or uncertainty about what the future holds and whether a judicial interpretation of the statute is strictly necessary. I do not believe this degree of speculation defeats a declaratory-judgment action under our jurisprudence; it seems very clear to me that a ballot-question committee has a valid interest in knowing what rules it must follow if its efforts are going to be legally valid. We have said that an " 'actual controversy' exists [for

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see *League of Women Voters of Mich v Secretary of State*, 506 Mich 885 (2020), the parties in Docket No. 160907 contend that their own case is moot. However, given that they have not stipulated to a dismissal of the case, I believe the Court should rely on the allegations made in the verified complaint in the Court of Claims.

purposes of the declaratory-judgment court rule, currently MCR 2.605(A)(1)] where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978). That is exactly what we have here. Moreover, MFTE has every right to continue collecting signatures to submit its proposal to voters at a future general election. I believe it has as much of an interest today in knowing what rules it must abide by while gathering signatures as it did when this action was filed.

I also believe the individual-voter plaintiffs in Docket No. 160907 continue to have a live interest in the outcome of this dispute. The majority concludes that their case presents no "actual controversy" under MCR 2.605(A)(1) because they "only want instruction going forward." But that is not at all what they want—indeed, the voters do not allege any need for instructions at all. Rather, they want assurance that any signatures they offer will be legally effective. They seem to me to have at least as much interest in a ruling on that as do the plaintiffs in more routine election cases concerning disputes over whether candidates will appear on the ballot. See, e.g., *Stumbo v Roe*, 332 Mich App 479; 957 NW2d 830 (2020), lv den 505 Mich 1127 (2020) (allowing the township supervisor and treasurer to challenge whether a particular candidate for township clerk was eligible for placement on the ballot). A plaintiff who is informed enough about the candidate field to challenge an allegedly ineligible candidate is not being denied any *personal* ability to vote—such a voter is free to vote for whichever candidate he or she prefers. Rather, in challenging an ineligible name, such a plaintiff is essentially trying to control (or at least influence) the behavior of *all other voters* in the jurisdiction, so that those voters will not

be presented with the possibility of voting for a particular option.[3] If voters can litigate the question of whether candidates they have no desire to vote for can appear on a ballot, just to control the options presented to all other voters in the jurisdiction, it seems to me that a voter has an even greater interest in whether their own signature will be legally effective—at that point, the voter is not trying to influence the behavior of others but rather obtain some legal certainty for his or her own participation in the electoral process.

Notably, the majority acknowledges "that the bar for standing is lower when a case concerns election law." Frankly, even in the absence of a relaxed standing rule in election cases, I think a voter positioned as these individual-voter plaintiffs are positioned would have standing to litigate this question. The relaxed standing rule in election cases only strengthens my view—an observation that applies with equal force to MFTE's interests as well. Consequently, while I agree with Justice ZAHRA that this dispute at least falls within the "capable of repetition, yet evading review" exception to our mootness doctrine, I do not even believe the case is moot such that an exception need be invoked.

II. LEGISLATIVE STANDING

A. THE LEGISLATURE'S CLAIMS ARE NONJUSTICIABLE

Of course, regardless of whether the dispute in Docket No. 160907 is moot, this Court could reach the

[3] Indeed, the way in which such litigation is directed at influencing the behavior of other voters is particularly apparent when one considers the distinction between being eligible to *run* for office and being eligible to have one's name *printed on the ballot*. See *Barrow v Detroit Election Comm*, 301 Mich App 404; 836 NW2d 498 (2013).

merits of the legal issues presented if the Legislature can maintain its declaratory-judgment action against the Secretary of State in Docket No. 160908, seeing as the issues presented are essentially identical. The Court of Appeals rejected this argument, holding "that the Legislature did not and does not have standing to bring a declaratory action in the matters at hand." *League of Women Voters of Mich v Secretary of State*, 331 Mich App 156, 175; 952 NW2d 491 (2020). The Legislature appeals this ruling to us, maintaining that it need not intervene in Docket No. 160907 to bring these issues before us and that its own declaratory-judgment action against the Secretary of State under MCR 2.605 in Docket No. 160908 is a sufficient vehicle for it to get a judicial ruling that 2018 PA 608 is constitutional.

Our Constitution vests this Court with "the judicial power of the state," Const 1963, art 6, § 1, which we have described as " 'the right to determine actual controversies arising between adverse litigants,' " *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 255 n 12; 701 NW2d 144 (2005), quoting *Anway v Grand Rapids R Co*, 211 Mich 592, 616; 179 NW 350 (1920) (quotation marks omitted). For us to answer the constitutional questions presented, then, we need an "actual controversy" between "adverse litigants." When the Legislature is suing the executive branch over its intended nonenforcement of a statute the Legislature enacted, do we have before us sufficiently adverse litigants who have between them an "actual controversy"?

This Court laid out the governing standard for standing in Michigan in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). There, we said that standing is "a limited, prudential

doctrine," *id*. at 372, whose purpose "is to assess whether a litigant's interest in the issue is sufficient to 'ensure sincere and vigorous advocacy,' " *id*. at 355, quoting *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995), meaning that "the standing inquiry focuses on whether a litigant 'is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable,' " *Lansing Sch Ed Ass'n*, 487 Mich at 355, quoting *Allstate Ins Co v Hayes*, 442 Mich 56, 68; 499 NW2d 743 (1993).

> Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [*Lansing Sch Ed Ass'n*, 487 Mich at 372.]

Here, if the focus is on whether the litigant's interest in the issue is sufficient to ensure sincere and vigorous advocacy, I have no doubt that the Legislature can satisfy this threshold. But as *Lansing Sch Ed Ass'n* notes, our standing inquiry is separate from our justiciability inquiry. And I do not believe a legislative declaratory-judgment action against an executive officer is justiciable when the Legislature seeks nothing more than a judicial declaration that the executive must implement a law as the Legislature prefers.

In general, the rule is that "a Michigan court of record may declare the rights and other legal relations

of an interested party seeking a declaratory judgment" "[i]n a case of actual controversy within its jurisdiction . . . ." MCR 2.605(A)(1). Per the text of the rule, then, "[t]he existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief." *Shavers*, 402 Mich at 588. Such an " 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights" and "prevents a court from deciding hypothetical issues," *id*. at 588, 589. This is not the case here. As has been noted in cases involving lawsuits filed by individual lawmakers, once "their legislative work-product [is] enacted . . . their special interest as lawmakers has ceased." *Killeen v Wayne Co Rd Comm*, 137 Mich App 178, 189; 357 NW2d 851 (1984). This is equally true of the Legislature as an institution—without regard to whether its laws are being properly enforced, that does not change the laws' status as public acts.

The Legislature argues that it must be able to maintain its declaratory-judgment action because "[i]f an executive branch member and the Attorney General team up to nullify a law and no party sues, that would leave the Legislature without a remedy." But this is not true—if the Legislature cannot maintain a direct action against the executive branch, "[t]he matter would [be] left, as so many matters ought to be left, to a tug of war between the [Executive] and the [Legislature], which has innumerable means (up to and including impeachment) of compelling the [Executive] to enforce the laws it has written." *United States v Windsor*, 570 US 744, 787; 133 S Ct 2675; 186 L Ed 2d 808 (2013) (Scalia, J., dissenting). See also *id*. at 763 (opinion of the Court) ("The integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise."). Our

political-question doctrine recognizes that "prudential considerations for maintaining respect between the three branches [may] counsel against judicial intervention[.]" *House Speaker v Governor*, 443 Mich 560, 574; 506 NW2d 190 (1993) (quotations marks, citation, and brackets omitted). "Courts are reluctant to hear disputes that may interfere with the separation of powers between the branches of government." *House Speaker v State Admin Bd*, 441 Mich 547, 555; 495 NW2d 539 (1993). This may help explain why the Legislature does not provide a single example of a legislative body maintaining a declaratory-judgment action against an executive officer.

In short, under *Lansing Sch Ed Ass'n*, our standing analysis and our justiciability analysis are distinct questions. The Court of Appeals held that the Legislature lacks standing. I disagree—if the test of standing is going to be whether we will get sincere and vigorous advocacy, I believe the Legislature satisfies it. However, I agree with the result of denying relief to the Legislature, because its claims are nonjusticiable. The purported injury suffered by the Legislature—the practical nullification through executive nonimplementation of a law the Legislature has enacted—is not one that the judiciary has recognized in the past. We have not done so for good reason: it would threaten the separation of powers and risk injecting this Court into political disputes between the Legislature and executive despite the fact that those coordinate branches of government are capable of resolving their disputes through the political process. When private litigants without access to the constitutional levers of power assert that their rights are being violated—as in Docket No. 160907—I of course believe it is generally the judiciary's duty to resolve such disputes, but if no such litigant steps forward, I would not set this Court

up as the arbiter of disputes solely between branches of government to which we are coequal, not superior.

B. RESPONSE TO THE MAJORITY

Although we reach the same result—denying relief to the Legislature in Docket No. 160908—I am unable to join the majority's analysis. The majority says that when the Legislature filed its complaint for a declaratory judgment, it "had two potential sources of interest in the case." The first is "the ongoing litigation in [Docket No. 160907]," which raises the question "whether an executive officer's actual or threatened nondefense of legislation in a private lawsuit gives the Legislature a sufficient interest to bring its own action against those officers." The second "is the formal Attorney General opinion that concluded the statute at issue is unconstitutional." The majority concludes that neither one of these is sufficient to confer standing on the Legislature. As noted, in my view the issue here is not whether the Legislature has *standing* but rather whether its issue is *justiciable*, but setting this distinction aside, I believe these two options erect a straw man that the majority knocks down to elide the actual question presented—whether the Legislature has recourse to the judiciary to compel the executive to enforce a law.

The majority's first proffered and rejected rationale for granting the Legislature standing to maintain its declaratory-judgment action in Docket No. 160908 is the Secretary of State's litigation position in the trial court in Docket No. 160907. The majority frames this as an open and unsettled question—"a complicated issue," where "[v]iews on legislative standing are wide-ranging . . . ." As near as I can tell, however, this is predicated on a proposition for which there is no

support: the notion that the *litigation position* of a party in a case can be an injury conferring standing on a nonparty to file suit. Setting aside the particular peculiarity of this case—that it was brought by the Legislature against an executive officer—the majority simply offers no support for the notion that a given party's litigation posture can, if unfavorable to some nonparty to the case, give the nonparty standing to file a separate action.[4] Indeed, this is the essence of the problem that intervention was designed to solve. It was developed as a procedural mechanism because "a lawsuit often is not merely a private fight and will have implications on those not named as parties." 7C Wright, Miller & Kane, Federal Practice and Procedure (3d ed), § 1901, p 258. Intervention thus "strike[s] a balance between . . . those who are presently litigants [who] will prefer that others not be brought in, [and] those on the outside [who] will wish to be made parties [because] they believe that a decision may have an effect on them." *Id*. at 258-259. I do not believe a

[4] To the extent that there is any authority on point, it seems to cut in the opposite direction. For example, in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017), we held that a healthcare provider lacks an independent cause of action against a no-fault insurer to be compensated for services provided to an injured claimant covered by no-fault insurance. The provider in *Covenant* presumably wanted to maintain its own cause of action because the claimant had already settled his claim for personal protection insurance (PIP) benefits against the no-fault insurer, and the amount of the settlement was unlikely to be a practical source of recovery for the provider—the provider's bill was nearly 75% of the settlement amount, which also needed to cover the various other aspects of PIP benefits (such as lost wages). If the provider in *Covenant* could not maintain an action to recover its charges from the claimant's PIP provider, it seems rather unlikely to me that it could have filed a separate action against the PIP provider during the claimant's litigation against the insurer out of concern that the claimant was going to negotiate an inadequate settlement to his PIP claim and render himself uncollectible.

party's litigation position is an injury that can give rise to a declaratory-judgment action and therefore do not understand what analytic relevance there is in rejecting it as a potential option.

Second, the majority posits that the other source of interest the Legislature may have had to maintain its declaratory-judgment action was the Attorney General opinion holding that the statute at issue was, in pertinent part, unconstitutional. The majority says that "the only way to hold that the Legislature has standing to pursue its case would be to conclude that any time the Attorney General issues a formal opinion concluding that an act is unconstitutional, the Legislature has been harmed in such a way that it has standing to bring an action for declaratory judgment," and concludes that this "would require a very generous view of legislative standing . . . ." I struggle to see the relevance of the Attorney General opinion. The Legislature's allegation is that the Secretary of State is not going to implement 2018 PA 608 because the statute is alleged to be unconstitutional. As it happens, that conclusion is memorialized here in an Attorney General opinion, but I do not see how or why that is essential to this analysis. If the Attorney General had issued an opinion reaching the opposite conclusions, the Secretary of State could still have insisted on implementing the statute as though it were unconstitutional—she has human agency distinct from the Attorney General and the ability to think and act for herself. The question we face would still be the same: does the Legislature have recourse to the judiciary to compel an executive official to perform a clear legal duty the Legislature has legislated but which the executive official believes is unconstitutional? I believe the answer is "no," but I do not understand the majority's analytic framing.

In Docket No. 160908, a litigant—the Legislature—filed a complaint initiating a civil action asking for a declaratory judgment. We are going to decline to provide that judgment. I agree with that decision, but I believe we owe the litigant a square explanation why. The majority contends that neither the Secretary of State's litigation posture in Docket No. 160907 nor the existence of the Attorney General opinion the Secretary of State is relying on is sufficient to confer standing on the Legislature and closes the courthouse door as a result. I do not believe this is an adequate explanation, because it does not investigate the core concern of the Legislature: whether it may obtain a judicial declaration to compel an executive official to implement a statutory enactment. Neither the Secretary of State's litigation position nor the existence of the Attorney General opinion is the sine qua non of the Legislature's complaint; batting them down gets us no closer to an answer. I simply do not think we can avoid answering the question of whether the Legislature is entitled to maintain its action in Docket No. 160908 and get a judgment on the merits. I agree with the Court that it cannot maintain its action, but I would answer the question squarely rather than beating around the bush.

MARKMAN, J. (*dissenting*). The majority grants the motion of the Michigan Senate and House of Representatives (the Legislature) to intervene in the suit brought by the League of Women Voters of Michigan (LWV) and others against the Secretary of State, holds that that case is moot as to plaintiff Michiganders for Fair and Transparent Elections (MFTE), and concludes that the remaining plaintiffs in that case lack standing. As a result, the majority vacates the lower-court decisions. It also holds that the Legislature lacks standing in its own

case against the Secretary of State. Accordingly, it remands both cases to the trial court to be dismissed.

I respectfully dissent. Instead, I would deny the Legislature's motion to intervene in the LWV case, hold that the Legislature possesses standing in its own right in its case against the Secretary of State, and resolve the substantive questions of law in the latter case, in particular, the constitutionality of the checkbox and pre-circulation affidavit requirements as well as the 15% cap on ballot-proposal signatures per congressional district. The majority opinion leaves all of these questions unanswered. Moreover, the Court not only leaves unresolved questions it was asked to resolve by the Legislature, but it leaves these matters in a state of utter disarray and confusion for every Michigan citizen concerned about the proper procedures for placing constitutional and legislative measures on the ballot. Are those who pursue such measures obligated to abide by the statutory direction of the Legislature or by the direction of the Attorney General in her opinion as construed by the Secretary of State? Take your pick; toss a coin; chance a guess. The majority opinion offers not the slightest legal guidance. Until the issues are resolved at some future date, the initiative and referendum processes of this state will be confused, uncertain, and obscure, likely only to generate further litigation and controversy.[1] I would

[1] In order to allay this confusion, uncertainty, and obscurity, I would hold respectfully that neither the Board of State Canvassers nor groups submitting petitions should act in reliance on the Attorney General's opinion. While "the extent to which a governmental agency is [ever] bound by an opinion of the Attorney General is open to question," *Danse Corp v Madison Hts*, 466 Mich 175, 182 n 6; 644 NW2d 721 (2002), it is clear that "the opinion of the Attorney General that a statute is unconstitutional does not have the force of law and certainly does not compel agreement by a governmental agency," *East Grand Rapids Sch*

have answered the questions presented, and I would have done so in a timely manner so that the law might be known in advance of future ballot efforts.

I. FACTS & HISTORY

In December 2018, the Michigan Legislature passed and the Governor signed 2018 PA 608. This act imposed new requirements for gathering petition signatures for statewide ballot proposals, including initiatives, referendums, and constitutional amendments. In May 2019, the Attorney General issued OAG, 2019-2020, No. 7,310, p ___ (May 22, 2019), in response to a request from Secretary of State Jocelyn Benson regarding the constitutionality of certain aspects of 2018 PA 608. The Attorney General opined that the precirculation affidavit requirement, the checkbox requirement, and the 15% cap on ballot-proposal signatures per congressional district, in her judgment, were each unconstitutional.

The LWV, MFTE, Henry Mayers, Valeriya Epshteyn, and Barry Rubin have brought an action for declaratory relief challenging the constitutionality of these aspects of 2018 PA 608 against the Secretary of State, who was, and who continues to be, represented by the Attorney General.[2] The Court of Claims granted LWV's

Dist v Kent Co Tax Allocation Bd, 415 Mich 381, 394; 330 NW2d 7 (1982). See also *Wikman v City of Novi*, 413 Mich 617, 646-647; 322 NW2d 103 (1982) ("[A]n agency exercising quasi-judicial power does not undertake the determination of constitutional questions or possess the power to hold statutes unconstitutional[.]"). Therefore, the Board of State Canvassers is not bound to follow the Attorney General's opinion. Indeed, given that legislation is presumed to be constitutional, the Board of State Canvassers and groups submitting petitions are instead bound to follow 2018 PA 608.

[2] The LWV describes itself as a "nonpartisan political organization, dedicated to Making Democracy Work through voter education, issue

motion for summary disposition in part and struck down as unconstitutional the provisions that allow no more than 15% of petition signatures to be obtained in any one congressional district and that require petitions to include a box that must be checked if the petition circulator is a paid circulator. The court upheld the provision that requires paid circulators to file an affidavit with the Secretary of State indicating that the person has been paid to circulate a petition and gather signatures. LWV filed an appeal of right in the Court of Appeals and a bypass application in this Court.

In a separate case brought in the Court of Claims, the Legislature sought a declaratory judgment that 2018 PA 608 is constitutional in its entirety. The Court of Claims consolidated these two cases, but ultimately held that the Legislature lacked standing to bring its own case and thus dismissed it. However, the court treated the Legislature's briefs effectively as amicus

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advocacy, and citizen participation." League of Women Voters of Michigan, *Home* <https://www.lwvmi.org/index.html> (accessed December 23, 2020) [https://perma.cc/ZCA7-XF5W]. MFTE is a ballot-question committee that was supporting a 2020 ballot initiative regarding lobby reform. Lawler, MLive, *New Ballot Initiative Aims to Curb Lobbyist Influence Over Michigan Lawmakers* (January 23, 2020) <https://www.mlive.com/news/2020/01/new-ballot-initiative-aims-to-curb-lobbyist-influence-over-michigan-lawmakers.html> (accessed November 5, 2020) [https://perma.cc/A9Z2-335P]. When plaintiffs filed their answer in this Court, they indicated that a proposal was then being drafted. However, efforts to place the proposal on the 2020 ballot were suspended as a result of the coronavirus pandemic. See Gibbons, MLive, *Ballot Drive to Change Michigan Lobbying Laws Suspended Due to Coronavirus Pandemic* (March 20, 2020) <https://www.mlive.com/public-interest/2020/03/ballot-drive-to-change-michigan-lobbying-laws-suspended-due-to-coronavirus-pandemic.html> (accessed December 23, 2020) [https://perma.cc/27DL-5YP4]. Henry Mayers, Valeriya Epshteyn, and Barry Rubin are individual Michigan voters. For ease of reference, I will refer to these plaintiffs collectively as "LWV," unless otherwise specified.

briefs in the LWV case, given that no party in that case was offering arguments in favor of the constitutionality of 2018 PA 608; the Secretary of State fully agreed with LWV that all of the challenged provisions are unconstitutional. The Legislature appealed the Court of Claims' decision to the Court of Appeals, but did not file a bypass application in this Court, and the Court of Appeals consolidated the two cases for appellate review.

The Legislature then filed a motion in this Court to intervene in the LWV case and requested that we grant LWV's bypass application and uphold the constitutionality of 2018 PA 608 in its entirety. We denied the Legislature's motion to intervene, denied LWV's bypass application, and ordered the Court of Appeals to issue an opinion by January 27, 2020. *League of Women Voters v Secretary of State*, 505 Mich 931 (2019).

The Court of Appeals issued a published opinion by this deadline, holding that the Legislature lacks standing and that the 15% cap on ballot-proposal signatures per congressional district, the checkbox requirement, and the pre-circulation affidavit requirement are each unconstitutional. *League of Women Voters of Mich v Secretary of State*, 331 Mich App 156; 952 NW2d 491 (2020). Judge BOONSTRA, concurring in part and dissenting in part, agreed with the majority that the 15% cap on ballot-proposal signatures per congressional district and the pre-circulation affidavit requirement are unconstitutional, but he would have held that the Legislature possesses standing and that the checkbox requirement is constitutional. The Legislature then filed an application for leave to appeal in this Court and a motion to intervene. We heard oral argument on March 11, 2020, and on July 31, 2020, we directed the

parties and the proposed intervenors to file supplemental briefs regarding mootness and standing. *League of Women Voters v Secretary of State*, 506 Mich 885 (2020). They subsequently did so on August 28, 2020.

II. STANDARD OF REVIEW

"Whether a party has standing is a question of law that is reviewed de novo." *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019). Questions of court rule and statutory interpretation are also reviewed de novo. *Safdar v Aziz*, 501 Mich 213, 217; 912 NW2d 511 (2018).

III. ANALYSIS

The majority grants the Legislature's motion to intervene in the LWV case, while holding that the Legislature lacks standing to seek declaratory relief in its own right.

A. THE LWV CASE

In *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 288; 715 NW2d 846 (2006), this Court held that the Attorney General could not appeal as an intervenor in this Court where the losing parties had not themselves sought review. As we stated, "[b]ecause neither of the losing parties below filed a timely appeal, . . . there is no longer a justiciable controversy" and "this Court is not constitutionally authorized to hear non-justiciable controversies." *Id*. at 288, 294-295.

The LWV case is analogous in this regard to *Federated*. The Legislature is not a party in the LWV case and it did not file a motion to intervene in either the

Court of Claims or the Court of Appeals. And neither the plaintiffs nor the defendant in LWV filed an application for leave to appeal in this Court. Because neither party below filed a timely appeal, there is no longer a justiciable controversy, and because there is no longer a justiciable controversy, the Legislature cannot intervene. "[T]his case ceased to be an 'action' when the losing parties below . . . failed to file a timely application for leave to appeal in this Court." *Id*. at 294.[3] The Legislature cannot intervene in an action that no longer exists. Rather, the LWV case is over, and the Legislature waited too long to file a motion to intervene. For these reasons, I would deny the Legislature's motion to intervene and would dismiss the application for leave to appeal in the LWV case.

The Legislature argues that it has a right to intervene under MCR 2.209(A)(3), which provides that an applicant has a right to intervene in an action "when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." However, the Legislature is not entitled here to intervention of right under MCR 2.209(A)(3) because there is no "property or transaction" at issue. The only question is whether this Court should exercise its discretion to grant *permissive* intervention under MCR 2.209(B). Accordingly, even assuming that the majority

[3] As discussed at greater length later, the LWV case is unique in that there were *no* losing parties below given that *both* sides agreed with the Court of Appeals that all three of the challenged provisions are unconstitutional. That does not alter the fact, however, that none of the actual *parties* in the LWV case filed an application for leave to appeal and thus that the case ceased at that point to be a justiciable controversy.

is correct that "*Federated* does not foreclose granting the motion to intervene," that does not mean we are obligated to grant the Legislature's motion to intervene. Nothing precludes us from relying on the fact that neither of the actual parties in the LWV case filed an appeal in this Court as a basis for exercising our discretion in favor of denying the Legislature's motion to intervene in the LWV case. Moreover, I do not see much point in granting the Legislature's motion to intervene in a case that the majority ultimately dismisses on the basis of mootness and lack of standing.

Since I would deny the Legislature's motion to intervene and would dismiss the LWV case, it is unnecessary to decide whether the majority is correct that the LWV case is moot as to MFTE and that the remaining parties lack standing. However, given that both the majority and Justice ZAHRA address mootness, I feel compelled to indicate that I agree with Justice ZAHRA that the LWV case is not moot for the reasons explained by Justice ZAHRA.

B. "LEGISLATURE" CASE

MCR 2.605(A)(1) provides:

> In a case of *actual controversy* within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted. [Emphasis added.]

In the LWV case, there was *from the start* no "actual controversy" between the parties because both parties (LWV and the Secretary of State) argued that each of the statutory provisions at issue here is unconstitutional. Therefore, absent the Legislature's intervention, the Court of Claims should have peremptorily dismissed the LWV case. Instead of doing this, that

court allowed the Legislature to participate, but only as an amicus. Furthermore, the Legislature should have moved at that time to intervene so that it could have been added as an actual party in the LWV case, but it did not.

In *Federated*, this Court held that "the party seeking appellate relief [must] be an 'aggrieved party . . . .' " *Id*. at 291. That is, "[i]n order to have appellate standing, the party filing an appeal must be 'aggrieved.' " *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008). As we explained,

> 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*, 475 Mich at 291-292.]

"A party who could not benefit from a change in the judgment has no appealable interest." *Id*. at 291 n 2 (quotation marks and citation omitted). "Of course one [also] may not appeal from a judgment, order or decree, in his favor by which he is not injuriously affected." *Id*. (quotation marks and citations omitted). Generally, "a party who prevails on every claim cannot be considered to be aggrieved by a court's ruling." *Manuel*, 481 Mich at 644.

In the LWV case, the Court of Claims held that the 15% geographical limitation and the checkbox requirement are unconstitutional and that the affidavit requirement is constitutional. LWV appealed in the Court of Appeals, arguing that all three requirements are unconstitutional. However, LWV lacked appellate standing with respect to the issues on which it *pre-*

vailed in the Court of Claims because it was not an "aggrieved party." The only issue as to which LWV possessed appellate standing was that pertaining to the affidavit requirement, as to which it did *not* prevail in the Court of Claims. Yet, the Court of Appeals unaccountably ruled on all three of the appellate issues.

Although the Court of Appeals did not address whether LWV *was* an "aggrieved party," it held that the Legislature was *not* an "aggrieved party," because although the Court of Claims held that the Legislature lacked standing, it nonetheless fully considered and addressed the Legislature's arguments. The Court of Appeals also held that the Legislature lacked standing because it did not have an interest that was distinct from that of the general public. Moreover, although the Court of Appeals held that the Legislature lacked standing, the entirety of its opinion reads *as if* the Legislature possessed standing because the Court of Appeals fully addressed its arguments in an indistinguishable manner from the arguments of the LWV. That is, the Court of Appeals' opinion is phrased throughout in terms of LWV representing one side of the dispute and the Legislature representing the other side.

Given that LWV ultimately prevailed on the issues regarding the geographic-distribution-requirement and the checkbox requirement in the Court of Claims and thus was not an "aggrieved party" on those issues —and given that, according to the Court of Appeals, the Legislature lacked standing—the Court of Appeals should not have addressed the constitutionality of the geographic-distribution requirement and the checkbox requirement, and yet it did.

The Court of Appeals stated further:

> While the Legislature also argues that "[l]eaving the Court of Claims Opinion in place will result in a single member of the executive branch being able to exercise unchecked veto power over a bill that has already been passed and enacted into law," the Court of Claims analyzed the Attorney General's legal conclusions, this Court scrutinized those conclusions, and presumably, our Supreme Court will also consider the legal conclusions in the Attorney General's opinion. In light of that review process, it cannot be concluded that the Attorney General has "unchecked veto power" over 2018 PA 608. [*League of Women Voters of Mich*, 331 Mich App at 174 n 10.]

The Court of Appeals thus erred again, in my judgment, in failing to consider that if this Court were eventually to agree with the Court of Appeals that the Legislature lacked standing, we would then have been unable to consider the legal conclusions of the Attorney General's opinion because *neither* LWV *nor* the Secretary of State was going to appeal the Court of Appeals' decision to this Court since their positions would already have prevailed in the Court of Appeals. In other words, we would have been unable to consider the conclusions of the Attorney General's opinion in the LWV appeal because that case could not have been appealed to this Court, and we would also have been unable to address these conclusions in the *Legislature's* case if we agreed with the Court of Appeals that the Legislature lacked standing to bring its own action. That is, the Court of Appeals seemingly did not recognize the full significance of its holding concerning the Legislature's lack of standing.

Judge BOONSTRA concluded that, because this Court has most recently held that standing is a matter of mere judicial discretion, at least under these unique circumstances, he would exercise that discretion to fully address the Legislature's arguments. The circumstances are indeed unique because the Legislature is

suing to maintain the effectiveness of its legislative process in enacting 2018 PA 608—an act that the Secretary of State is now declining in part to enforce and the Attorney General has opined is unconstitutional in part. In other words, *apart* from the Legislature, there would appear to be *no one* to argue in opposition to the position taken jointly by LWV, the Secretary of State, and the Attorney General.

I generally agree with Judge BOONSTRA. That is, under at least the unique circumstances of this case, I agree that the Legislature possesses standing—these unique circumstances comprising in particular (a) that the Attorney General, at the request of the Secretary of State, issued an opinion in which she asserted that the challenged statutory provisions are unconstitutional; (b) that in the LWV case, although the Legislature did not file a motion to intervene in either lower court and both lower courts held that the Legislature lacked standing, both lower courts proceeded nonetheless to treat the Legislature *as if* it were a party; and (c) that, absent the Legislature's participation, there would have been no "actual controversy" because the Legislature was the only one arguing in favor of the constitutionality of the statutory provisions at issue.[4] As Judge BOONSTRA noted, the Legislature stated in its reply brief that

[4] The majority contends that I "ignore[] that standing is determined at the time the complaint is filed" and that "[e]xcept for the formal opinion, none of these 'unique circumstances' existed at the time the Legislature brought its suit." However, given that at the time the Legislature brought its suit, the Attorney General, at the request of the Secretary of State, had issued an opinion in which she opined that the challenged statutory provisions are unconstitutional, the Legislature knew or had reason to believe (and rightfully so, as it turned out) that the Secretary of State, as represented by the Attorney General, would not defend the constitutionality of the statutory provisions at issue in the LWV case. And indeed, in the Legislature's complaint, it asserted that the Secre-

this case represents an "incredibly rare" circumstance in which "the Attorney General refuses to defend a statute and instead affirmatively attacks it. Historically, even when the Attorney General disagreed with a policy embodied in the statute, the Office of the Attorney General

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tary of State's "motivation for obtaining a formal opinion appears to have been so that she can circumvent the requirements of validly enacted statutes she has a legal duty to enforce." As evidence of this, the Legislature proceeded to observe that "[i]n her letter to Attorney General Nessel, Secretary Benson made clear her personal disdain for 2018 PA 608, characterizing the validly enacted law as establishing 'new grounds for rejecting otherwise valid petition signatures' " and as imposing a " 'burden' " on the process. The Legislature also referenced the Attorney General's press release regarding 2018 PA 608, in which she stated that the Secretary of State "rightly contests new petition drive law" and praised the Secretary of State for "challenging the legality of the newly established petition drive law." Department of the Attorney General, *Nessel: Secretary of State Rightly Contests New Petition Drive Law* <https://www.michigan.gov/ag/0,4534,7-359--487945--,00.html> (accessed December 23, 2020) [https://perma.cc/ZU28-ACK8]. Furthermore, at the time the Court of Claims ruled that the Legislature lacked standing, it was well aware that the Secretary of State was not defending the constitutionality of the challenged provisions in the LWV case because she had already indicated such in her response to plaintiffs' motion for summary disposition.

The majority also questions whether I "intend to suggest that any time the executive fails to *enforce* a statute, the Legislature can step in to fill the void[.]" No, I do not. However, what we have here is not a situation in which the executive has simply chosen not to enforce a statute; rather, it is one in which the executive has affirmatively taken the position that the challenged provisions are *unconstitutional* where the executive was the only party in the LWV case who could possibly have defended the constitutionality of those provisions. It is at least in such a remarkable situation that I believe the Legislature possesses the right to defend laws it has enacted on behalf of the people of this state. Or is it the majority's position that the Attorney General, at her sole and unchecked discretion, may deprive the people of any legal defense of the enactments of its representatives in the Legislature by mere recourse to arguing a contrary position?

Because, unlike the majority, I would not vacate the lower courts' opinions in the LWV case, it is unnecessary for me to decide whether the Legislature would possess standing to bring its own cause of action under such alternative circumstances.

> would set up a conflict wall and appoint assistant attorneys general to argue both sides of the dispute. In that way, there were always attorneys defending the Legislature's enactment." [*League of Women Voters of Mich*, 331 Mich App at 202 n 1 (BOONSTRA, J., concurring in part and dissenting in part) (alterations omitted).]

Judge BOONSTRA further noted that under MCL 14.28, "the attorney general shall . . . when requested by . . . either branch of the legislature . . . intervene in and appear for the people of this state in any . . . court or tribunal, in any cause or matter . . . in which the people of this state may be a party or interested," and he observed that "[h]ad the Attorney General followed that procedure in this case, the standing issue would be moot, and much angst and gnashing of teeth could have been avoided." *League of Women Voters of Mich*, 331 Mich App at 202 n 1 (BOONSTRA, J., concurring in part and dissenting in part).

As he further recognized, this Court has adopted a "limited, prudential approach" to standing. *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 353; 792 NW2d 686 (2010).[5] Under this approach, "the

[5] I very much disagree with this Court's decision in *Lansing Sch Ed Ass'n* as I believe that this Court correctly held in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), and *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004)—both of which were overruled by *Lansing Sch Ed Ass'n*—that standing is a constitutional doctrine. Const 1963, art 3, § 2 provides, "The powers of government are divided into three branches: legislative, executive and judicial," and "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." In addition, Const 1963, art 6, § 1 provides that the judiciary is to exercise the "judicial power." Reading these provisions together, it is clear that the judiciary is to exercise the "judicial power" and only the "judicial power." "The 'judicial power' has traditionally been defined by a combination of considerations[.]" *Nat'l Wildlife Federation*, 471 Mich at 614. "Perhaps the most critical element of the 'judicial power' has been its requirement of a

court's decision to invoke [standing is] one of discretion and not of law." *Id*. at 355 (quotation marks and citation omitted). That is, it is a "prudential limit that [can], within the Court's discretion, be ignored." *Id*. at 356-357. "The purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to ensure sincere and vigorous advocacy." *Id*. at 355 (quotation marks and citation omitted). "[W]henever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Id*. at 372. As discussed earlier, MCR 2.605(A)(1) requires an "actual controversy." "[T]he essential requirement of the term 'actual controversy' under the rule is that plaintiffs plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised." *Lansing Sch Ed Ass'n*, 487 Mich at 372 n 20 (quotation marks and citations omitted). "[W]here a cause of action [is] not provided at law, the Court, in its discretion, [should] consider whether a litigant [has] standing based on a special injury or right or substantial inter-

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genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute, and one in which the plaintiff has suffered a 'particularized' or personal injury." *Id*. at 615 (citation omitted). In other words, exercising the judicial power requires that the plaintiff possesses standing. Just as "standing is an essential . . . part of the case-or-controversy requirement of Article III," *Lujan v Defenders of Wildlife*, 504 US 555, 560; 112 S Ct 2130; 119 L Ed 2d 351 (1992), standing is an essential part of the "judicial power" of Const 1963, art 6, § 1. The doctrine of standing is encompassed within the meaning of the "judicial power," and this Court is limited to exercising the "judicial power." Therefore, we are limited to deciding genuine cases or controversies. However, my position regarding standing did not prevail in *Lansing Sch Ed Ass'n*, and therefore, the Legislature at this time need only satisfy the requirements of the "limited, prudential approach" to standing. Nevertheless, as explained more later, I believe that the Legislature has satisfied the requirements of *both* prudential *and* constitutional standing.

est that would be detrimentally affected in a manner different from the citizenry at large . . . ." *Id*. at 359; see also *id*. at 372 (adopting this standard).

In the Legislature's case, there is an "actual controversy" because while the Legislature argues that all the statutory provisions at issue are constitutional, the Secretary of State argues that they are all unconstitutional. That is, the Legislature has an "adverse interest necessitating the sharpening of the issues raised." *Id*. at 372 n 20 (quotation marks and citations omitted). Accordingly, the Legislature meets the requirements of MCR 2.605 and thus possesses standing to seek a declaratory judgment. In addition, the Legislature possesses standing based on a "special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large . . . ." *Id*. at 372. The Legislature possesses a "substantial interest" in the enforcement of the statutory provisions at issue, and it has suffered a "special injury" by their lack of enforcement, each of which is distinct from those of the general public, because the Legislature directly enacted those provisions into law pursuant to its specific authority to exercise the "legislative power" of the state, Const 1963, art 4, § 1, and because the effectiveness of its votes, individually and collectively, would be implicated by a judicial decision to strike down all or parts of the law that was enacted. For these reasons, I would hold that at least under these unique circumstances, the Legislature possesses standing under *Lansing Sch Ed Ass'n*.[6]

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[6] In *House Speaker v State Admin Bd*, 441 Mich 547; 495 NW2d 539 (1993), this Court addressed whether four individual legislators possessed standing. We held that one of the individual legislators possessed standing and that the other three did not. The instant case is distinguishable because it does not involve individual legislators suing, but instead involves the Senate and the House of Representatives suing as

Furthermore, even if *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992), was controlling (which I concede that it is not, see note 5 of this opinion), I believe that the Legislature possesses standing (at least under the instant circumstances) even under the more demanding standing requirement set forth in *Lujan* and adopted by this Court in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), and *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004), before those cases were overruled by *Lansing Sch Ed Ass'n*, 487 Mich 349. Pursuant to *Lujan*:

> "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical." ' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " [*Lee*, 464 Mich at 739, quoting *Lujan*, 504 US at 560-561.]

The Legislature satisfies each of these requirements. First, the Legislature has suffered an "injury in fact" —statutes that the Legislature enacted have been

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constitutional institutions. See *Raines v Byrd*, 521 US 811, 829; 117 S Ct 2312; 138 L Ed 2d 849 (1997) ("We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit."). In addition, this is not a situation in which a legislator is "suing to reverse the outcome of a political battle that he lost," as was the case with one of the legislators in *House Speaker*. *House Speaker*, 441 Mich at 561. Rather, this is a situation in which the Legislature is "suing to maintain the effectiveness of [its] vote[s] . . . ." *Id*.

rendered null and void. Second, there is a causal connection between the injury and the conduct complained of—these statutes were rendered null and void as a result of the Secretary of State's refusal to enforce them. Finally, the injury suffered by the Legislature would be redressed by a favorable decision—a declaration that the statutes are not unconstitutional.

Concluding that *Lujan* has been satisfied here given that the lower courts effectively allowed the Legislature to intervene is consistent with United States Supreme Court's decisions allowing Congress to intervene in cases to defend the constitutionality of laws. The United States Supreme Court has "long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." *Immigration & Naturalization Serv v Chadha*, 462 US 919, 940; 103 S Ct 2764; 77 L Ed 2d 317 (1983). In *Chadha*, Congress was allowed to intervene to defend the constitutionality of a single-house-of-Congress legislative veto.

Similarly, in *United States v Windsor*, 570 US 744; 133 S Ct 2675; 186 L Ed 2d 808 (2013), the Court allowed the Bipartisan Legal Advisory Group of the House of Representatives to intervene in litigation to defend the constitutionality of the Defense of Marriage Act. As the Court explained:

> [I]f the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. This would undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to

> conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is. Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court. [*Id*. at 762 (quotation marks and citations omitted).]

The same reasoning applies here.[7] Both the Secretary of State and the Attorney General agree with LWV that the challenged provisions are unconstitutional. The Legislature thus is the only party arguing in favor of the constitutionality of these provisions. Accordingly, under at least these unique circumstances,[8] I would hold that the Legislature possesses standing.[9]

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[7] I recognize that, as the majority points out, *Windsor* and *Chadha* "involved intervention in a suit already initiated by a private party, not standing for the Legislature itself to initiate a suit." However, what this Court has before it is not simply a case in which the Legislature *itself* sought to initiate a lawsuit. Rather, what this Court has before it are two cases, one initiated by a private party and one initiated by the Legislature. And in regard to the LWV case, although the Legislature did not file a motion to intervene in either lower court and both lower courts held that the Legislature lacked standing, both lower courts nonetheless *treated* the Legislature *as if* it were a party to the LWV case, and absent the Legislature's participation, there would be no "actual controversy" because the Legislature is the only entity arguing in favor of the constitutionality of the statutory provisions at issue. In light of these circumstances, I do not believe that it is at all inappropriate to apply the reasoning of *Windsor* and *Chadha* here.

[8] I am not necessarily asserting that the Legislature only possesses standing under these unique circumstances. Whether the Legislature would possess standing under different circumstances is a question for another day. I am simply asserting that under these unique circumstances, the Legislature *does* possess standing.

[9] I recognize that "[c]ourts are reluctant to hear disputes that may interfere with the separation of powers between the branches of government." *House Speaker*, 441 Mich at 555. However, under the circum-

IV. CONCLUSION

I would deny the Legislature's motion to intervene in the LWV case, hold that the Legislature has standing in its own case against the Secretary of State, and would resolve the substantive questions of law in the latter case. It is regrettable that the majority leaves these questions unanswered and gives rise to confusion for all participants in this case, as well as for all persons seeking to place constitutional and legislative measures on the ballot, concerning what constitutes the law of this state. After substantial delays in finally "resolving" this case, we not only do not resolve it in any way but we leave the matter considerably more confused and uncertain.

ZAHRA, J., concurred with MARKMAN, J.

ZAHRA, J. (*dissenting*). I dissent. The majority opinion improperly grants the motion of the Michigan Senate and House of Representatives (collectively, the Legislature) to intervene in Docket No. 160907. Because I would deny the Legislature's untimely motion to intervene under *Federated Ins Co v Oakland Co Rd Comm*,[1] I would not reach the question of whether that case is moot. Instead, for the reasons stated by Justice MARKMAN, I would recognize the Legislature's standing in Docket No. 160908 under *Lansing Sch Ed Ass'n v*

stances of this case, in which the Attorney General's refusal to defend the constitutionality of the challenged provisions has transformed what would otherwise constitute an ordinary case or controversy between private parties and the executive branch into a dispute between the Legislature and the executive branch, I would resolve the instant dispute.

[1] *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286; 715 NW2d 846 (2006).

Lansing Bd of Ed[2] and would proceed to decide the merits of this dispute. Nonetheless, I am compelled to address the majority opinion's remarkable conclusion that the case has been rendered moot by the fact that Michiganders for Fair and Transparent Elections (MFTE) has temporarily paused its pursuit of its ballot initiative amidst the current pandemic.

It is a well-established principle that " '[t]he judicial power . . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.' "[3] Accordingly, " 'this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before' it."[4] Generally speaking, "[a] moot case presents nothing but abstract questions of law which do not rest upon existing facts or rights" such that "a judgment cannot have any practical legal effect upon a then existing controversy."[5] Of course, moot issues may yet be justiciable where they are "of public significance and are likely to recur, yet may evade judicial review."[6] The facial challenge to the geographic-distribution requirement, checkbox requirement, and affidavit requirement in 2018 PA 608

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[2] *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010).

[3] *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010), quoting *Anway v Grand Rapids R Co*, 211 Mich 592, 616; 179 NW 350 (1920) (alterations in original; quotation marks omitted).

[4] *Richmond*, 486 Mich at 34, quoting *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002), overruled on other grounds by *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463; 719 NW2d 19 (2006).

[5] *TM v MZ*, 501 Mich 312, 317; 916 NW2d 473 (2018) (quotation marks and citations omitted).

[6] *In re Midland Publishing Co, Inc*, 420 Mich 148, 152 n 2; 362 NW2d 580 (1984).

brought by the League of Women Voters of Michigan, MFTE, Henry Mayers, Valeriya Epshteyn, and Barry Rubin (collectively, plaintiffs) are just such issues.

The constitutionality of an election law affecting *all* exercises of the people's power to propose new laws by petition (the initiative), to approve or reject laws enacted by the Legislature (the referendum), and to propose constitutional amendments by petition (voter-initiated constitutional amendments) is undoubtedly an issue of public significance.[7] The more pertinent question is whether the issues presented are likely to recur, yet evade judicial review. In *Meyer v Grant*, the Supreme Court of the United States held that an action challenging a Colorado law making it a felony to pay petition circulators was not moot, even though the election in which the proponents had hoped to present their ballot proposal had already taken place, because the issue was "one capable of repetition, yet evading review."[8] The Court explained that courts "may exercise jurisdiction over [a challenge to an electoral restriction] if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again."[9] Because "Colorado grants the proponents of an initiative only six months in which to obtain the necessary signatures," the Court reasoned

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[7] See *Ferency v Secretary of State*, 409 Mich 569, 593; 297 NW2d 544 (1980) ("This Court has a tradition of jealously guarding against legislative and administrative encroachment on the people's right to propose laws and constitutional amendments through the petition process.").

[8] *Meyer v Grant*, 486 US 414, 417 n 2; 108 S Ct 1886; 100 L Ed 2d 425 (1988).

[9] *Id*. (quotation marks, citations, and brackets omitted).

that "[t]he likelihood that a proponent could obtain a favorable ruling within that time, much less act upon such a ruling in time to obtain the needed signatures, is slim at best."[10] The Court also held that it was reasonable to expect that the same controversy would recur between the proponents and the state because the proponents' initiative had not yet been enacted, the proponents continued to advocate for its adoption, and they continued to make preparations for future attempts to obtain the signatures necessary to place the issue on the ballot.[11]

Similarly, the Michigan Election Law requires signatures on a petition initiating legislation or proposing a voter-initiated constitutional amendment to be made within 180 days of the petition's filing with the Secretary of State.[12] Despite its decision to postpone its initiative efforts, MFTE retains an interest in knowing whether it must satisfy the requirements of PA 608. Given the condensed timeline to collect signatures, it is unreasonable to expect a timely ruling in cases where a specific ballot proposal is at issue, much less a facial challenge to an election law affecting *all* ballot proposals. Further, all indications are that MFTE is merely postponing its initiative efforts until the November 2022 election, not abandoning them altogether.[13]

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[10] *Id*. at 418 n 2.

[11] *Id*.

[12] MCL 168.472a.

[13] See Gibbons, *Ballot Drive to Change Michigan Lobbying Laws Suspended Due to Coronavirus Pandemic* <https://www.mlive.com/public-interest/2020/03/ballot-drive-to-change-michigan-lobbying-laws-suspended-due-to-coronavirus-pandemic.html> (accessed November 3, 2020) [https://perma.cc/CZ9G-H56J]. According to the article, the Coalition to Close Lansing Loopholes, the group with which MFTE is working in pursuit of its initiative, has indicated that it is postponing the ballot-petition drive until the 2022 election. The majority opinion states that "MFTE has not asserted

Thus, "it is reasonable to expect that the same controversy will recur" between MFTE and the Secretary of State, "yet evade meaningful judicial review."[14]

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to this Court that it intends to resume the petition drive later, nor is there any record evidence suggesting it will." *Ante* at 583 n 26. That MFTE has asserted it is not pursuing its ballot initiative "at the present time"—an assertion made in its August 2020 supplemental brief and arguably directed at the November 2020 election, which has since passed—says nothing about its intent to do so at the next election. Although there will always be some degree of uncertainty about what the future holds, it seems clear that a ballot-question committee like MFTE, whose very purpose is to draft ballot proposals in accordance with the Michigan Election Law, has a valid interest in knowing what rules to follow when its initiative efforts inevitably resume. At the very least, a far more appropriate alternative to declaring plaintiffs' case moot, one not considered by the majority opinion, would be to remand this case to the Court of Claims to allow for further factual development as to whether it is reasonable to expect that the same controversy will recur leading up to the November 2022 election. See, e.g., *Reclaim Idaho v Little*, 826 F Appx 592 (CA 9, 2020); *People Not Politicians Oregon v Clarno*, 826 F Appx 581 (CA 9, 2020).

[14] *Meyer*, 486 US at 417 n 2. The majority opinion criticizes my reliance on a footnote in *Meyer*, yet that case is the most relevant to the mootness challenge presented here. Indeed, the Supreme Court of the United States has often stated that cases involving challenges to election laws are not moot where the issues presented were not tied to a particular election, and it has done so in footnotes no less. See, e.g., *Anderson v Celebrezze*, 460 US 780, 784 n 3; 103 S Ct 1564; 75 L Ed 2d 547 (1983) (challenge to Ohio's early filing deadline for independent presidential candidates on First and Fourteenth Amendment grounds not rendered moot by passing of election); *Storer v Brown*, 415 US 724, 737 n 8; 94 S Ct 1274; 39 L Ed 2d 714 (1974) (challenges to California's statutory requirements for independent candidates for elective public office were not moot because even though "[t]he 1972 election is long over, and no effective relief can be provided to the candidates or voters, . . . the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections"); *Rosario v Rockefeller*, 410 US 752, 756 n 5; 93 S Ct 1245; 36 L Ed 2d 1 (1973) (challenge involving voter's eligibility to participate in New York's party primary system not rendered moot because "[a]lthough the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, . . . the question the petitioners raise is 'capable of repetition, yet evading review' "), quoting *Dunn v Blumstein*, 405 US 330, 333 n 2;

Plaintiffs argue that while the issues presented are capable of repetition, they will not evade judicial review because they can be resolved in future election cycles under this Court's expedited litigation procedure. This case, however, presents a prime example of the difficulty in obtaining timely relief in ballot-initiative cases. Plaintiffs filed their action against the Secretary of State on May 23, 2019. It took nearly six months just for the case to reach this Court, and that was only because plaintiffs filed an application to bypass a decision from the Court of Appeals. We are

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92 S Ct 995; 31 L Ed 2d 274 (1972) (challenge to Tennessee's durational residence requirement for voters not rendered moot by the challenger's subsequent eligibility to vote in the next election because "the problem to voters posed by the Tennessee residence requirements is capable of repetition, yet evading review") (quotation marks and citations omitted).

Further, while the majority opinion distinguishes *Meyer*, in a footnote, on the basis that it "did not involve an issue that could have been fully and finally litigated through all appellate levels in a timely manner," *ante* at 583 n 26, I fail to see how the issue in *Meyer* is any different from the issues presented in this case. *Meyer* involved a challenge to a statutory prohibition against the use of paid circulators on First and Fourteenth Amendment grounds. Here, plaintiffs challenge the geographic-distribution requirement, checkbox requirement, and affidavit requirement in PA 608 on numerous state and federal constitutional grounds. That is, both *Meyer* and this case involve constitutional challenges to election laws with condensed time frames.

Moreover, unlike the majority opinion, I do not find the caselaw from other states persuasive or helpful. None of those cases appears to distinguish the Supreme Court's decision in *Meyer*. *Personhood Nevada v Bristol*, 126 Nev 599, 603-604; 245 P3d 572 (2010), and the other cases the Nevada Supreme Court relied on in declaring that case moot, concerned facts specific to the particular initiative at issue and thus lacked the "public, widespread importance to necessitate th[e] court's review . . . ." Here, plaintiffs' facial challenge to PA 608, which affects all ballot proposals, clearly involves issues of great public importance. In *Poulton v Cox*, 368 P3d 844, 845; 2016 UT 9 (2016), the petitioners terminated their efforts to place the initiative on the ballot before the Utah Supreme Court heard oral argument and did not plan to place that initiative on a future ballot. The same cannot be said of MFTE. See note 13 of this opinion.

now over a year and a half removed from the inception of this litigation and there has yet to be a final disposition on the challenged provisions. The majority opinion's decision today further delays resolution of these jurisprudentially significant issues to an unknown date.

Finally, MFTE's suspension of its petition drive has not changed the circumstances under which plaintiffs brought this lawsuit. As plaintiffs themselves acknowledge, the uncertainty surrounding petition drives has existed from the moment the Attorney General opined that various portions of PA 608 were unconstitutional.[15] Various petition drives, apparently relying on the Attorney General's advisory opinion, began collecting signatures on petitions that did not comply with PA 608 because the Board of State Canvassers instructed those launching petition drives to prepare petition sheets that conformed to the opinion of Attorney General.[16] Aside from the fact that PA 608 is presumed

[15] Plaintiffs' Verified Complaint, ¶ 57 ("While the Attorney General has recognized the unconstitutionality of PA 608, until Michigan courts declare it unenforceable there will be considerable uncertainty about how and when to undertake the considerable work and expense required to circulate petitions to qualify for the ballot. Given this uncertainty, those wishing to exercise their right to petition may be compelled to wait until their rights are judicially clarified before proceeding.").

[16] On June 11, 2019, the Secretary of State and the Board of State Canvassers issued instructions for ballot proposals, stating that the Board intended to comply with OAG, 2019-2020, No. 7,310, p ___ (May 22, 2019), because it believed it was bound by the Attorney General's opinion, but they cautioned that the public should be wary of the opinion's conclusions as to the constitutionality of PA 608. See Department of State, *Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment Petition*, pp 4-5 <https://www.michigan.gov/documents/sos/Initiative_and_Referendum_Petition_Instructions_2019-20_061119_658168_7.pdf> (accessed November 3, 2020) [https://perma.cc/5QX3-WSAH]. In a letter dated September 23, 2020, the Secretary of State reaffirmed the Board's position, incorporating the June 11, 2019 letter by reference.

constitutional until the judiciary exercises its exclusive power to say otherwise,[17] the majority opinion's decision today adds to the uncertainty among those seeking to exercise their rights to engage in direct democracy. Petition drives will continue to find themselves caught between Scylla and Charybdis: either comply with PA 608 and risk rejection early on by the Board of State Canvassers, or comply with the Attorney General's advisory opinion and risk invalidation later by a decision from this Court.

Accordingly, while I would deny the Legislature's motion to intervene in Docket No. 160907 and dismiss that case altogether, I disagree with the majority opinion that the issues presented in that appeal—the same issues presented in Docket No. 160908—are rendered moot by the postponement of MFTE's ballot-initiative efforts. Instead, the facial challenges lodged against PA 608 are issues are of great public significance and are likely to recur, yet evade meaningful judicial review. Because I am not convinced that plain-

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See Department of State, *Submitting Petition Signatures to Facilitate Efficient Review* <https://www.michigan.gov/documents/sos/Submitting_Petition_Signatures_Guidance_703168_7.pdf> (accessed November 3, 2020) [https://perma.cc/M8BT-RDNH]. Yet the Secretary of State and the Board fail to recognize that the extent to which an Attorney General's opinion even binds a government agency is open to question. See *Danse Corp v Madison Hts*, 466 Mich 175, 182 n 6; 644 NW2d 721 (2002); see also *East Grand Rapids Sch Dist v Kent Co Tax Allocation Bd*, 415 Mich 381, 394; 330 NW2d 7 (1982) ("[T]he opinion of the Attorney General that a statute is unconstitutional does not have the force of law and certainly does not compel agreement by a governmental agency[.]").

[17] See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007) ("A statute challenged on a constitutional basis is clothed in a presumption of constitutionality[.]") (quotation marks and citation omitted); *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 403 n 9; 578 NW2d 267 (1998) ("[I]t is unquestioned that the judiciary has the power to determine whether a statute violates the constitution.").

tiffs, the purported moving parties now seeking to have their own case declared moot, have satisfied the heavy burden required to demonstrate mootness, I would not grant the rare relief the majority opinion grants today.[18] Instead, I would decide these important questions forthwith.

MARKMAN, J., concurred with ZAHRA, J.

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[18] See *MGM Grand Detroit, LLC v Community Coalition for Empowerment Inc*, 465 Mich 303, 306-307; 633 NW2d 357 (2001) ("[T]he burden of demonstrating mootness is a heavy one. . . . [T]he party urging mootness on the court must make a very convincing showing that the opportunity for an appellate court to review the matter should be denied. Not surprisingly, it is rare for a court to grant such a motion.") (quotation marks and citation omitted).

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Order Directing Oral Argument in Case Pending on Application for Leave to Appeal Entered July 22, 2020:

TSCHIRHART v CITY OF TROY, Nos. 160877 and 160878; Court of Appeals Nos. 345411 and 345715. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals erred in concluding that, under this Court's precedent, a lifeguard's delay, even if it constitutes gross negligence, is not a cause in fact of drowning for purposes of determining governmental immunity under MCL 691.1407(2)(c) because of the inherent uncertainty of successful rescue. See *Beals v Michigan*, 497 Mich 363 (2015); *Ray v Swager*, 501 Mich 52 (2017). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). 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. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. 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. The application for leave to appeal as cross-appellant is denied, because we are not persuaded that the question presented should be reviewed by this Court.

Leave to Appeal Denied July 24, 2020:

In re SRC, MINOR, No. 161435; Court of Appeals No. 348774.

GLOWACKI v GLOWACKI, No. 161579; Court of Appeals No. 350691.

PEOPLE v HIGHTOWER, No. 161593; Court of Appeals No. 353903.

Rehearing Denied July 24, 2020:

FOSTER v FOSTER, No. 157705; Court of Appeals No. 324853. Opinion at 505 Mich 151.

Summary Disposition July 28, 2020:

PEOPLE v DUKES, No. 160667; Court of Appeals No. 350886. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Muskegon Circuit Court's September 11, 2019 opinion and order deny-

ing the defendant's motion for additional funds to obtain expert assistance, and we remand this case to that court for reconsideration of the motion. The trial court's ruling rests in part on its mistaken belief that the defendant sought to raise the cap on expert funding from $10,000 to $22,000. In fact, the defendant seeks to increase the cap to $16,300. On remand, the trial court shall conduct an individualized assessment of the sum required to "assure the defendant access" to the experts needed to "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *People v Kennedy*, 502 Mich 206, 218 (2018) (emphasis removed), quoting *Ake v Oklahoma*, 470 US 68, 83 (1985). We do not retain jurisdiction.

FANNON v LUTZ, No. 160934; Court of Appeals No. 350637.

PEOPLE v SWENSON, No. 161045; Court of Appeals No. 352265. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the St. Clair Circuit Court. On remand, because the trial court determined that it would not take the challenged information in the presentence investigation report (PSIR) into account at sentencing, the trial court shall direct the probation officer to delete the challenged information from the PSIR as required by MCR 6.425(E)(2)(a), and ensure that a corrected copy of the report is prepared and transmitted to the Michigan Department of Corrections. MCR 6.425; MCL 771.14(6). 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.

Leave to Appeal Denied July 28, 2020:

PEOPLE v SEARS, No. 160008; Court of Appeals No. 348422.

PEOPLE v JACOB BARNES, No. 160356; Court of Appeals No. 339431.

PEOPLE v DONALD JAMES, No. 160476; Court of Appeals No. 349220.

2727 RUSSELL STREET, LLC v DEARING, No. 160604; Court of Appeals No. 344175.

CALCO v CALCO, No. 160612; Court of Appeals No. 344932.

PEOPLE v CHARLES PERRY, No. 160628; Court of Appeals No. 343092.

PEOPLE v JAVON SMITH, No. 160704; Court of Appeals No. 336122.

PEOPLE v MERRIWEATHER, No. 160714; Court of Appeals No. 350594.

PEOPLE v BLANDING, No. 160769; Court of Appeals No. 350505.

PEOPLE v PIERCE, No. 160770; Court of Appeals No. 344143.

PEOPLE v LOPP, No. 160782; Court of Appeals No. 350561.

PEOPLE v AQUARIUS JOHNSON, No. 160785; Court of Appeals No. 350309.

PEOPLE v COOPWOOD, No. 160796; Court of Appeals No. 346241.

PEOPLE v BILLY WILDER, No. 160828; Court of Appeals No. 343804.

PEOPLE v GRANT, No. 160842; Court of Appeals No. 338615.

PEOPLE v TONY WALKER, No. 160860; Court of Appeals No. 350854.

PEOPLE v MAY, No. 160873; Court of Appeals No. 351498.

MAJOR v CITY OF ECORSE, No. 160883; Court of Appeals No. 349769.

PEOPLE v GUY, No. 160893; Court of Appeals No. 344388.

PEOPLE v CUELLAR, No. 160913; Court of Appeals No. 349638.

PEOPLE v WEAVER, No. 160916; Court of Appeals No. 350342.

PEOPLE v MICHAEL BARNES, No. 160936; Court of Appeals No. 351585.

PEOPLE v LAROUE, No. 160939; Court of Appeals No. 351567.

PEOPLE v RALPH BUTLER, No. 160942; Court of Appeals No. 344787.

PEOPLE v HUDGENS, No. 160963; Court of Appeals No. 350914.

HOUTHOOFD v OAKS CORRECTIONAL FACILITY WARDEN, No. 160965; Court of Appeals No. 351654.

PEOPLE v MAHAFFEY, No. 160974; Court of Appeals No. 341267.

OWEN v CONTO, No. 160975; Court of Appeals No. 345253.

PEOPLE v JERRY ANDERSON, No. 160993; Court of Appeals No. 350687.

PEOPLE v MARCUS BROWN, No. 161001; Court of Appeals No. 345146.

JH v JPH, No. 161005; Court of Appeals No. 345589.

PEOPLE v IANNOTTI, Nos. 161024, 161025, 161026, and 161027; Court of Appeals Nos. 341477, 341493, 341494, and 341503.

PEOPLE v PERALA, No. 161028; Court of Appeals No. 351260.

PEOPLE v CHERRY, No. 161032; Court of Appeals No. 350722.

In re PAROLE OF CHARLES LEE, No. 161033; Court of Appeals No. 347539.

PEOPLE v BENSON, No. 161036; Court of Appeals No. 351463.

WENNERS v CHISHOLM and SHAUGHNESSY v UNKNOWN OWNERS OF PROPERTY EXISTING BETWEEN WASHTENAW COUNTY PARCEL NOS D-04-01-470-001 AND D-04-01-484-009, Nos. 161037 and 161038; Court of Appeals Nos. 345830 and 345831.

PEOPLE v MCGRAW, No. 161041; Court of Appeals No. 351655.

THOMPSON v THOMPSON, No. 161043; Court of Appeals No. 347346.

PEOPLE v CALLOWAY, No. 161050; Court of Appeals No. 345450.

PEOPLE v TRAYLOR, No. 161052; Court of Appeals No. 346237.

PEOPLE v RUEDA-DIAZ, No. 161054; Court of Appeals No. 351351.

PEOPLE v RICKY NELSON, No. 161055; Court of Appeals No. 350765.

SWAN v SHERRIFF-GOSLIN COMPANY, No. 161059; Court of Appeals No. 344597.

PEOPLE v BOYKIN-JOHNSON, No. 161060; Court of Appeals No. 351804.

PEOPLE v ROWLEY, No. 161069; Court of Appeals No. 351748.

PEOPLE v ERIC JOHNSON, No. 161072; Court of Appeals No. 351464.

PEOPLE v HUA, No. 161078; Court of Appeals No. 351518.

PEOPLE v ALVIN FRANKLIN, No. 161080; Court of Appeals No. 346137.

PEOPLE v COUCH, No. 161082; Court of Appeals No. 344235.

PEOPLE v KISSANE, No. 161088; Court of Appeals No. 351873.

PEOPLE v GRINAGE, No. 161095; Court of Appeals No. 346538.

PEOPLE v CHANDLER, No. 161122; Court of Appeals No. 344565.

PEOPLE v JETT, No. 161125; Court of Appeals No. 351940.

ROSARIO v DEPARTMENT OF CORRECTIONS, No. 161130; Court of Appeals No. 350904.

PEOPLE v MANSFIELD, No. 161156; Court of Appeals No. 351490.

ELLIS v CITY OF DETROIT, No. 161158; Court of Appeals No. 346753.

PEOPLE v STOWELL, No. 161174; Court of Appeals No. 352183.

PEOPLE v BOMIA, No. 161175; Court of Appeals No. 352285.

PEOPLE v TIMOTHY WELLS, No. 161179; Court of Appeals No. 352191.

PEOPLE v DARIUS DUNN, No. 161181; Court of Appeals No. 344841.

SIMMONS v DEPARTMENT OF CORRECTIONS, No. 161195; Court of Appeals No. 351927.

PEOPLE v GATHRITE, No. 161219; Court of Appeals No. 343753.

PEOPLE v CODY CLARK, No. 161221; Court of Appeals No. 352340.

PEOPLE v LASHAN ADAMS, No. 161225; Court of Appeals No. 351099.

PEOPLE v SCOTT, No. 161227; Court of Appeals No. 351870.

PEOPLE v SHAMAR WILLIAMS, No. 161272; Court of Appeals No. 342893.

PEOPLE v WEISSERT, No. 161276; Court of Appeals No. 352519.

PEOPLE v LAPINE, No. 161404; Court of Appeals No. 353275.

PEOPLE v TIPPINS, No. 161409; Court of Appeals No. 347903.

PEOPLE v CURTIS, No. 161410; Court of Appeals No. 351657.

Superintending Control Denied July 28, 2020:

SHIVERS v ATTORNEY GRIEVANCE COMMISSION, No. 160849.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Reconsideration Denied July 28, 2020:

BOMAN v CATHOLIC DIOCESE OF GRAND RAPIDS, No. 158201; Court of Appeals No. 338458. Leave to appeal denied at 505 Mich 1024.

CITY OF WARREN v ANTHONY HOTI, No. 159627; Court of Appeals No. 346148. Summary disposition order entered at 505 Mich 999.

CITY OF WARREN v MARJANA HOTI, No. 159629; Court of Appeals No. 346152. Summary disposition order entered at 505 Mich 999.

LONG v FIEGER and KOTT-MILLARD v FIEGER, Nos. 159744 and 159745; Court of Appeals Nos. 341412 and 341414. Leave to appeal denied at 505 Mich 995.

JAWAD A SHAH, MD, PC v FREMONT INSURANCE COMPANY, No. 159979; Court of Appeals No. 340441. Leave to appeal denied at 505 Mich 995.

PEOPLE v CURTIS WOODS, No. 160005; Court of Appeals No. 348546. Leave to appeal denied at 505 Mich 995.

PEOPLE v COLE, No. 160163; Court of Appeals No. 346915. Leave to appeal denied at 505 Mich 976.

PEOPLE v REGINALD WALKER, No. 160179; Court of Appeals No. 348737. Leave to appeal denied at 505 Mich 1015.

TAYLOR v UNIVERSITY PHYSICIAN GROUP, No. 160183; reported below: 329 Mich App 268. Leave to appeal denied at 505 Mich 1016.

THE ROMANIAN ORTHODOX EPISCOPATE OF AMERICA v CARSTEA, No. 160185; Court of Appeals No. 347497. Leave to appeal denied at 505 Mich 995.

PEOPLE v CARTER, No. 160296; Court of Appeals No. 345504. Leave to appeal denied at 505 Mich 995.

PEOPLE v MERLO, No. 160300; Court of Appeals No. 350088. Leave to appeal denied at 505 Mich 995.

PEOPLE v CAIN, No. 160337; Court of Appeals No. 348562. Leave to appeal denied at 505 Mich 1016.

PEOPLE v WILLIAM SMITH, No. 160410; Court of Appeals No. 348914. Summary disposition order entered at 505 Mich 1052.

TOWN CENTERS DEVELOPMENT CO, INC v PND INVESTMENTS, LLC, No. 160420; Court of Appeals No. 343247. Leave to appeal denied at 505 Mich 1016.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v JOHNNIE BROWN, No. 160438; Court of Appeals No. 343237. Leave to appeal denied at 505 Mich 996.

PEOPLE v CORKER, Nos. 160505 and 160506; Court of Appeals Nos. 350425 and 350427. Leave to appeal denied at 505 Mich 1017.

PEOPLE v COREY MANNING, No. 160508; Court of Appeals No. 348967. Leave to appeal denied at 505 Mich 1017.

PEOPLE v PHILLIPS, No. 160541; Court of Appeals No. 350060. Leave to appeal denied at 505 Mich 1040.

PEOPLE v GATES, No. 160546; Court of Appeals No. 350246. Leave to appeal denied at 505 Mich 996.

TIA CORPORATION v PEACEWAYS, No. 160566; Court of Appeals No. 348696. Leave to appeal denied at 505 Mich 1018.

PEOPLE v DARREN JOHNSON, No. 160567; Court of Appeals No. 349529. Leave to appeal denied at 505 Mich 1041.

PEOPLE v DEONTE MCCOY, No. 160580; Court of Appeals No. 342015. Leave to appeal denied at 505 Mich 1041.

PEOPLE v MCNEES, No. 160611; Court of Appeals No. 349518. Leave to appeal denied at 505 Mich 1041.

PEOPLE v DONALD WRIGHT, No. 160681; Court of Appeals No. 350848. Leave to appeal denied at 505 Mich 1041.

PEOPLE v LARKIN, No. 160749; Court of Appeals No. 341303. Leave to appeal denied at 505 Mich 1042.

KIZER v JUDICIAL TENURE COMMISSION, No. 160750. Complaint for superintending control dismissed at 505 Mich 1019.

MARKMAN, J., did not participate because of discussions he had as Chief Justice with the State Court Administrative Office concerning aspects of the dispute.

PEOPLE v BALDWIN, No. 160784; Court of Appeals No. 349925. Leave to appeal denied at 505 Mich 1043.

PEOPLE v ARMOUR, No. 160862; Court of Appeals No. 351353. Leave to appeal denied at 505 Mich 1043.

PEOPLE v BOYD, No. 160899; Court of Appeals No. 342166. Summary disposition order entered at 505 Mich 1068.

MATHESON v SCHMITT, No. 160931; Court of Appeals No. 347022. Leave to appeal denied at 505 Mich 998.

PEOPLE v CLIFTON WITHERSPOON, No. 160969; Court of Appeals No. 350503. Leave to appeal denied at 505 Mich 1044.

PEOPLE v CLIFTON WITHERSPOON, No. 160971; Court of Appeals No. 350670. Leave to appeal denied at 505 Mich 1044.

PEOPLE v NEAL, No. 160983; Court of Appeals No. 350673. Leave to appeal denied at 505 Mich 1083.

GREAT LAKES CAPITAL FUND FOR HOUSING LIMITED PARTNERSHIP XII v ERWIN COMPANIES, LLC, Nos. 161306 and 161307; Court of Appeals Nos. 349763 and 349931. Leave to appeal denied at 505 Mich 1079.

Order Denying Motion to Disqualify Entered July 28, 2020:

WILLIAMS v ATTORNEY GRIEVANCE COMMISSION, No. 160690. Superintending control denied at 505 Mich 1044. On order of the Court, the plaintiff-appellant's motion to disqualify the entire Court from deciding the pending motion for reconsideration is denied pursuant to the rule of necessity. *United States v Will*, 449 US 200 (1980). The plaintiff-appellant's alternative request to disqualify Justices MARKMAN, ZAHRA, and VIVIANO is denied because those Justices believe, and the other Justices concur, there is no basis for their disqualification under MCR 2.003. The motion for reconsideration of this Court's April 29, 2020 order is considered, and it is denied, because we are not persuaded that reconsideration of our previous order is warranted. MCR 7.311(G). The motion to appoint counsel is denied.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Summary Disposition July 29, 2020:

PEOPLE v RAYMOND, No. 161068; Court of Appeals No. 351432. 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.

Leave to Appeal Denied July 29, 2020:

HART v STATE OF MICHIGAN, No. 159539; Court of Appeals No. 338171. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of September 25, 2019. The application for leave to appeal the February 7, 2019 judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court.

CLEMENT, J. (*concurring*). I concur with the Court's disposition of this matter. I write separately to draw attention to an issue that the parties have not raised, and upon which I would therefore have been uncom-

fortable deciding this case, but that I think is important and needs clarification: whether the Court of Appeals had jurisdiction to issue the opinion it did.

In defendant's motion for summary disposition in the trial court, it argued that this case should be resolved either on the basis of sovereign immunity or that plaintiff failed to plead a claim upon which relief could be granted. See MCR 2.116(C)(7) and (8). The trial court denied the motion on both grounds. Defendant then took a claim of appeal to the Court of Appeals. On appeal, that Court affirmed the trial court's (C)(7) holding to deny summary disposition on the basis of sovereign immunity, but reversed the trial court's (C)(8) holding and held that plaintiff had not made a claim upon which relief could be granted.

To understand my concern with whether the Court of Appeals had jurisdiction here, one must understand the bases of the Court of Appeals' jurisdiction. "The jurisdiction of the court of appeals shall be provided by law . . . ."[1] Const 1963, art 6, § 10. As a result, "the jurisdiction of the Court of Appeals is entirely statutory." *People v Milton*, 393 Mich 234, 245 (1974). The principal statutory grant of jurisdiction to the Court of Appeals provides:

> (1) The court of appeals has jurisdiction on appeals from all final judgments and final orders from the circuit court, court of claims, and probate court, as those terms are defined by law and supreme court rule, except final judgments and final orders described in subsections (2) and (3). A final judgment or final order described in this subsection is appealable as a matter of right.
>
> (2) The court of appeals has jurisdiction on appeal from the following orders and judgments that are reviewable only on application for leave to appeal granted by the court of appeals:
>
> (a) A final judgment or final order of the circuit court under any of the following circumstances:
>
> (*i*) In an appeal from a final judgment or final order of the district court . . . .
>
> (*ii*) In an appeal from a final judgment or final order of a municipal court.

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[1] The phrase "provided by law" indicates that the Constitutional Convention contemplated broad authority on the part of the Legislature to define this subject. "The committee on style and drafting of the constitutional convention of 1961 made a distinction in the use of the words 'prescribed by law' and the words 'provided by law.' Where 'provided by law' is used, it is intended that the legislature shall do the entire job of implementation. Where only the details were left to the legislature and not the over-all planning, the committee used the words 'prescribed by law.' " *Beech Grove Inv Co v Civil Rights Comm*, 380 Mich 405, 418-419 (1968).

> (b) A final judgment or final order from the circuit court based on a defendant's plea of guilty or nolo contendere.
>
> (c) Any other judgment or interlocutory order from the circuit court, court of claims, business court, or probate court as determined by supreme court rule.
>
> (3) An order concerning the assignment of a case to the business court . . . is not appealable to the court of appeals. [MCL 600.308.]

In short, the scheme recognizes a dichotomy between appeals of right and appeals by leave. Appeals of right are available from "final orders" as this Court defines that term, except appeals of right are not available from circuit court orders reviewing lower court proceedings, guilty pleas, or orders assigning a case to the business court.[2] The statute allows appeals from these latter sorts of "final orders" (with the exception of business court assignments, which are not appealable at all), along with appeals from "[a]ny other judgment or interlocutory order," but "only on application for leave to appeal granted by the court of appeals."

We have adopted court rules that track with and implement this scheme.[3] In MCR 7.203(A)(1), we have provided that the Court of Appeals "has jurisdiction of an appeal of right from" all final orders, but in MCR 7.203(A)(1)(a) and (b) we have carved out the same exceptions found in MCL 600.308(2)(a) and (b) (i.e., denying the Court of Appeals jurisdiction on a claim of appeal from an order resolving an appeal from a lower court to the circuit court, and from guilty and *nolo contendere* pleas). In MCR 7.203(B)(1) and (2), we have authorized the Court of Appeals to grant leave to appeal in those circumstances where an appeal of right is not available, which is consistent with MCL 600.308(2). We have defined a "final order" as: (1) "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties," (2) an order designated as final in receivership and related proceedings, (3) "a postjudgment order that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile" in domestic-relations actions, (4) "a postjudgment order awarding or deny-

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[2] See also MCL 600.309, which provides that "all appeals to the court of appeals from final judgments or decisions permitted by this act shall be a matter of right," minus these exceptions from MCL 600.308(2) and (3).

[3] Prior to 2016 PA 186, MCL 600.308(1) simply allowed appeals of right from final judgments and orders, but it did not define those terms or expressly refer to this Court's definition. This Court amended MCR 7.202 to include a definition of final judgments and orders well before then, on October 19, 1995. See 450 Mich clv, clv (1995). So, while we adopted the definition before the Legislature had invited us to do so, the Legislature has since amended MCL 600.308(1) to expressly incorporate our definition by reference.

ing attorney fees and costs," and (5) an order denying a motion for summary disposition[4] on the basis of governmental immunity under MCR 2.116(C)(7) or (10). MCR 7.202(6)(a).

Under this scheme, the Court of Appeals apparently had jurisdiction to review the trial court's sovereign-immunity ruling under MCR 2.116(C)(7). The Legislature has conferred upon the Court of Appeals authority to hear appeals of right from final orders as this Court has defined them. See MCL 600.308(1); MCR 7.203(A)(1). This Court has defined "final order" to include orders denying summary disposition on the basis of governmental immunity under MCR 2.116(C)(7). See MCR 7.202(6)(a)(v). Thus, defendant's claim of appeal gave the Court of Appeals jurisdiction to review the trial court's sovereign-immunity holding.[5]

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[4] Note that an order *denying* summary disposition to a party, for any reason, is in some tension with the notion of being a "final order"—something the United States Supreme Court wrestled with in *Mitchell v Forsyth*, 472 US 511 (1985), the case our staff comment cited in support of our 2002 amendment to the definition of "final order" that added denials of summary disposition on the basis of governmental immunity. See 466 Mich xc, xcv (2002). This is presumably why the Legislature has specified in MCL 600.308(3) that an order concerning the assignment of a case to the business court cannot be appealed in the Court of Appeals—no English speaker would construe that as a "final order," but § 308(3) prevents this Court from defining it as a "final order" as we have done with orders denying summary disposition on the basis of governmental immunity.

[5] Strictly speaking, MCR 7.202(6)(a)(v) defines a final order as being an order denying *governmental* immunity, whereas the state here invoked *sovereign* immunity. "The term 'governmental immunity' derives from 'sovereign immunity,' and although the two are often used interchangeably, they are not synonymous. Sovereign immunity refers to the immunity of the state from suit and from liability, while governmental immunity refers to the similar immunities enjoyed by the state's political subdivisions." *Ballard v Ypsilanti Twp*, 457 Mich 564, 567-568 (1998). If MCR 7.202(6)(a)(v) were understood as allowing an appeal of right *only* when "governmental" immunity but not when "sovereign" immunity is at issue, the Court of Appeals may well not have had jurisdiction over the sovereign-immunity issue in this case, either. That said, as *Ballard* noted, we have often used the terms interchangeably, and there is reason to believe such usage was intended in MCR 7.202(6)(a)(v). We have said that "a central purpose of *governmental* immunity" is "to prevent a drain on the *state's* financial resources, by avoiding even the expense of having to contest on the merits any claim barred by *governmental* immunity," *Mack v Detroit*, 467 Mich 186, 203 n 18 (2002) (emphasis added), which refers to the "state" being protected

The question, however, is whether the Court of Appeals had jurisdiction to review the trial court's holding under MCR 2.116(C)(8) that plaintiff had stated a claim upon which relief can be granted. The definition of "final order" in MCR 7.202(6)(a) does not include an order denying a (C)(8) motion. Moreover, MCR 7.203(A) makes clear that parties cannot bootstrap their way to appellate review. It provides that an appeal of right from an order denying summary disposition on the basis of governmental immunity "is limited to the portion of the order with respect to which there is an appeal of right." MCR 7.203(A)(1). The trial court's (C)(7) decision was, undoubtedly, a different "portion of [its] order" than its (C)(8) decision, and MCR 7.203(A) makes clear that even though the claim of appeal gave the Court of Appeals jurisdiction over defendant's appeal of the (C)(7) sovereign-immunity decision, that did not then mean the Court of Appeals had jurisdiction to review the (C)(8) decision.

> Where the language of a court rule is clear and unambiguous, it must be enforced as written. We therefore conclude that in an appeal by right from an order denying a defendant's claim of governmental immunity, such as this one, [the Court of Appeals] *does not have the authority* to consider issues beyond the portion of the trial court's order denying the defendant's claim of governmental immunity. To conclude otherwise would render part of the court rule nugatory. [*Pierce v City of Lansing*, 265 Mich App 174, 182 (2005) (emphasis added; citation omitted).]

If the trial court's (C)(8) decision was not a "final order," and the Court of Appeals' jurisdiction over the (C)(7) decision did not extend to reviewing the (C)(8) decision as well, then the (C)(8) decision must be part of the group of "[a]ny other . . . interlocutory order[s] from the . . . court of claims" in MCL 600.308(2)(c), which are outside the definition of a "final order" in MCR 7.202(6)(a). Such orders are "reviewable *only* on application for leave to appeal granted by the court of appeals." MCL 600.308(2)(c) (emphasis added).

The jurisdictional difficulty here is that defendant never filed an application for leave to appeal the trial court's (C)(8) ruling in the Court of Appeals under MCR 7.203(B)(1). As was noted in *Pierce*, the Court of

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by "governmental" rather than "sovereign" immunity. Our inclusion of orders denying governmental immunity in the definition of "final orders" furthers the "central purpose" of immunity stated in *Mack* by allowing for immediate appellate review before a government entity is forced to take on "the expense of having to contest on the merits" a claim it alleges the trial court should have barred—reasoning that applies with equal force to the state as to local units of government and would be consistent with our opinion in *Fairley v Dep't of Corrections*, 497 Mich 290 (2015). That said, MCR 7.202(6)(a)(v) admittedly reads as it does. For the purpose of this analysis, I assume that the definition of a "final order" in MCR 7.202(6)(a)(v) includes a denial of sovereign immunity.

Appeals "does not have the authority" to review a nonfinal order under MCR 7.202(6)(a) on an appeal of right. Nor is *Pierce* an anomaly. During the era when the Court of Appeals published all of its decisions,[6] it held on many occasions that the failure to file an application for leave to appeal when one is required denies that Court jurisdiction to review questions presented in an improper claim of appeal.[7] However, it thereafter began holding that it could treat an improper claim of appeal as an application for leave to appeal and grant it, in order to reach important legal questions.[8] Since then, the Court of Appeals has lived on

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[6] On May 12, 1972, this Court amended GCR 1963, 821.1, to allow the Court of Appeals to issue unpublished opinions. See 387 Mich xxxix (1972); cf. Toth, *A Critique of the Unpublished P.C.*, 58 Mich B J 653 (1979).

[7] See, e.g., *Solner Inv Co v Thoms*, 2 Mich App 189, 190 (1966); *Sears, Roebuck & Co v Holmes*, 2 Mich App 190, 191 (1966); *Earp v Detroit*, 11 Mich App 659, 660 (1968); *City of Dearborn v Pulte-Strang, Inc*, 12 Mich App 161, 162-163 (1968); *Hope v Weiss*, 12 Mich App 404, 405 (1968); *Highland Park v Werch*, 15 Mich App 536, 537 (1969); *People v Smith*, 16 Mich App 606, 607 (1969); *People v Abess*, 17 Mich App 617, 618 (1969); *Chevrolet Local 659, UAW-CIO v Reliance Ins Cos*, 21 Mich App 123, 124-125 (1970); *People v Markunas*, 23 Mich App 616, 617-618 (1970); *Conlon v State Treasurer*, 23 Mich App 646, 647-648 (1970); *In re Freedland Estate*, 28 Mich App 580, 581-582 (1970); *Downriver Loan Co v Gabbert*, 37 Mich App 411, 412-413 (1971); see also *Standard Bldg Prod Co v Woodland Bldg Co*, 1 Mich App 434, 437 (1965) (dismissing the appeal because "[i]t is only by granted application for leave to appeal that a matter of this nature may be brought before the Court," but not expressly using the word "jurisdiction"); *Cassidy v Wisti*, 43 Mich App 356, 363 (1972) (holding that "any review of the order setting aside the default judgment must await the possible filing of an application for leave to appeal," but not expressly using the word "jurisdiction"). We affirmed the Court of Appeals' unpublished order dismissing a claim for lack of jurisdiction in *Lasher v Mueller Brass Co*, 392 Mich 488, 498-499 (1974).

[8] See, e.g., *People v Martin*, 59 Mich App 471, 482-483 (1975), overruled on other grounds by *Jackson Co Prosecutor v Court of Appeals*, 394 Mich 527 (1975); *People v Currie*, 59 Mich App 659, 660 (1975); *Moore v Ninth Dist Judge*, 69 Mich App 16, 19 (1976); *Oakland Co Prosecutor v Forty-Sixth Dist Judge*, 72 Mich App 564, 567 (1976); *Tenney v Springer*, 121 Mich App 47, 51 (1982); *Krajewski v Krajewski*, 125 Mich App 407, 409 n 1 (1983), rev'd on other grounds 420 Mich 729 (1984); *Guzowski v Detroit Racing Ass'n, Inc*, 130 Mich App 322, 324-326 (1983); *Lindner v Lindner*, 137 Mich App 569, 571 n 1 (1984). The "treated as" solution was not unknown before unpublished opinions were allowed. See *People v Jebb*, 3 Mich App 118, 119-120 (1966).

both sides of this fence. It has held that without a proper application for leave to appeal having been filed and granted, it lacked jurisdiction to entertain an appeal,[9] but it more often asserts discretion to treat an improper claim of appeal as an application, and then grants this constructive application in order to reach the legal questions presented in the name of judicial economy.[10] Nowhere is this tension better demonstrated than in *Pierce* itself; immediately after concluding that it "[did] not have the authority" to entertain the appeal because to do so would "render part of the court rule nugatory," the Court of Appeals then said, in the *very next sentence*, that it would "[n]evertheless, in the

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[9] See, e.g., *Ulery v Coy*, 153 Mich App 551, 555-556 (1986), vacated on other grounds 428 Mich 879 (1987); *Zimmerman v Zimmerman*, 177 Mich App 8, 10 (1989); *Konal v Forlini*, 235 Mich App 69, 75-76 (1999); *Minority Earth Movers, Inc v Walter Toebe Constr Co*, 251 Mich App 87, 91 (2002); *People v Perks*, 259 Mich App 100, 115 (2003); see also *McDowell v Detroit*, 264 Mich App 337, 344 n 2 (2004) (outlining circumstances under which "it would be incumbent on defendants to file an application for leave to appeal rather than a claim of appeal"), rev'd on other grounds 477 Mich 1079 (2007). We have also affirmed the Court of Appeals' dismissing a claim of appeal for lack of jurisdiction. See *Children's Hosp of Mich v Auto Club Ins Ass'n*, 450 Mich 670, 677 (1996).

[10] See, e.g., *SNB Bank & Trust v Kensey*, 145 Mich App 765, 770 (1985); *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75, 78 n 2 (1986); *Jackson Printing Co, Inc v Mitan*, 169 Mich App 334, 336 n 1 (1988); *Schultz v Auto-Owners Ins Co*, 212 Mich App 199, 200 n 1 (1995); *Waatti & Sons Elec Co v Dehko*, 230 Mich App 582, 585 (1998); *In re Investigative Subpoena*, 258 Mich App 507, 508 n 2 (2003); *Detroit v Michigan*, 262 Mich App 542, 545-546 (2004); *Newton v Mich State Police*, 263 Mich App 251, 259 (2004), overruled on other grounds 477 Mich 856 (2006); *Walsh v Taylor*, 263 Mich App 618, 626 (2004); *Martin v Secretary of State*, 280 Mich App 417, 422 n 2 (2008), rev'd on other grounds 482 Mich 956 (2008); *Amerisure Ins Co v Plumb*, 282 Mich App 417, 419 n 1 (2009); *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 61-62 (2011); *Wardell v Hincka*, 297 Mich App 127, 133 n 1 (2012); *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354 (2013); *Rains v Rains*, 301 Mich App 313, 320 n 2 (2013); *Ronnisch Constr Group, Inc v Lofts On The Nine, LLC*, 306 Mich App 203, 205 n 1 (2014), aff'd on other grounds 499 Mich 544 (2016); *Nickola v MIC Gen Ins Co*, 312 Mich App 374, 377 n 2 (2015), rev'd on other grounds 500 Mich 115 (2017); *In re Ballard*, 323 Mich App 233, 235 n 1 (2018); *In re Attorney General Petition*, 327 Mich App 136, 145 n 2, argument on app for lv to appeal ordered 505 Mich 939 (2019); *Stumbo v Roe*, 332 Mich App 479, 482 n 1 (2020), lv den 505 Mich 1127 (2020). There is at least one pre-1972 example of the judicial economy rationale as well. See *People v Sattler*, 20 Mich App 665, 669 (1969).

interest of judicial economy, . . . consider the [improper (C)(10) interlocutory appeal] as on leave granted." *Pierce*, 265 Mich App at 182-183. This Court has apparently endorsed this process, albeit without analysis and relying only on Court of Appeals authority, in a few recent family-law cases.[11]

In my view, this situation presents a quandary. On the one hand, the Court of Appeals clearly has the authority to grant applications for leave to appeal, see MCR 7.203(B)(1). Because that prerogative belongs to the Court of Appeals as an institution, it may seem like a pointless formalism to conclude that the Court lacks the authority to adjudicate an issue because it was brought as a claim of appeal, when the Court would have had the authority to confer upon itself the ability to adjudicate the issue had it been brought as an application for leave to appeal instead.[12] It seems extraordinarily inefficient for the same institution that could have granted a proper application for leave to appeal en route to adjudicating an issue, to instead conclude that its hands are tied because the issue was brought as an improper claim of appeal instead. In addition, MCR 7.211(C)(2)(a) allows for a motion to dismiss in the Court of Appeals for lack of jurisdiction, but requires that such a motion be made "before [the appeal] is placed on a session calendar." This could be construed as a sort of limitations period on challenging the jurisdiction of the Court of Appeals, which might indicate that such defects can be waived if not timely raised.

On the other hand, "the jurisdiction of the Court of Appeals is entirely statutory." *Milton*, 393 Mich at 245. To hear an appeal from a

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[11] See *Varran v Granneman*, 497 Mich 928, 928 (2014) ("If the Court of Appeals determines that the [trial court]'s order is not appealable by right, it may then dismiss the . . . claim of appeal for lack of jurisdiction, or exercise its discretion to treat the claim of appeal as an application for leave to appeal and grant the application."); *Varran v Granneman*, 497 Mich 929, 929 (2014) (same); *Madson v Jaso*, 499 Mich 960, 960 (2016); *Ozimek v Rodgers*, 499 Mich 978, 978 (2016); *Royce v Laporte*, 501 Mich 1025, 1025 (2018); *Royce v Laporte*, 501 Mich 1025, 1025-1026 (2018). The invitation to "exercise discretion" was accepted in *Varran v Granneman*, 312 Mich App 591, 607 (2015), but declined in *Madson v Jaso*, 317 Mich App 52, 68 (2016), vacated 501 Mich 1024 (2018), and *Ozimek v Rodgers*, 317 Mich App 69, 81 (2016), overruled by *Marik v Marik*, 501 Mich 918 (2017). We also directed its use without analysis to resolve procedural tangles in *Lasher*, 392 Mich at 499; *In re Complaint of the City of Marshall Against Consumers Power Co*, 440 Mich 914 (1992); and *Grand Traverse Co v Michigan*, 441 Mich 919 (1993).

[12] Note, though, that the Court of Appeals here did not acknowledge this jurisdictional issue so as to at least recite that it was treating the claim of appeal as an application for leave to appeal and granting it (as it has done in other cases). That said, it would be unsatisfying to have this issue turn on such a pro forma recitation.

denial of a (C)(8) motion, MCL 600.308(2)(c) undoubtedly requires that it be on leave granted. Indeed, MCL 600.308(2) is clearly written to function as a limitation on the Court, as it says that the orders listed in it "are reviewable *only* on application for leave to appeal granted." If the Court of Appeals has "discretion" to disregard what is clearly expressed in MCL 600.308(2) as a limitation on the Court's jurisdiction, it would seem the limitation has been rendered nugatory. And the deadline in MCR 7.211(C)(2)(a) need not necessarily be construed as a limitations period on challenging the Court's jurisdiction. The Court submits motions to motion panels, which are distinct from the merits panels that hear cases which have been calendared. See MCR 7.211(D), (E)(1). The motion panels are not merely distinct from merits panels in their responsibilities; they also have a distinct composition, being drawn specifically from the judges in each Court of Appeals district instead of from the Court's entire roster of judges. Compare MCR 7.201(D) ("The court shall sit to hear cases in panels of 3 judges. . . . The judges must be rotated so that *each judge sits with every other judge* with equal frequency . . . .") (emphasis added) with COA IOP 7.211(D) ("The motions and answers are accumulated and submitted to regularly scheduled motion docket panels *at each of the Court's locations*.") (emphasis added). The deadline in MCR 7.211(C)(2)(a) could be construed as apportioning responsibility to decide the jurisdictional question between a motion panel and a merits panel without eliminating it as a live issue.

I think this is an important issue. While the convenience of treating improper claims of appeal as applications for leave to appeal (and granting them) is attractive, I am uncomfortable with how it renders nugatory significant chunks of MCR 7.203 and MCL 600.308—particularly where the Court of Appeals' jurisdiction is purely a function of the statutory grant of authority. I think more rigorous attention needs to be paid to this in the future, whether in the form of focused judicial consideration of the issue, possible revision of the court rules, or reform of the underlying statute. I believe we need a readier and clearer explanation of something that it seems to me ought to be straightforward—the boundaries of the appellate jurisdiction of the Court of Appeals—preferably an explanation that does not result in situations like *Pierce*, where the Court considered an issue it expressly held it lacked the authority to consider.

MCCORMACK, C.J. (*dissenting*). I respectfully dissent from the Court's order denying leave to appeal. Before addressing governing legal principles, the bigger picture should not get lost. In 2014, the plaintiff, Anthony Hart, was arrested. He was then convicted. He was then incarcerated for at least 17 months.[1] His "crime" was failing to register his address with Michigan's sex-offender registry. The problem is that, in fact, Mr. Hart was not required to register at all. Not since 2011. He was incarcerated for no unlawful act whatsoever. Served time. No crime.

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[1] There is some discrepancy in the record about whether the plaintiff served 17 or 19 months of his sentence. The plaintiff and the Court of Claims say 19; the Court of Appeals says 17.

For beginning in 2011, state law unambiguously *required* the Michigan State Police (MSP) to remove his name from the registry. MCL 28.728(9). The MSP did not do so. The state realized its mistake 17 months too late. Upon doing so, the state released Mr. Hart. He sued, alleging the state's failure to remove him from the registry led to his unconstitutional arrest and detention. Although the burden of demonstrating that the government violated an individual's constitutional rights is high, the plaintiff has met it.

I would reverse the Court of Appeals judgment and reinstate the Court of Claims' order denying the defendant's motion for summary disposition. The citizens of Michigan would be surprised indeed to learn that Michigan law provides no recourse for blatantly lawless incarceration.

To back up, in 2001, the plaintiff was 16 years old when he was adjudicated for violating former MCL 750.520(e), fourth-degree criminal sexual conduct.[2] As the statute then required, the plaintiff was designated as a Tier II sex offender and mandated to register his address with the sex-offender registry biannually for 25 years under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. Ten years later, the Legislature amended the SORA, so that as of July 1, 2011, individuals like the plaintiff—those who were adjudicated before these amendments to be juvenile Tier II offenders—were no longer required to register. As part of the amendments, the MSP was required to remove individuals like the plaintiff from the registry. See MCL 28.728(9) (requiring that, "[i]f the department determines that an individual . . . is no longer required to register under this act, the department shall remove the individual's registration . . . within 7 days after making that determination").

The plaintiff complied fully with the SORA until 2011, but the MSP never removed him from the registry that year as the statute required. So the plaintiff continued to comply. In 2013, he made a single-digit error in reporting his address, for which he was arrested and charged with violating his requirements to register, MCL 28.729. He pled *nolo contendere* and was assessed a $325 fine. Then in 2014, he did not verify his address. Acting in accordance with an MSP policy, an MSP agent sent a verified letter to the Hillsdale Police Department to inform them that the plaintiff did not verify his address and that he was out of compliance with the SORA because he was required to fulfill these obligations until 2054.[3] The plaintiff was prosecuted for the felony of failing to meet his registration obligations under the SORA for a second time, MCL 28.729. He pled guilty and was sentenced to serve 16 to 24 months in prison and pay additional fines and fees. After he served longer than his minimum sentence, the Department of Corrections

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[2] This section has since been amended and is now MCL 750.520e.

[3] It is unclear why the MSP believed the obligations continued until 2054, a year well beyond the plaintiff's initial 25-year reporting requirement period, but it is more evidence that the state's policies on the registry were unconstitutionally flawed.

figured out that the plaintiff was serving a sentence for a crime it was legally impossible to commit because he was not required to register. The Department notified the MSP, the plaintiff was released, and his convictions were vacated.

The plaintiff sued the state of Michigan, alleging constitutional torts based on violations of his rights to (1) be free of unreasonable searches and seizures and (2) due process. Const 1963, art 1, §§ 11, 17. Before discovery, the state moved for summary disposition for two reasons: the claims were barred by governmental immunity, MCR 2.116(C)(7), and the plaintiff failed to adequately state a constitutional-tort claim, MCR 2.116(C)(8). The Court of Claims denied both motions. It held that the plaintiff properly alleged a constitutional tort because he alleged that the state knew that law enforcement would use information contained in the registry to arrest noncompliant actors, yet the state neither properly trained its officers to detect changes in the SORA nor made necessary efforts to ensure the registry was accurate. These failures caused the violations of the plaintiff's constitutional rights.

The state appealed. The Court of Appeals reversed, holding that the Court of Claims erred by denying the state's (C)(8) motion, and remanded for entry of summary disposition in favor of the state.[4] *Hart v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued February 7, 2019 (Docket No. 338171).

The panel correctly framed the issue: the state can be sued for violations of its Constitution only if it would be liable under the standards set in 42 USC 1983 as explained in *Monell v New York City Dep't of Social Servs*, 436 US 658 (1978).[5] *Id*. at 6, citing *Reid v Michigan*, 239 Mich App 621, 628 (2000). That is, the state can only be liable if a state custom or policy was primarily responsible for its employee's actions resulting in the constitutional violation. *Hart*, unpub op at 6, citing *Carlton v Dep't of Corrections*, 215 Mich App 490, 505 (1996). And where no information is alleged about other harms resulting from the policy, a plaintiff must allege that the state was deliberately indifferent in order to survive summary disposition. *Hart*, unpub op at 7-8, citing *Canton v Harris*, 489 US 378 (1989), and *Bd of Co Comm'rs of Bryan Co, Okla v Brown*, 520 US 397 (1997). That is, the plaintiff must allege a "*direct and obvious causal link* between the failure to train and the deprivation of constitutional rights that demonstrates 'deliberate indifference.' " *Hart*, unpub op at 8.

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[4] The Court of Appeals held that the defendant's (C)(7) motion was properly dismissed because governmental immunity is not a defense to constitutional-tort claims. *Hart*, unpub op at 5, citing *Smith v Dep't of Pub Health*, 428 Mich 540, 544 (1987). The defendants did not cross-appeal this issue, so I do not address it further.

[5] In *Monell*, 436 US at 660-661, the plaintiffs were a class of female employees who sued because their municipal employer, as a matter of policy, compelled pregnant employees to take unpaid leaves of absence before they were medically necessary.

The panel held that the plaintiff's allegations were legally insufficient on the conclusory grounds that "the alleged failure to train MSP employees in this SORA context does not carry the same obvious or clear dangers of a constitutional violation." *Id*.

Grants and denials of motions for summary disposition are reviewed de novo, which means the issue is reviewed independently without deference to the lower courts. *Genesee Co Drain Comm'r v Genesee Co*, 504 Mich 410, 417 (2019). And a court must consider the plaintiff's factual allegations to be true and construe them in the plaintiff's favor. *Spiek v Dep't of Transp*, 456 Mich 331, 338-339 (1998); see also *Maiden v Rozwood*, 461 Mich 109, 119 (1999).

In *Canton*, 489 US at 389, the Court held that a failure-to-train claim is actionable in those rare cases in which a plaintiff demonstrates that the failure shows a deliberate indifference. The Court acknowledged that sometimes a pattern or practice is not the only way to show deliberate indifference because "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id*. at 390. The Court added context in a footnote:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v Garner*, 471 US 1 (1985), can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.
>
> It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need. [*Id*. at 390 n 10].

The Court of Appeals here concluded that the plaintiff's allegations fell short of showing the deliberate indifference required to make the causal link between the state's policies and the violations of his constitutional rights. It held that "the failure to train employees on how to update the SORA after pertinent legislative changes does not possess the same direct causal link to a constitutional violation, being illegally arrested." *Hart*, unpub op at 8. The panel explained why it viewed the plaintiff's case differently than the failure to train officers about deadly force: the plaintiff's allegations were "distinguishable from the fleeing felon example in *Canton* because it is not 'a moral certainty' or 'patently obvious' that people who are on the [registry] (properly or not) will fail to keep the [registry] updated and be arrested as a result." *Hart*, unpub op at 8. It noted that the state would not have arrested and convicted the plaintiff for conduct that was not criminal if the plaintiff (1) had stated a correct address when complying with a statute with which he was not required to

comply, (2) had been aware of the change in the law and taken steps to remove himself from the registry, or (3) had been represented by an attorney who noticed the plaintiff could not have been guilty of the offense. *Hart*, unpub op at 8 n 6.

Put simply, the panel held that because people who are not required to be on the registry might, in theory, take steps to avoid the state's failure to remove them and subsequent decision to illegally arrest and detain them, they are better positioned than fleeing felons to avoid being victims of constitutional torts.

So the plaintiff was not entitled to relief because he could have avoided his illegal arrest and detention by complying with a law that he was not required by law to comply with? Or by taking the initiative to ask the state to please follow the law's express requirement that the state remove him from the registry? Or by somehow figuring out that the state provided him with deficient counsel and asking for the effective assistance of counsel the constitution guarantees him to avoid his unconstitutional conviction and sentence?

No, the constitutional-tort standard takes plaintiffs as they are. It does not ask courts to hypothesize what steps a *plaintiff* might have taken to avoid the tort altogether. By that logic, the plaintiff might have taken any number of steps not to be in the situation he was in. Indeed, by that logic, the plaintiffs in *Monell* might have avoided the constitutional tort in that case by avoiding becoming pregnant. Or by changing jobs. What-if is not the proper analysis.

Nobody disputes that the plaintiff was illegally arrested and incarcerated *because*, *in fact*, the MSP failed to update the registry as unambiguously required by law and then sent false information to the local prosecutor. That's what the plaintiff pled: that the state's inadequate training regarding its registry policies caused his illegal arrest and detention. It is "so obvious" because people who are not required to comply with reporting requirements will certainly not do so, which will result in their illegal arrest and detention. *Canton*, 489 US at 390 n 10. It was not only "so obvious" that these failures would result in the plaintiff's illegal arrest; it was exactly what happened. The plaintiff presented a well-pled direct causal link between the state's policy corresponding to this statutory duty and the alleged constitutional deprivation. *Id*. at 385.

Deliberate indifference is a steep pleading requirement. But the uncontested facts the plaintiff has pled, viewed in a light most favorable to him, lead to the conclusion that he has met it. I would reverse.

BERNSTEIN and CAVANAGH, JJ., join the statement of MCCORMACK, C.J.

Reconsideration Denied July 29, 2020:

GREAT LAKES CAPITAL FUND FOR HOUSING LIMITED PARTNERSHIP XII v ERWIN COMPANIES, LLC, No. 160569; Court of Appeals No. 349916. Leave to appeal denied at 505 Mich 1029.

Summary Disposition July 31, 2020:

PEOPLE v HAMMOCK, No. 158819; Court of Appeals No. 343893. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the September 15, 2017, May 4, 2018, and May 14, 2018 orders of the Wayne Circuit Court, and we remand this case to the Wayne Circuit Court for an evidentiary hearing on the defendant's motion for relief from judgment. The trial court abused its discretion in failing to "carefully consider the newly discovered evidence in light of the evidence presented at trial." *People v Grissom*, 492 Mich 296, 321 (2012). On remand, the trial court shall first assess "whether a *reasonable juror* could find the testimony credible on retrial." *People v Johnson*, 502 Mich 541, 567 (2018). If so, the trial court shall then assess "the effect of the newly discovered evidence in conjunction with the evidence that was presented at the original trial[]," and whether the newly discovered evidence makes a different result probable on retrial. *Id*. at 572. The motion for bond is denied. We do not retain jurisdiction.

CAVANAGH, J. (*concurring*). I concur in the order remanding this case to the trial court for an evidentiary hearing because defendant's offer of proof identifies evidence that, if believed, would raise serious concerns about his conviction. Further, not only is the offer of proof not incredible on its face, but it offers the possibility of development at an evidentiary hearing such that defendant may be able to establish he is entitled to a new trial under *People v Johnson*, 502 Mich 541 (2018).

The crime at issue is a shooting at 29549 Oakwood Street in Inkster on November 15, 2006. Also relevant is a house at 29613 Oakwood Street. Defendant was charged with first-degree murder, assault with intent to commit murder, being a felon in possession of a firearm, and possessing a firearm during the commission of a felony. Defendant elected a bench trial, and the court acquitted defendant of first-degree murder but convicted him of second-degree murder as well as the other charges. At defendant's trial, Lemone Pippen[1] testified that he was at 29549 Oakwood in the early morning hours of November 15, 2006, with Claude Lundy. Pippen said that he was invited by Lundy, who lived there, and that they were visiting and drinking. Pippen testified that Roderick Healy and defendant arrived about 20 minutes after he did and that defendant shot both him and Lundy. Pippen told the first police officer on the scene that defendant shot him.

However, there was significant testimony from the police at trial that did not seem to fit Pippen's story. Detective Anthony Delgreco testified that a door to 29549 Oakwood had been "forced." He testified that although the house was generally furnished—it had a couch, dining table, chairs, dressers, beds, and an entertainment center—there were no televisions in the house, nor were there radios or VCRs. Similarly, there was a monitor, keyboard, and mouse for a desktop computer, but the tower was missing.

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[1] This name is spelled in various ways throughout the lower court record.

The police received a phone call regarding a vacant house across the street from 29549 Oakwood, and Detective Delgreco testified that they found property from 29549 Oakwood at another house on the street—29613 Oakwood. The detective said that there was a big-screen television at 29613 Oakwood that the police had identified as coming from 29549 Oakwood. There was also another television, a VCR, and a computer tower, though the record seems unclear as to where these came from. The television that was identified as coming from 29549 Oakwood was "outside the breezeway" of 29613 Oakwood, the computer tower was inside, and the other items were inside the breezeway. Detective Delgreco also testified that he found jewelry at 29613 Oakwood that appeared to be part of a matching set with jewelry from 29549 Oakwood.

The trial court did not resolve the question of how the big-screen television from 29549 Oakwood made its way to 29613 Oakwood, or why other valuable property was in the vacant house, but the court did not think there was enough evidence to support an alternative theory of a robbery:

> Now, the big screen TV that's across the street on the lawn. Maybe it took two people to carry it across. I was surprised. I bought a 32 inch the other day, and the guy in the store put it on his shoulder and walked it out the door. He didn't need any help.
>
> So I don't know whether this big screen TV needed two people to take it. But it's sitting on the lawn. It's left there.
>
> The other strange this [sic] is, some of the other stuff from that house is inside of the vacant house. So who's saying anybody is ripping off? Maybe people were just moving. So I can't conclude that there was a robbery here going on. I don't know whether it was one drug house moving to another drug house. I have no idea.

The trial court noted that the prosecution presented cell-tower tracking evidence indicating that defendant was in Inkster, but it expressed deep skepticism of Pippen's testimony:

> And what I see here is maybe that there was something that happened between all of the parties that caused the shooter to react. I don't know what it was. Because the People don't establish the circumstances because Mr. Pippins—and he is the mainstay in this that you have to sink or swim with Mr. Pippins. And Mr. Pippins does say in that first 911 tape, I noticed he doesn't say who shot him. It's not till later that he starts talking about who shot him.
>
> But I don't consider that as a plan to make up anything. I think he finally figured out, hey, I'm about to die, and he starts talking.
>
> But his credibility, based on that, based on the fact he's in this house. At one point he says, oh, we went over there to see some girls. Another point he says something different. I don't know.

> And I tried to figure it out because I asked him some questions myself. And he'd say one thing one minute and something else the next minute. And how can you rely on all of those things that he said.

The trial court ended up convinced that defendant had shot Lundy and Pippen. However, the court was not convinced of the exact circumstances, and it convicted defendant of second-degree murder, assault with intent to murder, felon-in-possession, and felony-firearm.

In this motion for relief from judgment, defendant offers the affidavit of Jason Carter. In the affidavit, Carter says he was on Oakwood Street in Inkster on November 15, 2006, and observed several relevant events. Carter says Lundy bought marijuana from him at about 2 a.m., and then Lundy and Pippen went to 29549 Oakwood to break in. Carter says he watched Pippen and Lundy for about 10 to 20 minutes going back and forth from 29549 Oakwood to 29613 Oakwood and taking items such as televisions and VCRs. Carter further says that while Lundy and Pippen were in 29549 Oakwood, a light-blue Lincoln pulled up and a white man got out and went into the house. Carter heard yelling "to the effect of 'what the fuck are you doin' in my house,' " and then Carter heard gunshots. Carter then saw the white man leave the house and drive off in the light-blue Lincoln. Carter says that he was interviewed by Detective Delgreco and that he told the detective all of the above. Carter says that he knows defendant and that defendant is not the man who drove up in the light-blue Lincoln.

This motion has not made a straight path to this Court, and its journey is worth noting. The judge who rendered defendant's verdict had retired by the time this motion was filed, and the successor judge initially denied the motion for relief from judgment as well as a motion for reconsideration. However, the Court of Appeals remanded for further proceedings. *People v Hammock*, unpublished order of the Court of Appeals, entered July 15, 2016 (Docket No. 331895). On remand, the trial court initially granted an evidentiary hearing, reasoning:

> Viewed in isolation, it is entirely possible to dismiss the underlying circumstances (whether the Complainant and the decedent were committing an active larceny when they befell gunfire), nevertheless, as the Prosecution's case relied upon the Complainant's testimony, corroborated by thin strands of circumstantial evidence, an exculpatory connection between the heart of the Complainant's testimony, and Carter's proposed testimony is undeniable. It further appears that this predecessor Court found the veracity of the Complainant's testimony quite doubtful.
>
> Thus, this Court finds it necessary to make a "holistic judgment about all the evidence and its likely effect on [a reasonable trier of fact] applying the reasonable-doubt standard." *People v Swain*, 288 Mich App 609, 640; 794 NW2d 92 (2010). As such, and to consider "all the evidence, old and new, incriminating and exculpatory," this Court finds it necessary and prudent to conduct an Evidentiary Hearing, pursuant to MCR 6.508(C). [Alteration in original.]

Then the trial court changed its mind, and decided against taking any testimony. At a hearing on the motion, without defendant present, defense counsel said that he had nothing to say for the record, only that "I do thank you for an opportunity to file a brief if one was necessary in my opinion. I think Judge Michael Talbot did a far better job writing this than I could have."[2] The trial court denied the motion from the bench, saying only:

> All right.
>
> The defendant was convicted after a bench trial before Judge Vera Massey-Jones:
>
> > Where the surviving eyewitness Pippens [sic] testified that he called 911 and a family member immediately following the shooting and identified the defendant by name.
> >
> > At the trial, the defendant attempted to establish an alibi. However his location during the offense was admitted by way of cell tower information.
> >
> > Judge Jones in here [sic] findings stated that she believed Pippens and that his testimony was corroborated by the defendant's girlfriend and the cell phone tower evidence.
> >
> > Furthermore, Judge Jones rejected the defendant's theory that Pippens [sic] identification of the defendant as the shooter was fabricated.
> >
> > The defendant now claims that an unidentified Caucasian male may have committed the crimes as detailed in Jason Carter's signed affidavit.
> >
> > Considering the factors stated in [*People v Cress*, 468 Mich 678, 692 (2003)], the Court finds that the defendant has failed to show that the new evidence makes a different result probable on retrial. The Court further finds that an evidentiary hearing is not necessary.
> >
> > The defendant's motion is denied. [Some commas omitted.]

Ultimately, to obtain a new trial with an offer of newly discovered evidence, a defendant must show that:

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[2] This is not explained further, but it may be a reference to the Court of Appeals opinion in defendant's direct appeal. The Court of Appeals affirmed in an unpublished per curiam opinion with a panel which included the Hon. MICHAEL TALBOT. *People v Hammock*, unpublished per curiam opinion of the Court of Appeals, issued September 23, 2008 (Docket No. 277672).

> "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." [*Johnson*, 502 Mich at 566, quoting *Cress*, 468 Mich at 692.]

A trial court evaluating an offer of newly discovered evidence will first ask "whether a *reasonable juror* could find the testimony credible on retrial." *Johnson*, 502 Mich at 567. In this regard:

> If a witness's lack of credibility is such that *no* reasonable juror would consciously entertain a reasonable belief in the witness's veracity, then the trial court should deny a defendant's motion for relief from judgment. However, if a witness is not patently incredible, a trial court's credibility determination must bear in mind what a reasonable juror might make of the testimony, and not what the trial court itself might decide, were it the ultimate fact-finder. [*Id*. at 568.]

If the evidence passes this threshold determination of whether a reasonable juror would entertain a reasonable belief in its veracity, analysis continues and the court asks whether the new evidence makes a different result probable on retrial. *Id*. at 571. To answer this question, the court must consider all the evidence that was presented at trial and all the evidence that would be presented on retrial. *Id*. However, this is the burden a defendant must meet to obtain a new trial *after* an evidentiary hearing. Clearly, a defendant does not have to satisfy this burden just *to obtain* the hearing in the first place.

This is certainly not to say that a trial court must grant an evidentiary hearing whenever one is requested. A motion for relief from judgment requesting an evidentiary hearing is properly denied without a hearing if it offers evidence that is not newly discovered, evidence that is cumulative, or evidence that could have been discovered and produced at trial. And certainly an offer of proof might be so weak that it does not offer a realistic possibility that evidence will be presented that would make a different result probable on retrial. However, a defendant does not need to conclusively satisfy the final prong of the newly-discovered-evidence test on pleadings alone just to obtain an evidentiary hearing. An evidentiary hearing is the defendant's opportunity to present the evidence to satisfy the burden. If a defendant could satisfy the burden without a hearing, what would even be the point of holding the hearing?

It seems to me that the trial court in this case abused its discretion by failing to consider the offer of newly discovered evidence in the context of the evidence presented at trial. As the trial court itself initially said, the predecessor court had concerns with Pippen's veracity, and Carter's affidavit directly challenges Pippen's account. Either Carter's affidavit is false, or Pippen's testimony is false. Both cannot be true. Carter's assertion that Pippen and Lundy were breaking into

29549 Oakwood is directly at odds with Pippen's assertions that Lundy lived there and invited Pippen and that Lundy and Pippen were socializing inside the house.[3]

Additionally, Carter's story must be weighed in the context of corroborating police testimony from trial that the door to 29549 Oakwood had been forced open and that valuable property had been removed and placed in 29613 Oakwood. If the police are to be believed, and their account has not been challenged, there was strong contemporaneous evidence that a larceny was ongoing when the shooting occurred. The trial court specifically noted this evidence, but there was no evidence at trial to tie the robbery to the shooting, so the court left this unresolved. Carter's version of events connects those loose ends. Pippen's story has some corroboration in his contemporaneous accusation of defendant and cell-phone evidence that seems to put defendant in Inkster. However, this case now seems to present an entirely different analysis than was before the finder of fact, and the trial court erred by failing to take account of these considerations.

Justice MARKMAN points out two ways in which Carter's story is not *yet* corroborated by the record—there is currently no record evidence that Carter had a connection to the neighborhood or that a Caucasian man lived at or owned 29549 Oakwood. That is true, but at this stage there will always be conceivable corroboration that has not yet been presented. Defendant might as easily point out that there is no record evidence that Carter lacked a connection to the neighborhood, or that Lundy lived at 29549 Oakwood. Rather than denying leave, and letting these questions linger unanswered while defendant lingers in prison, it seems to me that we should allow an evidentiary hearing to take place at which the parties can make a record on these matters.

Justice MARKMAN expresses disbelief that Carter was selling marijuana at 2 a.m. when he was 13 years old, that Carter and defendant happened to be incarcerated together eight years later, and that Carter happened upon the Court of Appeals opinion affirming defendant's conviction. In Justice MARKMAN's view, this version of events "lacks an air of credibility . . . ." And yet, it is true that people in prison run into past acquaintances, that some people serving long prison sentences spend long hours in the law library falling down legal rabbit holes, and that some of those people were selling marijuana at 2 a.m. when they were 13 years old. These experiences are unlike my own, and though I cannot speak for him, they may also be unlike Justice MARKMAN's. But maybe for exactly that reason the judicial function in this matter is not

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[3] Justice MARKMAN notes that defendant is African-American and the man Carter saw entering and leaving 29549 Oakwood was Caucasian. That is accurate, but by way of clarification, that is not the critical aspect of Carter's story. If Carter is correct that Pippen and Lundy were burgling 29549 Oakwood, then Pippen was lying about a fundamental aspect of his story. That would clearly call the rest of his version of events into question, and his credibility was already tenuous at best with the finder of fact.

to pass on the credibility of Carter's story, but only to ask "whether a reasonable juror *could* find the testimony credible on retrial," *Johnson*, 502 Mich at 567 (emphasis altered). Justice MARKMAN weighs these and other considerations and is left with "serious questions regarding Carter's affidavit . . . ." Whether or not there are serious questions about Carter's affidavit, Carter's corroborated account raises serious questions about Pippen's account, which sent defendant to prison. And an evidentiary hearing presents the opportunity to answer both sets of questions. At this point, I am not prepared to say that no reasonable juror could believe Carter. Further, the evidentiary hearing in this matter may amount to more than the affiant getting on the stand to repeat the assertions from his affidavit. As discussed earlier, objective and readily ascertainable facts could either corroborate or refute Carter's story. If believed, Carter's story may well make a different result probable on retrial. We know the finder of fact in this case was not entirely convinced by Pippen and could not make sense of facts that Carter's story would put into place. I think the trial court would have been very interested to hear from Carter, and defendant should have the opportunity to present Carter's testimony.

I appreciate that an evidentiary hearing of this kind is no small thing and that there is a cost to granting a remand. As Justice MARKMAN points out, hearings of this kind consume the time and resources of trial courts and prosecutors. They also consume the time and resources of appellate public defenders who bear the burden of presenting the affirmative case for innocence. For appellate public defenders, hearings of this kind can be the most time- and resource-intensive aspects of their caseloads, and such hearings normally do not occasion a corresponding reduction in workload. However, I disagree with Justice MARKMAN that granting an evidentiary hearing here risks "obscuring serious claims of actual innocence with those that are not," and I find that contention somewhat at odds with his additional concern that a remand here will "send a signal that trial courts must hold evidentiary hearings on almost every occasion on which a defendant submits new evidence in the form of an affidavit signed by a fellow prisoner." A cursory review of this Court's routine orders denying leave to appeal over the past few months reveals many cases in which this Court has denied leave in cases where defendants have offered newly discovered evidence of all sorts.[4] Of course there is also a cost to denying a remand for an evidentiary hearing, in that potentially exonerating evidence is never presented in court, and a claim of actual innocence goes unexplored. That is not to say that Justice MARKMAN does not appreciate this cost. I have every confidence he does, as I have every confidence that lower courts,

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[4] See, e.g., *People v Hubbard*, 505 Mich 1128 (2020); *People v Hawkins*, 505 Mich 1081 (2020); *People v Thompson*, 505 Mich 1081 (2020); *People v King*, 505 Mich 1080 (2020); *People v Smith*, 505 Mich 974 (2020); *People v Davis*, 505 Mich 1134 (2020); *People v Hudgens*, 506 Mich 853 (2020); *People v Cherry*, 506 Mich 853 (2020).

prosecutors, and public defenders appreciate this cost as well. I do not see the disagreement here as one about whether viable claims of actual innocence should be explored through evidentiary hearings. I believe Justice MARKMAN and I agree they should. The disagreement here is about the offer of proof in this motion, which Justice MARKMAN sees as "less than the thinnest of evidence" and which I see as not only a plausible version of events, but also a version with corroboration from the trial record and with the potential for either further corroboration or refutation at an evidentiary hearing.

BERNSTEIN, J., joins the statement of CAVANAGH, J.

MARKMAN, J. (*dissenting*). I respectfully dissent from the order remanding this case to the trial court for an evidentiary hearing. Because the affidavit submitted by defendant is, at least in my judgment, incredible, I would deny leave to appeal. More importantly, while I very much share the Court's concern about the incarceration of possibly innocent individuals, I question whether remanding a case of the instant nature does more harm than good by risking confusion as to what is wheat and what is chaff in that regard.

In 2007, defendant was convicted of second-degree murder, assault with intent to commit murder, possessing a firearm during the commission of a felony, and being a felon in possession of a firearm, stemming from the shootings of Claude Lundy and Lemone Pippen.[1] The shootings occurred around 2:00 a.m. on a Wednesday in November 2006. Nearly nine years after the shooting, defendant filed the present successive motion for relief from judgment, alleging new evidence in the form of an affidavit from Jason Carter. In the affidavit, Carter asserts that he was across the street on the night of the shooting and saw a Caucasian male enter the house where the shooting occurred, heard gunshots, and saw the Caucasian male leave the house and drive away.[2] Carter indicates that the white male resembled someone he believes owned the house in which the shooting occurred.

To obtain a new trial through a successive motion for relief from judgment based on newly discovered evidence,

> a defendant must show that: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." [*People v Johnson*, 502 Mich 541, 566 (2018), quoting *People v Cress*, 468 Mich 678, 692 (2003).]

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[1] This name is spelled in various ways in the lower court record.

[2] Defendant is African-American, the significance of which is that the man who Carter saw entering and leaving the house was not defendant because the person he identified was Caucasian. Thus, Carter seemingly identified someone other than defendant as having committed the crime.

In considering the fourth prong, "a trial court must first determine whether the evidence is credible." *Johnson*, 502 Mich at 566-567. "If a witness's lack of credibility is such that *no* reasonable juror would consciously entertain a reasonable belief in the witness's veracity, then the trial court should deny a defendant's motion for relief from judgment." *Id*. at 568. If, however, a reasonable jury could find the new evidence credible, the trial court must consider the evidence presented at trial along with "the evidence that would be presented at a new trial." *Id*. at 571.

The trial court, without holding an evidentiary hearing, concluded here that Carter's affidavit did not make a different result on retrial probable given the evidence presented at defendant's first trial, including that one of the victims identified defendant as the shooter. "This Court reviews a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion." *Id*. at 564. This Court also reviews a trial court's decision regarding whether to hold an evidentiary hearing for an abuse of discretion. See *People v Franklin*, 500 Mich 92, 100 (2017); MCR 6.508(B). " 'An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes.' " *Johnson*, 502 Mich at 564, quoting *Franklin*, 500 Mich at 100.

The Carter affidavit lacks an air of credibility, in my view, in light of the following considerations:

- Carter was incarcerated at the time he signed the affidavit, serving 25 to 30 years' imprisonment for first-degree criminal sexual conduct (CSC) convictions;
- Carter contends he approached defendant in prison after reading about defendant's case on the Lexis/Nexis legal research service, but it is not apparent what caused Carter to read a 2008 per curiam and unpublished decision of the Court of Appeals that involved a murder conviction and not a CSC conviction. See *People v Hammock*, unpublished per curiam opinion of the Court of Appeals, issued September 23, 2008 (Docket No. 277672);
- Carter was 13 years old at the time of the shooting, raising considerable doubt about his contention that he was coincidentally in the area of the crime at 2 a.m. on a Wednesday and that he knew one of the victims because he had sold marijuana to him a few hours prior to the shooting;
- No facts in the record tie Carter to the neighborhood in which the shooting occurred, circa 2006; and
- No facts in the record corroborate Carter's allegation that a Caucasian male owned or lived in the house in which the shooting occurred.

Affidavits by prisoners are typically viewed with a measure of skepticism, particularly when the affiant himself is serving lengthy sentences for felony convictions. The incredible scenario of Carter witnessing the murder at 2 a.m. on a Wednesday when he was 13 years of age, many years later reading about defendant's case on Lexis, and

then being coincidentally housed in the same correctional facility as defendant some eight years after the murder merely add to the skepticism with which a jurist should reasonably view Carter's affidavit. Standing alone, any one of these considerations may not preclude a reasonable juror from finding Carter's testimony credible on retrial. However, when considered together, they raise serious questions regarding Carter's affidavit such that, in my judgment, it was hardly outside the range of reasonable outcomes, i.e., it was no "abuse of discretion," for the trial court to conclude that the affidavit was of little or no probative value—that Carter's testimony at a new trial would not have made a different outcome probable. Accordingly, I would deny leave to appeal.

My disagreement with a single order remanding a case for an evidentiary hearing ordinarily would not cause me to write separately. Furthermore, during my time on the Court, I have often shared the concern of colleagues regarding the incarceration of innocent persons. To that end, I joined the majority opinion in *Johnson* and also joined in recent reforms that afford more opportunity for allegedly innocent persons to challenge their convictions. However, concern for incarceration of the innocent and remanding for evidentiary hearings on less than the thinnest of evidence are not one and the same. While I do not quarrel with the idea that this Court should view "actual innocence" claims in a receptive manner where a substantial question as to a defendant's innocence has been raised, there nonetheless must be some reasonable threshold standard for determining which cases are entitled to such a hearing. The instant case is but one of several recent instances in which, in my view, we have remanded for an evidentiary hearing on the basis of an affidavit of highly questionable veracity by a fellow prisoner. See, e.g., *People v Vick*, 941 NW2d 55 (2020); *People v Hailey*, 941 NW2d 50 (2020). And remands in cases of this nature do not come without cost, either in terms of the expenditure of the limited time and resources of trial courts and prosecutors or, even more importantly, in terms of the risk of increasingly obscuring serious claims of actual innocence with those that are not. Cases of this sort send a signal that trial courts must hold evidentiary hearings on almost every occasion on which a defendant submits new evidence in the form of an affidavit signed by a fellow prisoner. And if that is the message we intend, I fear that such lowering of the bar in support of new evidentiary hearings—perhaps many years after the commission of the offense and the presentation at trial of the evidence—is not only incompatible with the Court's new rules and incompatible with our traditional standards of appellate review of the trial courts, but, most grievously, risks burying potentially meritorious claims of innocence among claims based on far-fetched, incredible, and uncorroborated prisoner affidavits.

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

PEOPLE V ALONSO, No. 159617; Court of Appeals No. 347331. 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.

MCCORMACK, C.J. (*concurring*). I concur in the order remanding this case to the Court of Appeals as on leave granted. I respectfully disagree with Justice MARKMAN that leave to appeal can be denied because the

applicable immigration law was conclusively "neither succinct nor straightforward" in 2017. I agree with Justice MARKMAN that the legal question is whether it is "truly clear" that assault with intent to commit great bodily harm less than murder (AWIGBH) constitutes a "crime of violence" under 18 USC 16(a), and is therefore an "aggravated felony," 8 USC 1101(a)(43)(F). "Crime of violence" is defined in 18 USC 16(a) as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," and 8 USC 1101(a)(43)(F) requires that the offense be one for which the term of imprisonment is "at least one year."

As for the term of imprisonment, *Shaya v Holder*, 586 F3d 401, 403 (CA 6, 2009), provides:

> [F]or the purposes of Section 1101(a)(43)(F), indeterminate prison sentences in Michigan must be measured by the term actually served by the petitioner rather than by the maximum statutory sentence. . . . Thus, when using Michigan indeterminate sentences as the predicate for classifying someone as an "aggravated felon", the term must be measured by the sentence actually served or the minimum sentence given, whichever is greater . . . .

Here, the trial court imposed a minimum sentence of five years, which is clearly "at least one year." So 8 USC 1101(a)(43)(F) is satisfied.

As for 18 USC 16(a), the elements of AWIGBH, MCL 750.84(1)(a), are "(1) an assault, i.e., 'an attempt or offer with force and violence to do corporal hurt to another' coupled with (2) a specific intent to do great bodily harm less than murder." *People v Bailey*, 451 Mich 657, 668-669 (1996), quoting *People v Smith*, 217 Mich 669, 673 (1922). Thus, the remaining question is whether "an assault, i.e., 'an attempt or offer with force and violence to do corporal hurt to another,' " is clearly "the use, attempted use, or threatened use of physical force against the property or person of another." If so, defense counsel performed ineffectively by only informing the defendant that he "might" be subject to deportation; if not, he didn't. I think this issue merits further review, and I therefore support the Court's decision to remand this case to the Court of Appeals.[1]

CLEMENT, J. (*concurring*). I concur in the Court's remand to the Court of Appeals. But I write separately to note that I do so because I believe the Court of Appeals should address these issues before this Court does. The Court of Appeals denied leave to appeal for lack of merit in the grounds presented, and this Court remands this case to the Court of Appeals as on leave granted because it is persuaded that the Court of

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[1] I agree with Justice MARKMAN that the law surrounding 18 USC 16(b) has been in significant flux in recent years. But because I view this case as a straightforward question of the interaction between MCL 750.84(1)(a) and 18 USC 16(a), I do not share his belief that that uncertainty is relevant to analyzing the legal issue presented here.

Appeals should address defendant's arguments. This Court should generally refrain from addressing the merits of a case before the Court of Appeals has addressed them.

MARKMAN, J. (*dissenting*). In *Padilla v Kentucky*, 559 US 356, 369 (2010), the United States Supreme Court recognized that "[i]mmigration law can be complex," "it is a legal specialty of its own," some criminal defense attorneys "may not be well versed in it," and "there will . . . be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." As a result, when the law regarding deportation consequences "is not succinct and straightforward," a criminal defense attorney advising a defendant about the benefits and detractions of accepting a plea agreement "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id*. However, "when the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear," and the attorney may be required to advise the defendant that a guilty plea will result in deportation. *Id*.

Defendant here pleaded guilty to assault with intent to commit great bodily harm less than murder (AWIGBH) after receiving advice from counsel that he "might" face immigration consequences, including deportation, as a result of his guilty plea. Defendant, relying exclusively on *Shaya v Holder*, 586 F3d 401 (CA 6, 2009), now argues that his deportation following an AWIGBH conviction was virtually certain such that his counsel rendered ineffective assistance by merely advising that he "might" face deportation. Defendant, however, overlooks discussion not only by the Sixth Circuit in *Shaya*, but also by the Sixth Circuit and the United States Supreme Court in post-*Shaya* decisions. In particular, defendant overlooks a decision by the Sixth Circuit that (a) substantially altered immigration law governing when a state conviction mandates deportation, and (b) controlled how an immigration judge must view defendant's AWIGBH conviction in the course of his deportation proceeding. Accordingly, I believe that defendant's argument regarding ineffective assistance of counsel is without merit, and I respectfully dissent from this Court's order remanding to our Court of Appeals for further consideration.

This case centers on whether at the time of his August 2017 plea it was "truly clear" that defendant was ineligible for "cancellation of removal" if he pleaded guilty to AWIGBH. An alien convicted of a felony may be deportable. 8 USC 1227(a)(2). And if the alien is deportable, an order of "removal" will issue, but based upon certain circumstances specific to the alien and his offense, the Attorney General possesses the discretion to "cancel" this order. 8 USC 1229b. Relevant to defendant, under 8 USC 1228(a)(3), an alien convicted of an "aggravated felony" is ineligible for cancellation of removal. In turn, 8 USC 1101(a)(43)(F) defines "aggravated felony" to be "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year[.]" Defendant's plea agreement called for a 5- to 15-year sentence; thus, if it was certain

that AWIGBH constituted a "crime of violence," and hence an "aggravated felony," then it was certain that defendant was not eligible for cancellation of removal.

Section 16 of Title 18 states that a "crime of violence" is

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, *involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense*. [18 USC 16 (emphasis added).]

At the time of defendant's plea, the constitutionality of subsection (b), particularly the emphasized language, was in considerable doubt. In 2015, the United States Supreme Court, in *Johnson v United States*, 576 US 591 (2015), had held that the phrase "otherwise involves conduct that presents a serious potential risk of physical injury to another," in the related definition of "violent felony" in the Armed Career Criminal Act, see 18 USC 924(e)(2)(B)(ii), was unconstitutionally vague. Following *Johnson*, aliens seeking to avoid mandatory deportation under 8 USC 1229(a)(3) and 8 USC 1101(a)(43)(F) challenged the constitutionality of 18 USC 16(b). Federal circuit courts were split regarding the issue, with the Sixth Circuit ruling that § 16(b) was unconstitutional.[1] Compare *Shuti v Lynch*, 828 F3d 440 (CA 6, 2016); *United States v Vivas-Ceja*, 808 F3d 719 (CA 7, 2015); and *Dimaya v Lynch*, 803 F3d 1110 (CA 2, 2015) (holding § 16(b) unconstitutionally vague), with *United States v Gonzalez-Longoria*, 831 F3d 670 (CA 5, 2016), vacated 138 S Ct 2668 (2018) (upholding constitutionality of § 16(b)). Therefore, in August 2017, an offense against the law of Michigan only qualified as an "aggravated felony" if it satisfied the definition of "crime of violence" set forth by 18 USC 16(a).

As a result, for defendant to establish that it was "truly clear," "succinct," and "straightforward" that AWIGBH constituted an "aggravated felony," he needed to identify settled law holding that AWIGBH fell within the definition of "crime of violence" in § 16(a). *Shaya*, the case on which defendant relies in this regard, makes no mention of 18 USC 16(a). Indeed, given that the defendant in *Shaya* did not dispute that AWIGBH constituted a "crime of violence," *Shaya* merely assumed that AWIGBH constituted an "aggravated felony" without ever analyzing how the elements of AWIGBH compared to the definitions of "crime of violence" provided by either § 16(a) or § 16(b). See *Shaya*, 586 F3d at 405 n 1. And while Shaya's concession may have been reasonable in 2009, before the much broader § 16(b) definition faced constitutional scrutiny,

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[1] In *Sessions v Dimaya*, 584 US ___; 138 S Ct 1204 (2018), the United States Supreme Court adopted the Sixth Circuit's views. In light of the fact that *Dimaya* was decided *after* defendant pleaded guilty, however, I rely upon *Shuti*, and not *Dimaya*, in analyzing defendant's argument.

it no longer remained an obvious or reasonable concession after *Johnson* and *Shuti*. Evidence of this, as highlighted by the attached appendix, is the fact that other offenses classified as "crimes of violence" and "aggravated felonies" before *Johnson*, and before the invalidation of § 16(b), have no longer qualified as such. Included among those offenses are the serious felonies of federal second-degree murder, federal kidnapping, and Florida aggravated battery with a firearm. Thus, when counsel in the instant case advised defendant as to the relative costs and benefits of pleading guilty to AWIGBH, it was an open question whether AWIGBH constituted a "crime of violence" and thus an "aggravated felony." This is in considerable contrast with *Padilla*, wherein counsel merely needed to read a single and unambiguous statutory provision to determine that the defendant in that case faced mandatory deportation. *Padilla*, 559 US at 368 ("Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses.").

Under *Padilla*, therefore, if it was possible that defendant was eligible for "cancellation of removal," or if the legal framework for determining his eligibility for such consideration was "not succinct and straightforward," counsel had no greater duty than to advise defendant that he *might* face immigration consequences as a result of his guilty plea. That is, when counsel advised defendant about the plea agreement, the law controlling the definitions of both "aggravated felony" and "crime of violence" was in significant flux. Furthermore, no statute or caselaw established that AWIGBH qualified as a "crime of violence" under § 16(a), the only provision in the definition of "crime of violence" that survived *Shuti*. As a result, unlike in *Padilla*, there was no single legal source to which counsel could have turned to quickly, or authoritatively, or certainly, determine that AWIGBH constituted an "aggravated felony" that would render him ineligible for "cancellation of removal."[2] Accordingly, because the law was unsettled in this manner and neither succinct nor straightforward, defense counsel satisfied his legal obligations under *Padilla* by advising defendant that an AWIGBH conviction "might" result in immigration consequences, including deportation. This conclusion is altogether consistent with decisions from other jurisdictions that have relied on

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[2] Chief Justice MCCORMACK suggests that if an "assault" for purposes of AWIGBH satisfies § 16(a), then counsel performed deficiently by advising defendant that he "might" face deportation. However, this is but one of three necessary questions for consideration on remand, the others being: (a) whether the process required to determine whether an "assault" for purposes of AWIGBH satisfies § 16(a) constitutes an undertaking in which a criminal defense attorney in a state criminal proceeding is expected to engage pursuant to *Padilla*, and (b) whether, if counsel did perform deficiently, defendant has established prejudice as a result in that he would not have accepted the plea had he received different advice concerning the possible immigration implications of his plea.

Johnson and/or *Shuti* to reject claims of ineffective assistance of counsel because these cases sufficiently unsettled the law surrounding the definition of "crime of violence" and thus made it uncertain whether a given offense remained an "aggravated felony" that mandated deportation. See, e.g., *Tindi v State*, unpublished opinion of the Minnesota Court of Appeals, issued December 11, 2017 (Docket No. A17-0724), p 11 (citing *Johnson* and the Ninth Circuit's decision in *Dimaya* to conclude it was "not truly clear" that the defendant's fourth-degree criminal-sexual-conduct conviction was a "crime of violence" that would mandate deportation); *State v Taveras*, 2017-Ohio-1496, ¶ 29 (Ohio App, 2017) (rejecting the defendant's ineffective-assistance-of-counsel claim based on counsel's failure to advise the defendant that deportation was mandatory because it was "not 'truly clear' " that the defendant's offense was a "crime of violence" after *Shuti* invalidated § 16(b)). Therefore, I respectfully dissent from the Court's order remanding to the Court of Appeals for further consideration and instead would simply deny leave to appeal.

APPENDIX

The cases below are illustrative of those involving offenses that do not, or may no longer, qualify as "crimes of violence" and "aggravated felonies" following the invalidation of 18 USC 16(b) by *Shuti*.

1. Third-degree burglary, in violation of Conn Gen Stat 53a-103. See *Genego v Barr*, 922 F3d 499, 501-502 (CA 2, 2019) (reversing a Board of Immigration Appeals decision holding that the offense was an "aggravated felony" because it was a "crime of violence" under § 16(b)).

2. Robbery, in violation of Cal Penal Code 211. See *United States v Garcia-Lopez*, 903 F3d 887, 892-893 (CA 9, 2018) (noting that "[w]ithout § 16(b), the Government's indictment and the April 15 removal order can only stand if California robbery constitutes a 'crime of violence' pursuant to § 16(a)" and concluding that "California robbery" is not categorically a "crime of violence" under § 16(a)).

3. Rape of a spouse, in violation of Cal Penal Code 262. See *United States v Canales-Bonilla*, 735 F Appx 154, 155 (CA 5, 2018) (accepting the government's concession "that *Dimaya* precludes the classification of Canales-Bonilla's prior conviction as an aggravated felony under § 16(b) as incorporated into § 1326(b)(2) through § 1101(a)(43)(F)" and concluding that the offense does not qualify as an "aggravated felony" under any other provision of the Immigration and Nationality Act, 8 USC 1101 *et seq*.).

4. Aggravated battery with a firearm, in violation of Fla Stat 784.045(1), 775.087(2). See *Lukaj v United States Attorney General*, 763 F Appx 826, 830 (CA 11, 2019) (recognizing that "[b]ecause the Supreme Court invalidated section 16(b), that provision cannot serve as the basis for classifying Lukaj's conviction as a crime of violence and as an aggravated felony that makes him ineligible for relief from removal" and remanding to the Board of Immigration Appeals to determine whether the offense precluded cancellation of removal under any other provision of the Immigration and Nationality Act).

5. Aggravated child abuse, in violation of Fla Stat 827.03(2)(a). See *Villalobos v United States Attorney General*, 739 F Appx 947, 951-952 (CA 11, 2018) (holding that "[b]ecause *Dimaya* declared void for vagueness the statutory provision used to classify Villalobos's conviction as an aggravated felony, we grant the part of Villalobos's petition that challenges the denial of his application for cancellation of removal" and remanding for the Board of Immigration Appeals to determine whether the offense satisfied § 16(a)).

6. False imprisonment, in violation of Ga Code Ann 16-5-41. See *In re Luis Alexander Alvarez Sian*, unpublished decision of the Board of Immigration Appeals, decided July 13, 2018 (File No. AXX XX5 149) (ordering that where offense did not qualify as "crime of violence" under § 16(a), the proceeding to remove the defendant be terminated following the Supreme Court's invalidating § 16(b)).

7. Burglary of a habitation, in violation of Tex Penal Code Ann 30.01, 30.02. See *United States v Cruz*, 739 F Appx 261, 261 (CA 5, 2018) (recognizing the parties' concession that "in light of *Dimaya*'s invalidation of § 16(b), Cruz's prior Texas conviction for burglary of a habitation does not constitute an aggravated felony . . . .").

8. Second-degree murder, in violation of 18 USC 1111. See *United States v Begay*, 934 F3d 1033, 1041 (CA 9, 2019) (holding, within the context of a charge under 18 USC 924(c)(3), that the offense no longer qualifies as a "crime of violence" under analog to § 16(b) and does not qualify as a "crime of violence" under analog to § 16(a)).

9. Kidnapping, in violation of 18 USC 1201(a)(1). See *United States v Campbell*, 783 F Appx 311, 312 (CA 4, 2019) (recognizing that federal kidnapping is not a "crime of violence" for purposes of conviction under 18 USC 924(c)(3)); see also *United States v Walker*, 934 F3d 375, 378-379 (CA4, 2019) (same).

10. Conspiracy to commit Hobbs Act robbery, in violation of 18 USC 1951. See *United States v Biba*, 788 F Appx 70, 71-72 (CA 2, 2019) (recognizing that federal conspiracy to commit Hobbs Act robbery is not a "crime of violence" for purposes of conviction under 18 USC 924(c)(3)).

11. Conspiracy to commit assault with a dangerous weapon, in violation of 18 USC 1959(a)(6). See *Quinteros v United States Attorney General*, 945 F3d 772, 783 (CA 3, 2019) (recognizing that "[b]ecause the Supreme Court found that § 16(b) was unconstitutionally vague, the [immigration judge's] aggravated felony finding based on § 16(b) cannot stand" and determining in the first instance that the offense does not qualify as a "crime of violence" under § 16(a)).

Order Directing Supplemental Briefing July 31, 2020:

LEAGUE OF WOMEN VOTERS OF MICHIGAN v SECRETARY OF STATE and SENATE v SECRETARY OF STATE, Nos. 160907 and 160908; reported below: 331 Mich App 156. On March 11, 2020, the Court heard oral argument on the application for leave to appeal the January 27, 2020 judgment of the Court of Appeals and the motion to intervene. On order of the Court, the application and the motion to intervene are again

considered. MCR 7.305(H)(1). We direct the parties and the proposed intervenors to file supplemental briefs within 28 days of the date of this order addressing: (1) whether this case has become moot by virtue of the fact that Michiganders for Fair and Transparent Elections (MFTE) is no longer pursuing its ballot initiative, see *Anway v Grand Rapids R Co*, 211 Mich 592 (1920), and compare *Personhood Nevada v Bristol*, 126 Nev 599 (2010), and *Poulton v Cox*, 368 P3d 844 (Utah, 2016), with *Meyer v Grant*, 486 US 414, 417 n 2 (1988); (2) whether the remaining plaintiffs, League of Women Voters of Michigan, Henry Mayers, Valeriya Epshteyn, and Barry Rubin, have standing; (3) whether, if this case has become moot as to MFTE and no other plaintiff has standing, this Court should vacate the judgment of the Court of Appeals reported at 331 Mich App 156 (2020), and the judgment of the Court of Claims (Docket Nos. 19-000084-MM and 19-000092-MZ), see *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 489 Mich 884 (2011) (vacating this Court's and the Court of Appeals' opinions because the issue was moot), citing *United States v Munsingwear, Inc*, 340 US 36, 39-40 (1950) ("The established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below . . . . When that procedure is followed, the rights of all parties are preserved . . . ."); and (4) if the Court does proceed to the merits, whether any ruling by this Court should apply prospectively only, see *Pohutski v City of Allen Park*, 465 Mich 675 (2002).

MARKMAN, J. (*dissenting*). I would not direct the parties and the proposed intervenors to file supplemental briefs.

Leave to Appeal Denied July 31, 2020:

LEAGUE OF WOMEN VOTERS OF MICHIGAN v SECRETARY OF STATE, No. 161671; reported below: 333 Mich App 1.

BERNSTEIN, J. (*dissenting*). A majority of this Court has voted to deny leave in this case; I write to express how strongly I disagree with this course of action. This case concerns absentee ballots—specifically, whether absentee ballots must be received by local election clerks by 8 p.m. on an election day in order to be counted. I express no opinion on the substantive issue presented in this case. However, it must be noted that Proposal 3, which allows for no-reason absentee voting in Michigan, was approved by Michigan voters in November 2018. The upcoming general election will be the first presidential election in which no-reason absentee ballots are accepted. Although numbers for the upcoming August primary election have not yet been finalized, we know that Michigan voters have already requested many more absentee ballots this year than in past years, and it seems obvious that the COVID-19 pandemic will only increase the number of requests.[1]

[1] "Since the passage of Proposal 3 in 2018, any registered voter can now cast absentee ballots in Michigan. And voters are fully taking advantage of the option for the 2020 presidential primary

Given the importance that absentee voting will have on the upcoming general election, I am baffled and troubled by the majority's vote to deny leave to appeal here. The very split in the Court of Appeals panel below, which resulted in no less than three separate opinions being authored, suggests that this is not such a clear-cut case that a simple denial is obviously appropriate. Even if I were convinced that the Court of Appeals majority had correctly decided this case, it seems abundantly clear to me that this case is at least significant enough to demand full consideration by this Court via briefing and oral argument.

I would also note that, in the November 2016 general election, the difference between votes cast for the presidential nominees of our two major political parties was less than 0.3% of the total votes cast in Michigan, a little less than 11,000 votes.[2] The margins of victory were similarly close in a number of down-ballot races. The plaintiffs here estimate that as a result of the Court of Appeals' decision, between 41,000 and 64,000 absentee ballots will not be counted. Because absentee ballots will undoubtedly play a significant role in the upcoming general election, I would hold oral argument in this case ahead of that election in order to ensure that the interests of Michigan voters are thoroughly examined and considered before votes are tallied, in order to

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March 10. Nearly 800,000 voters have requested absentee ballots, which is nearly double the number at this point in the 2016 presidential primary cycle." Gray, *Michigan Primary Election 2020: Yes, You Can Change Your Vote on Absentee Ballots*, Detroit Free Press (March 2, 2020) <https://www.freep.com/story/news/politics/elections/2020/03/02/michigan-primary-2020-absentee-ballot-election/4881820002/> (accessed July 24, 2020) [https://perma.cc/C8YN-P6MA]. The May 5, 2020 election was the first election to take place after the onset of the COVID-19 pandemic in Michigan. "Michigan saw record-breaking turnout for the approximately 50 elections in 33 counties and 200 municipalities across the state yesterday, with nearly 25 percent of eligible voters participating and 99 percent of those voters casting absent voter ballots." Michigan Secretary of State, *Record-breaking Turnout for May 5 Election Demonstrates Michigan Voter Commitment to Democracy* (May 6, 2020) <https://www.michigan.gov/sos/0,4670,7-127-1640_9150-528236--,00.html> (accessed July 24, 2020) [https://perma.cc/G8LQ-89RD]. "Absent voter ballot numbers continue to grow steadily ahead of the August 4 state primary, with more than 1.8 million requested and more than 600,000 already returned. The total number of absent voter ballots cast in the August 2016 state primary was just 484,094." Michigan Secretary of State, *Absent Voter Ballot Returns Already Top 2016 Total* (July 22, 2020) <https://www.michigan.gov/sos/0,4670,7-127--534590--,00.html> (accessed July 24, 2020) [https://perma.cc/D9N9-CXW2].

[2] Michigan Secretary of State, *2016 Michigan Election Results* (updated November 28, 2016) <https://mielections.us/election/results/2016GEN_CENR.html> (accessed July 24, 2020) [https://perma.cc/G74E-XDBS].

avoid any potential disruption to the election process. The people of Michigan deserve nothing less.

MCCORMACK, C.J., and CAVANAGH, J., join the statement of BERNSTEIN, J.

Summary Disposition August 13, 2020:

PEOPLE v SHERRY DUNN, No. 161754; Court of Appeals No. 354179. 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 is directed to decide this case on an expedited basis.

Complaint for Superintending Control Dismissed August 13, 2020:

MONTANO v COURT OF APPEALS, No. 161299. On order of the Court, the motion to dismiss the complaint for superintending control is granted. The case is dismissed.

We conclude that the complaint is frivolous and vexatious. MCR 7.316(C). The plaintiff is ordered to pay the Clerk of this Court $1,000 within 28 days of the date of this order. We direct the Clerk of this Court not to accept any further filings from the plaintiff in any non-criminal matter until he has made the payment required by this order. We further direct the Clerk of this Court not to accept any documents from the plaintiff that require a fee unless the plaintiff pays the fee at the time of submission.

Leave to Appeal Denied August 14, 2020:

In re BUTCHER, MINOR, No. 161365; Court of Appeals No. 350439.

In re SHERIDAN, MINORS, No. 161540; Court of Appeals No. 351263.

In re KADOGUCHI, MINOR, No. 161568; Court of Appeals No. 351656.

PROMOTE THE VOTE v SECRETARY OF STATE, No. 161740; reported below: 333 Mich App 93.

BERNSTEIN, J., would grant leave to appeal.

PRIORITIES USA v SECRETARY OF STATE, No. 161753; reported below: 333 Mich App 93.

BERNSTEIN, J., would grant leave to appeal.

PEOPLE v BARBER, No. 161756; Court of Appeals No. 352361.

Leave to Appeal Denied August 28, 2020:

JACOB v JACOB, Nos. 161203, 161204, 161205, 161206, 161207, 161208, and 161209; Court of Appeals Nos. 344580, 344598, 344654, 344809, 344894, 347014, and 350162.

In re DELO, MINORS, No. 161616; Court of Appeals No. 351407.

WAYNE COUNTY JAIL INMATES v LUCAS, No. 161728; Court of Appeals No. 354075.

CAVANAGH, J. (*concurring*). I agree with this Court's order denying plaintiffs' application for leave to appeal. Injunctive relief is "an extraordinary remedy" appropriately granted when "there is no adequate remedy at law . . . ." *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 8 (2008) (quotation marks and citations omitted). A consent order regarding conditions in the Wayne County Jail currently exists between the parties. On May 18, 2020, the parties stipulated to an amended consent order wherein defendants agreed to undertake and/or continue to implement various measures in response to the COVID-19 pandemic. Many of plaintiffs' claims are that defendants are not complying with the measures agreed to as part of the amended consent order. If defendants have failed to actually implement those agreed-upon measures, plaintiffs may file a show-cause motion seeking the trial court's enforcement of the amended consent order. As plaintiffs have this legal remedy available, the trial court did not abuse its discretion when it denied plaintiffs' motion for a temporary restraining order or preliminary injunction.

MCCORMACK, C.J., joins the statement of CAVANAGH, J.

MICHIGAN ALLIANCE FOR RETIRED AMERICANS v SECRETARY OF STATE, No. 161837; Court of Appeals No. 354429.

Reconsideration Denied August 28, 2020:

In re SCHWARTZ, MINORS, No. 160987; Court of Appeals No. 349666. Leave to appeal denied at 505 Mich 1029.

SHANNON v RALSTON, Nos. 161268 and 161269; Court of Appeals Nos. 350094 and 350110. Leave to appeal denied at 505 Mich 1067.

In re MASON/LASOTA, MINORS, No. 161341; Court of Appeals Nos. 350001 and 350003. Leave to appeal denied at 505 Mich 1139.

Leave to Appeal Denied September 3, 2020:

WARREN CITY COUNCIL v BUFFA, No. 161940; reported below: 333 Mich App 422.

Summary Disposition September 8, 2020:

BORKE v KINNEY, No. 161091; Court of Appeals No. 350809. 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 September 8, 2020:

PEOPLE v FARLEY, No. 160131; Court of Appeals No. 347876.

FOX POINTE ASSOCIATION v RYAL, No. 160177; Court of Appeals No. 344232.

PEOPLE v THOMAS, No. 160231; Court of Appeals No. 348952.

PEOPLE v MCNABNEY, No. 160437; Court of Appeals No. 349869.

MICHIGAN HEAD & SPINE INSTITUTE, PC v GEICO INDEMNITY COMPANY, No. 160448; Court of Appeals No. 345916.

PEOPLE v CLAY, No. 160513; Court of Appeals No. 337666.

PEOPLE v CORNELIUS BROWN, No. 160583; Court of Appeals No. 348735.

WEINGRAD v JONES, No. 160605; Court of Appeals No. 342873.

PEOPLE v GRAHAM, No. 160651; Court of Appeals No. 341393.

PEOPLE v BOWERS, No. 160694; Court of Appeals No. 350731.

PEOPLE v KENNEDY, No. 160805; Court of Appeals No. 343961.

PEOPLE v PETTWAY, No. 160845; Court of Appeals No. 343792.

In re JAN H POL, DVM, No. 160872; Court of Appeals No. 344666.

QUALITY MARKET v DETROIT BOARD OF ZONING APPEALS, No. 160880; reported below: 331 Mich App 388.

ANDRESON v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 160882; Court of Appeals No. 345864.

COVE CREEK CONDOMINIUM ASSOCIATION, INC v VISTAL LAND & HOME DEVELOPMENT, LLC, No. 160884; reported below: 330 Mich App 679.

IANNUCCI v JONES, No. 160891; Court of Appeals No. 345886.

PEOPLE v TOLBERT, No. 160914; Court of Appeals No. 350459.

CHAFFIN v HASSAN, No. 160915; Court of Appeals No. 345307.

PEOPLE v HUMPHREY, No. 160941; Court of Appeals No. 341198.

STATE FARM FIRE AND CASUALTY v GENERAL ELECTRIC COMPANY, No. 160945; Court of Appeals No. 345992.

PEOPLE v JEFFREY WILLIS, No. 160966; Court of Appeals No. 344561.

PEOPLE v JEFFREY WILLIS, No. 160982; Court of Appeals No. 341913.

WELLESLEY GARDENS CONDOMINIUM ASSOCIATION v MANEK, No. 160990; Court of Appeals No. 344190.

PEOPLE v LYTLE, No. 161002; Court of Appeals No. 350577.

PEOPLE v DAMION BELL, No. 161013; Court of Appeals No. 345825.

PEOPLE v FREDDIE NELSON, No. 161014; Court of Appeals No. 351566.

MOORE v RYAN, Nos. 161018 and 161019; Court of Appeals Nos. 345170 and 345402.

CASSIDY RAE STUDIO, LLC v BOCKS, No. 161044; Court of Appeals No. 345984.

PEOPLE v GEORGE, No. 161047; Court of Appeals No. 351449.

PEOPLE v GIBBS-CURRY, No. 161048; Court of Appeals No. 345321.

PEOPLE v ROSEBURGH, No. 161062; Court of Appeals No. 350420.

ALSHABI v DOE, No. 161064; Court of Appeals No. 346700.

DEAN v ST MARY'S OF MICHIGAN, Nos. 161066 and 161067; Court of Appeals Nos. 345213 and 345374.

PEOPLE v SHAWN BELL, No. 161087; Court of Appeals No. 344437.

PEOPLE v CHAMBERLIN, No. 161102; Court of Appeals No. 351674.

CARPENTER v CARPENTER, No. 161111; Court of Appeals No. 344512.

PEOPLE v LOVE, No. 161115; Court of Appeals No. 351625.

PEOPLE v FREDERICK SMITH, No. 161120; Court of Appeals No. 342509.

PEOPLE v LONG, No. 161128; Court of Appeals No. 344655.

PEOPLE v MEEKHOF, No. 161135; Court of Appeals No. 346536.

PEOPLE v JEFFREY JAMES, No. 161142; Court of Appeals No. 344793.

PEOPLE v ROSIAK, No. 161146; Court of Appeals No. 352247.

PEOPLE v RONALD JOHNSON, No. 161147; Court of Appeals No. 345934.

PEOPLE v HILESKI, No. 161148; Court of Appeals No. 352137.

PEOPLE v HADDIX, No. 161150; Court of Appeals No. 351894.

PEOPLE v QUARLES, No. 161157; Court of Appeals No. 351944.

PEOPLE v TILLMAN, No. 161165; Court of Appeals No. 346136.

PEOPLE v SPEAR, No. 161168; Court of Appeals No. 352186.

PEOPLE v DAVID ROBERTS, No. 161169; Court of Appeals No. 345131.

PEOPLE v RUTHERFORD, No. 161172; Court of Appeals No. 344220.

PEOPLE v ROBERT JOHNSON, No. 161178; Court of Appeals No. 343882.

PEOPLE v LENOIR, No. 161183; Court of Appeals No. 345029.

PEOPLE v CRAIN, No. 161187; Court of Appeals No. 352039.

PEOPLE v HAROLD MORGAN, No. 161202; Court of Appeals No. 345603.

CARPENTER v CARPENTER, No. 161244; Court of Appeals No. 344512.

PEOPLE v VINCENT JOHNSON, No. 161253; Court of Appeals No. 344024.

PEOPLE v SCHOCKO, No. 161260; Court of Appeals No. 353073.

VANERDEWYK v SEILER, No. 161287; Court of Appeals No. 352507.

VANERDEWYK v SEILER, No. 161289; Court of Appeals No. 351994.

PEOPLE v CARR, No. 161291; Court of Appeals No. 345053.

PEOPLE v HASSAN MOORE, No. 161296; Court of Appeals No. 352388.

PEOPLE v ROOT, No. 161304; Court of Appeals No. 346164.

PEOPLE v TAMPLIN, No. 161305; Court of Appeals No. 352540.

PEOPLE v RADDEN, No. 161332; Court of Appeals No. 352783.

PEOPLE v LANGSTON, No. 161339; Court of Appeals No. 352387.

PEOPLE v YOUNG, No. 161346; Court of Appeals No. 346511.

PEOPLE v CURTIS HARRIS, No. 161350; Court of Appeals No. 351957.

PEOPLE v STEVEN SMITH, No. 161351; Court of Appeals No. 346391.

PEOPLE v CURTIS HARRIS, No. 161352; Court of Appeals No. 351959.

PEOPLE v MILLER, No. 161366; Court of Appeals No. 345990.

PEOPLE v STAFFELD, No. 161374; Court of Appeals No. 349252.

PEOPLE v LINDSEY, No. 161378; Court of Appeals No. 353504.

RODRIQUEZ v EMMA L BIXBY MEDICAL CENTER, No. 161385; Court of Appeals No. 351439.

PEOPLE v KEITH MOORE, No. 161398; Court of Appeals No. 352745.

JONES v COOPER STREET CORRECTIONAL FACILITY WARDEN, No. 161414; Court of Appeals No. 353026.

SMITH v MENARD, INC, No. 161421; Court of Appeals No. 352673.

DITECH FINANCIAL, LLC v RANDAZZO, No. 161441; Court of Appeals No. 352525.

PEOPLE v WHITE, No. 161472; Court of Appeals No. 337623.

PEOPLE v CHARLES BROWN, No. 151481; Court of Appeals No. 346844.

PEOPLE v HESKETT, Nos. 161508 and 161509; Court of Appeals Nos. 345966 and 349475.

Reconsideration Denied September 8, 2020:

CAN IV PACKARD SQUARE LLC v PACKARD SQUARE LLC, No. 160223; reported below: 328 Mich App 656. Leave to appeal denied at 505 Mich 1001.

PEOPLE v DEANGELO JONES, No. 160412; Court of Appeals No. 350851. Leave to appeal denied at 505 Mich 1016.

NEWMEYER v BANK OF AMERICA, INC, No. 160452; Court of Appeals No. 343206. Leave to appeal denied at 505 Mich 1081.

PEOPLE v POST, No. 160545; Court of Appeals No. 350229. Leave to appeal denied at 505 Mich 1081.

PEOPLE v CARLSON, No. 160630; Court of Appeals No. 346234. Leave to appeal denied at 505 Mich 1084.

PEOPLE v STOLTZ, No. 161311; Court of Appeals No. 346713. Leave to appeal denied at 505 Mich 1128.

Supplemental Briefing Ordered September 9, 2020:

In re CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, No. 161492. On September 9, 2020, the Court heard oral argument on the questions certified by the United States District Court for the Western District of Michigan. On order of the Court, the questions are again considered. We direct the parties to file supplemental briefs by 5:00 p.m. on Wednesday, September 16, 2020, addressing: (1) whether the Emergency Powers of the Governor Act (EPGA), MCL 10.31 *et seq*., applies in the context of public health generally or to an epidemic such as COVID-19 in particular; and (2) whether "public safety," as that term is used in the EPGA, is a term of ordinary meaning or has developed a specialized legal meaning as an object of the state's police power, and whether "public safety" encompasses "public health" events such as epidemics. Amici are invited to file supplemental briefs on these issues by the same deadline.

Leave to Appeal Denied September 10, 2020:

PROGRESS FOR MICHIGAN 2020 v JONSECK, No. 161968; Court of Appeals No. 354726.

Summary Disposition September 11, 2020:

PEOPLE v TRACY, No. 161430; Court of Appeals No. 352614. 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 MCL 771.4 and *People v Vanderpool*, 505 Mich 391 (2020). 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 for appeal bond is denied. We do not retain jurisdiction.

Leave to Appeal Denied September 11, 2020:

GRIFFIN v SWARTZ AMBULANCE SERVICE, No. 159205; Court of Appeals No. 340480. On April 22, 2020, the Court heard oral argument on the application for leave to appeal the November 29, 2018 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 question presented should be reviewed by this Court.

ZAHRA, J. (*dissenting*). I respectfully dissent from the order denying plaintiff's application for leave to appeal in this case. Plaintiff was involved in an automobile accident in which he sustained a leg injury. An ambulance unit operating under defendant Swartz Ambulance Service's control responded to the accident, and began transporting plaintiff to the hospital. While en route, the ambulance carrying plaintiff collided with a vehicle owned by a third party, Sarah Aurand. A second ambulance unit arrived at the scene of this accident, and it transported plaintiff to the hospital. Plaintiff filed suit against defendant[1] alleging, in part, that defendant's employee, Mary Shifter—a licensed emergency medical technician (EMT) and the driver of the ambulance that collided with Aurand's vehicle—was negligent in causing the second accident. Plaintiff also claimed that, as a result of Shifter's negligence, treatment of plaintiff's injury from the first accident was delayed and, as a result, a portion of his leg needed to be amputated.

Defendant moved for summary disposition, arguing that it was immune from liability under MCL 333.20965(1), which provides immunity for certain entities (including EMTs and ambulance operations) for "acts or omissions" that occur "in the treatment of a patient" and that do not amount to "gross negligence or willful misconduct." In response, plaintiff contended that MCL 333.20965(1) does not apply to these circumstances because the second accident occurred during *transportation* and not while plaintiff was receiving any kind of medical *treatment*. The trial court agreed with defendant and granted summary disposition in July 2016. Plaintiff appealed as of right in the Court of Appeals, which affirmed in an unpublished per curiam opinion over Judge MICHAEL J. KELLY's dissent.[2]

Plaintiff now seeks leave to appeal in this Court, maintaining that MCL 333.20965(1) does not apply because the second accident occurred

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[1] Plaintiff initially sued both defendant *and* Aurand, although plaintiff voluntarily dismissed the claims concerning Aurand. Thus, the instant appeal concerns only those claims asserted against defendant Swartz Ambulance Service, which will be referred to as "defendant."

[2] *Griffin v Swartz Ambulance Serv*, unpublished per curiam opinion of the Court of Appeals, issued November 29, 2018 (Docket No. 340480). The Court of Appeals panel majority also denied reconsideration, although Judge M. J. KELLY would have granted plaintiff's motion. *Griffin v Swartz Ambulance Serv*, unpublished order of the Court of Appeals, entered January 22, 2019 (Docket No. 340480).

during patient transportation, as distinguished from treatment of a patient. I am persuaded that the plain language of the emergency medical services act (EMSA)[3]—under which MCL 333.20965(1) falls—supports plaintiff's position.

This Court reviews a trial court's determination on a motion for summary disposition de novo.[4] Likewise, issues of statutory interpretation are questions of law that are reviewed de novo.[5] As the Court previously stated in *Krohn v Home-Owners Ins Co*:[6]

> The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.

Statutes should be interpreted in such a way as to avoid rendering any portion of them "surplusage or nugatory."[7] If a statute is unambiguously written, judicial construction is not required or even permitted.[8] "[A] provision of the law is ambiguous only if it irreconcilably conflict[s] with another provision, or when it is equally susceptible to more than a single meaning."[9] As this Court explained in *People v Feezel*:[10]

> When a statute is ambiguous, judicial construction is appropriate to determine the statute's meaning. When determining the Legislature's intent, the statutory language is given the reasonable construction that best accomplishes the purpose of the statute. Indeed, [i]t is a well-established rule of statutory construction that provisions of a statute must be construed in light of the other provisions of the statute to carry out the apparent purpose of the Legislature. As a result, the entire act must be read, and the

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[3] MCL 333.20901 *et seq*.

[4] *Maiden v Rozwood*, 461 Mich 109, 119 (1999).

[5] *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515 (2012).

[6] *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-157 (2011) (quotation marks and citations omitted).

[7] *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146 (2002), citing *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60 (2001).

[8] *People v Gardner*, 482 Mich 41, 50 (2008).

[9] *Id*. at 50 n 12 (quotation marks and citation omitted).

[10] *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010) (quotation marks and citations omitted; alteration in original).

> interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole.

The critical question presented in this case is whether the word "treatment" in the phrase "in the treatment of a patient" as used in MCL 333.20965(1) includes transportation—the act of driving a patient to a hospital in an ambulance. For reference, MCL 333.20965(1) reads, in pertinent part:

> Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of . . . [an] emergency medical technician . . . do not impose liability in the treatment of a patient on [the emergency medical technician] or any of the following persons:[11]
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> * * *
>
> (d) The life support agency or an officer, member of the staff, or other employee of the life support agency.

The above cited text indicates that EMTs[12] and life support agencies[13]—which, critically, include ambulance operations like defendant[14]—are given immunity under MCL 333.20965(1) for "acts or omissions," other than those that amount to gross negligence or willful misconduct, that occur "in the treatment of a patient." Thus, for purposes of this matter, it may be assumed that defendant is granted *some* level of immunity under the statute. The question is the extent to which that immunity applies.

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[11] "Person," in this context, means "a person as defined in [MCL 333.1106] or a governmental entity other than an agency of the United States." MCL 333.20908(7). Under MCL 333.1106(4), a "person" is "an individual, partnership, cooperative, association, private corporation, personal representative, receiver, trustee, assignee, or other legal entity. Person does not include a governmental entity unless specifically provided."

[12] Under MCL 333.20904(7), an " '[e]mergency medical technician' [is] an individual who is licensed by the department to provide basic life support."

[13] A " '[l]ife support agency' [is] *an ambulance operation*, nontransport prehospital life support operation, aircraft transport operation, or medical first response service." MCL 333.20906(1) (emphasis added).

[14] An " '[a]mbulance operation' [is] a person licensed . . . to provide emergency medical services and patient transport, for profit or otherwise." MCL 333.20902(5).

The Legislature did not define the term "treatment" in the EMSA, nor did it provide a definition of the term applicable more generally to the Public Health Code as a whole or to Article 17 of the Public Health Code, which contains the EMSA. Undefined statutory terms may sometimes be given meaning via reference to appropriate dictionary sources.[15] But as the diametrically opposed opinions of the Court of Appeals panel majority and dissent make clear below, the use of lay dictionaries on this subject is not helpful, as some support the notion that "treatment," in this context, includes "transportation," while others support the opposite conclusion.

Regardless, the text of the EMSA offers critical clues to suggest that the transport of a patient is not included in the scope of "treatment" as contemplated by MCL 333.20965(1). Multiple times in the EMSA, the act uses the words "treatment" and "transport" in close conjunction, yet clearly denoting *separate and distinct* concepts.

An "ambulance operation," as defined by MCL 333.20902(5), "means a person licensed under this part to provide *emergency medical services and patient transport*, for profit or otherwise."[16] "Emergency medical services" are defined under MCL 333.20904(4) as "the emergency medical services personnel, ambulances, nontransport prehospital life support vehicles, aircraft transport vehicles, medical first response vehicles, *and equipment required for transport or treatment of an individual* requiring medical first response life support, basic life support, limited advanced life support, or advanced life support."[17] In this way, the EMSA uses the word "treatment" and then, *separately*, uses the word "transport" to describe different functions of equipment used to provide varying degrees of life support. Thus, as far as "emergency medical services" under MCL 333.20902(5) are concerned, "treatment" is not synonymous with "transport"—even if neither term is defined by statute. Turning back to the statutory definition provided for "ambulance operations," one should note that "emergency medical services"—which includes the equipment *used for* treatment and transport of individuals—is separate from "patient transport."

Further, MCL 333.20969 reads, in full:

> This part and the rules promulgated under this part do not authorize medical treatment[18] for or transportation to a hospital of an individual who objects to the *treatment or transportation*.

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[15] *Brackett v Focus Hope, Inc*, 482 Mich 269, 276 (2008). See also MCR 8.3a.

[16] Emphasis added.

[17] Emphasis added.

[18] Amicus curiae Michigan Defense Trial Counsel, Inc., argues that the use of the word "medical" as a qualifier for "treatment" in this statute indicates that the *unqualified* use of the word "treatment" in MCL 333.20965(1) must refer to acts or omissions that encompass more than plaintiff's narrow interpretation of the term. Even assuming that

> However, if emergency medical services personnel, exercising professional judgment, determine that the individual's condition makes the individual incapable of competently objecting to *treatment or transportation*, emergency medical services may provide *treatment or transportation* despite the individual's objection unless the objection is expressly based on the individual's religious beliefs.[19]

As the emphasized text demonstrates, the Legislature differentiated between "treatment" and "transportation" multiple times in this single provision of the EMSA. That is, this statute suggests that "emergency medical services," which include "ambulances,"[20] can be used in certain circumstances for either "treatment *or* transportation."[21]

Defendant and amici curiae in support of its position point out that transportation is among the critical functions of an ambulance and an ambulance operation. From this, they reason that transportation must be an inherent component of "treatment." But the very text of the EMSA indicates that transportation is not *the only* function of ambulances or ambulance operations. An ambulance is defined under MCL 333.20902(4) as "a motor vehicle or rotary aircraft that is primarily used or designated as available to provide transportation *and basic life support, limited advanced life support, or advanced life support*."[22] From the words of the act, it is plain that the degree of life support that can be provided by EMTs (basic life support), EMT specialists (limited advanced life support), and paramedics (advanced life support) exceeds the mere act of transporting a patient to a hospital.[23] Further, the statutory provisions governing the licensure, powers, and duties of an ambulance operation indicate that ambulance operations not only provide transportation, but also certain degrees of life support (depending on the licensure of the ambulance operation).[24] If transportation were *the only* function of ambulances and, more importantly, ambulance operations, I would be more inclined to agree that—whatever the definition of "treatment" under MCL 333.20965(1)—by merely including ambulance operations under the list of entities that may benefit from the immunity provision, the Legislature conveyed an intent that transportation of patients be included in that definition. As discussed, however, because ambulances and ambulance operations do more than provide transportation, this assumption is without merit.

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this is true, it *does not* inherently follow that transportation, specifically, qualifies as "treatment" for purposes of the immunity provision.

[19] Emphasis added.

[20] MCL 333.20904(4).

[21] MCL 333.20969 (emphasis added).

[22] Emphasis added.

[23] See MCL 333.20902(1) and (6); MCL 333.20906(3).

[24] MCL 333.20920; MCL 333.20921.

Whatever the term "treatment" encompasses, the Court must bear in mind that it "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render *any part* of the statute surplusage or nugatory."[25] If the word "treatment" had been meant to include "transportation," the two would not have been used as separate terms in multiple places throughout the EMSA.[26] To interpret the word "treatment" to include mere "transportation" for purposes of MCL 333.20965(1) would render the latter term meaningless and redundant in other parts of the EMSA. As the Court of Appeals has previously stated:

> Identical terms in different provisions of the same act should be construed identically, statutory provisions must be read and interpreted as a whole, and the meaning given to one section [must be] arrived at after due consideration of other sections so as to produce, if possible, an harmonious and consistent enactment as a whole."[27]

On the basis of these firmly established principles of statutory interpretation, I am concerned that the Court of Appeals improperly construed the EMSA. I would therefore grant plaintiff's application for leave to appeal to allow this Court the opportunity to explore these aspects of the EMSA, an act important to the jurisprudence of this state.

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

VIVIANO, J. (*dissenting*). I dissent from the denial of leave to appeal. The issue in this case is whether the operation of the ambulance constitutes an act "in the treatment of a patient" as that phrase is used in MCL 333.20965(1). MCL 333.20965(1) states, in relevant part:

> Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of . . . [an] emergency medical technician . . . do not impose liability in the treatment of a patient on [the emergency medical technician] or any of the following persons:
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> * * *
>
> (d) The life support agency or an officer, member of the staff, or other employee of the life support agency.

I would grant leave to consider whether the term "treatment" is ambiguous.

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[25] *State Farm Fire & Cas Co*, 466 Mich at 146, citing *Wickens*, 465 Mich at 60 (emphasis added).

[26] See MCL 333.20902(5); MCL 333.20904(4); MCL 333.20969.

[27] *The Cadle Co v City of Kentwood*, 285 Mich App 240, 249 (2009) (quotations marks and citations omitted; alteration in original).

As Justice ZAHRA recounts, various provisions of the emergency medical services act (the EMSA), MCL 333.20901 *et seq*., use "transport" and "treatment" separately.[1] This indicates that the terms have two separate meanings, and that "treatment" does not include "transport." As Justice ZAHRA explains, "If the word 'treatment' had been meant to include 'transportation,' the two would not have been used as separate terms in multiple places throughout the EMSA."[2]

But the dictionary definition used by the Court of Appeals majority and, in my view, even the definition cited by the dissent appear to indicate that "treatment" does include "transport." The Court of Appeals majority cited *Merriam-Webster's Collegiate* Dictionary (11th ed), which defines "treatment," in relevant part, as "the act or manner or an instance of treating someone or something" and "the techniques or actions customarily applied in a specified situation . . . ."[3] Applying this definition, the Court of Appeals majority determined that treatment was not "limited to actual medical services . . . but . . . includ[ed] activities by first responders acting within the scope of their duties and training as first responders."[4]

I would add that *Merriam-Webster's Collegiate Dictionary* (11th ed) also defines "treat," in relevant part, as "to care for or deal with medically or surgically . . . ." Therefore, "treatment" in the medical context is "the act . . . of "car[ing] for" someone "or deal[ing] with [someone] medically or surgically . . . ." In this context, "deal" means "to take action with respect to someone . . . ."[5] Transporting someone to the hospital is "tak[ing] action with respect to someone" medically.

The Court of Appeals dissent disagreed, quoting the *Oxford English Dictionary* (2d ed), which defines "treatment" as " '[m]anagement in the

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[1] Justice ZAHRA discusses MCL 333.20902(5), MCL 333.20904(4), and MCL 333.20969. I would also add MCL 333.20925, which states, in relevant part:

> This part does not prohibit an ambulance from providing emergency transport of a police dog that is injured in the line of duty to a veterinary clinic or similar facility, if the police dog is in need of emergency medical treatment and there are no individuals who require transport or emergency assistance at that time. Ambulance personnel may require that a police officer accompany the police dog during the emergency transport.

[2] *Ante* at 899.

[3] *Griffin v Swartz Ambulance Serv*, unpublished per curiam opinion of the Court of Appeals, issued November, 29, 2018 (Docket No. 340480), p 4.

[4] *Id*.

[5] *Merriam-Webster's Collegiate Dictionary* (11th ed).

application of remedies; medical or surgical application or service.' "[6] Based on this definition, the dissent reasoned that "under the plain language of the statute if an individual's acts or omissions are undertaken in the management of the application of remedies or in medical or surgical application, then they would constitute 'treatment.' "[7] Because the ambulance driver "was not undertaking any action to manage plaintiff's injuries" but "was merely transporting him to the hospital while the paramedic in the patient-compartment . . . provided treatment," the ambulance driver was not engaging in "treatment."[8]

However, I think that even under the dissent's definition, treatment could be found to encompass transportation. As stated, the *Oxford English Dictionary* defines "treatment" as "[m]anagement in the application of remedies; medical or surgical application or service." Though the ambulance driver was not applying remedies at the moment the accident occurred, it appears she was "[m]anag[ing] . . . the application of remedies[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "management," in relevant part, as "1: the act or art of managing: the conducting or supervising of something (as a business) . . . ." Relatedly, "manage" is defined, in relevant part, as "to handle or direct with a degree of skill: as . . . b: to treat with care . . . c: to exercise executive, administrative, and supervisory direction of . . . ."[9] By transporting plaintiff to a hospital where he could get care, the ambulance driver appeared to be "managing," i.e., "handl[ing] or direct[ing]," or "exercis-[ing] executive . . . direction of," the application of remedies.

Thus, the dictionary definitions seem to indicate that "treatment" does include "transportation." But the statutory provisions surrounding MCL 333.20965(1) indicate that "treatment" does not include "transportation." Whether this potential conflict renders "treatment" ambiguous is a difficult question, and I would have granted leave to decide it.

In determining whether "treatment" is ambiguous, I would also review the proper threshold for ambiguity, namely by reconsidering whether our Court's caselaw stating that "a provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision, or when it is *equally* susceptible to more than a single meaning," is too stringent.[10] As then Judge Brett Kavanagh explained:

> Unfortunately, there is often no good or predictable way for judges to determine whether statutory text contains "enough" ambiguity to cross the line . . . . In my experience, judges will

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[6] *Griffin* (M. J. KELLY, P.J., dissenting), unpub op at 2, quoting *Oxford English Dictionary* (2d ed).

[7] *Griffin* (M. J. KELLY, P.J., dissenting), unpub op at 2.

[8] *Id*.

[9] *Merriam-Webster's Collegiate Dictionary* (11th ed).

[10] *Mayor of City of Lansing v Pub Serv Comm*, 470 Mich 154, 166 (2004) (citations omitted; alteration in original).

> often go back and forth arguing over this point. One judge will say that the statute is clear, and that should be the end of it. The other judge will respond that the text is ambiguous, meaning that one or another canon of construction should be employed to decide the case. Neither judge can convince the other. That's because there is no right answer.
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> It turns out that there are at least two separate problems facing those disagreeing judges.
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> First, judges must decide how much clarity is needed to call a statute clear. If the statute is 60-40 in one direction, is that enough to call it clear? How about 80-20? Who knows?
>
> Second, let's imagine that we could agree on an 80-20 clarity threshold. In other words, suppose that judges may call a text "clear" only if it is 80-20 or more clear in one direction. Even if we say that 80-20 is the necessary level of clear, how do we then apply that 80-20 formula to particular statutory text? Again, who knows? Determining the level of ambiguity in a given piece of statutory language is often not possible in any rational way. One judge's clarity is another judge's ambiguity. It is difficult for judges (or anyone else) to perform that kind of task in a neutral, impartial, and predictable fashion.[11]

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[11] Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv L Rev 2118, 2136-2137 (2016) (citation omitted). Other commentators have also written about the problems with defining and identifying ambiguity. See, e.g., Farnsworth, Guzior & Malani, *Ambiguity About Ambiguity: An Empirical Inquiry Into Legal Interpretation*, 2 J Legal Analysis 257, 258-259 (2010) ("First, our concern is . . . with what ambiguity *is*; for the word itself is ambiguous. To say that a statute is ambiguous could be a claim that ordinary readers of English would disagree about its meaning, which we will call an external judgment. Or it could be a private conclusion that, regardless of what others might think, the reader is unsure how best to read the text—which we will call an internal judgment. This ambiguity about ambiguity is latent; courts generally talk about whether a statute is ambiguous without making clear whether they are making internal or external judgments."); Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 Md L Rev 791, 799-800 (2010) ("Despite the seemingly straightforward nature of the ambiguity definition, courts have struggled to adapt it to legal usage. Consider the hodgepodge of differing, and generally unhelpful, standards courts have used for describing statutory ambiguity. Often these definitions are circular, declaring that a statute is ambiguous merely if it is unclear. Other definitions focus on the interpreter rather than the text.") (citations omitted); Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79

Moreover, I would also consider whether certain interpretive tools may be used only after a finding of ambiguity, if at all.[12] Specifically, though this Court has permitted consideration of legislative history after a finding of ambiguity,[13] I would question whether the Court should turn to legislative history even after such a finding because of the

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Chi-Kent L Rev 859, 859-860 (2004) ("The problem, perhaps ironically, is that the concept of ambiguity is itself perniciously ambiguous. People do not always use the term in the same way, and the differences often appear to go unnoticed. While all agree that ambiguity occurs when language is reasonably susceptible to different interpretations, people seem to differ with respect to whether those interpretations have to be available to a single person, or whether ambiguity occurs when different speakers of the language do not understand a particular passage the same way. In addition, line drawing problems lead to disagreement about what interpretations are reasonable.").

[12] This Court has said that judicial construction is only appropriate with a finding of ambiguity. *In re MCI Telecom Complaint*, 460 Mich 396, 411 (1999) ("If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible. Should a statute be ambiguous on its face, however, so that reasonable minds could differ with respect to its meaning, judicial construction is appropriate to determine the meaning.") (citation omitted). For example, this Court has allowed the use of preferential rules of interpretation only after a finding of ambiguity. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 319 (2002) ("We do not apply preferential rules of statutory interpretation, however, without first discovering an ambiguity and attempting to discern the legislative intent underlying the ambiguous words."). It is worth noting that the Court has recently declined to employ certain preferential rules, see *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 553 n 18 (2016), a trend with which I agree, see *Schaub v Seyler*, 504 Mich 987, 991 (2019). Moreover, some prominent commentators suggest that ambiguity can always be resolved after applying the normal tools of interpretation. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 233 ("So in our view a contractual provision that all ambiguities will be resolved in favor of one of the parties is ineffective—or, perhaps, effective only when, after applying all the normal tools of interpretation, an ambiguity cannot be resolved (which is never).").

[13] *Luttrell v Dep't of Corrections*, 421 Mich 93, 103 (1984) ("Where ambiguity exists in a statute, a court may refer to the history of the legislation in order to determine the underlying intent of the Legislature.").

many problems with reliance on legislative history.[14] Because I would grant leave to consider these issues, I dissent from the Court's denial order.

CITY OF WAYNE RETIREES ASSOCIATION v CITY OF WAYNE, Nos. 160809 and 160810; Court of Appeals Nos. 343522 and 343916.

MCCORMACK, J. (*concurring*). I concur in this Court's order denying leave to appeal because, as the Court of Appeals recognized, the outcome in this case is resolved by our decision in *Kendzierski v Macomb Co*, 503 Mich 296 (2019).

The issue in *Kendzierski* was whether retiree healthcare benefits provided through the parties' collective-bargaining agreements (CBAs) were vested, i.e., unalterable for the plaintiff-retirees' lifetimes, or were instead time-limited promises that did not survive the expiration of those CBAs.

As I explained in my dissent, I believe the CBAs in *Kendzierski* were ambiguous and that the plaintiffs should have been allowed to present extrinsic evidence to resolve that ambiguity. *Kendzierski*, 503 Mich at 327 (MCCORMACK, C.J., dissenting). But this Court disagreed, concluding that the benefits were unambiguously time-limited and that the defendant was, therefore, entitled to summary disposition for that reason. *Id*. at 326 (opinion of the Court).

Plaintiffs in this case have offered arguments for ambiguity that are similar to those the Court considered and rejected in *Kendzierski*. While

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[14] See, e.g., *Reading Law*, p 375 ("[T]he use of legislative history poses a major theoretical problem: It assumes that what we are looking for is the intent of the legislature rather than the meaning of the statutory text."); *id*. at 376 ("A reliance on legislative history also assumes that the legislature even *had* a view on the matter at issue. This is pure fantasy. In the ordinary case, most legislators could not possibly have focused on the narrow point before the court."); *id*. ("Further, the use of legislative history to find 'purpose' in a statute is a legal fiction that provides great potential for manipulation and distortion."); *id*. at 377 ("Legislative history creates mischief both coming and going—not only when it is made but also when it is used. With major legislation, the legislative history has something for everyone . . . . Moreover, because there are no rules about which categories of statements are entitled to how much weight, the history can be either hewed to as determinative or disregarded as inconsequential . . . ."); *id*. at 386 ("The use of legislative history also spawns a separation-of-powers problem: It entrusts the legislature (or more precisely, some legislators) with the interpretation of provisions that it has enacted—a function that is the preeminent and exclusive responsibility of the courts."); *id*. at 388 ("[U]se of legislative history is not just wrong; it violates constitutional requirements of nondelegability, bicameralism, presidential participation, and the supremacy of judicial interpretation in deciding the cases presented.").

I find these arguments to be persuasive, plaintiffs have not asked us to reconsider our decision in *Kendzierski*. For that reason, I concur in this Court's order denying leave to appeal.

BERNSTEIN, J., joins the statement of MCCORMACK, C.J.

Leave to Appeal Denied September 11, 2020:

In re SMITH, MINOR, No. 161557; Court of Appeals No. 351233.

PEOPLE V TIGGART, No. 161863; Court of Appeals No. 354242.

Reconsideration Denied September 11, 2020:

LEAGUE OF WOMEN VOTERS OF MICHIGAN V SECRETARY OF STATE, No. 161671; reported below: 333 Mich App 1. Leave to appeal denied at 506 Mich 886.

VIVIANO, J. (*concurring*). Plaintiffs' central claim in this case is that the statutory deadline requiring absentee ballots to be received by 8:00 p.m. on election day, MCL 168.764a, is unconstitutional under Const 1963, art 2, § 4. I voted to deny the application for leave to appeal in this matter previously and concur in the Court's order denying plaintiff's motion for reconsideration. I did so (and do so) because, while I agree the Court of Appeals should have focused first on the Constitution's plain language (and not the ballot summary), no clear errors were apparent in the majority's analysis of the constitutional text.[1]

I write separately to highlight another reason why this Court should not exercise its discretionary power to grant the application: this lawsuit appears to be a friendly scrimmage brought to obtain a binding result that both sides desire. Nearly from the start, the defendant Secretary of State has agreed with plaintiffs that the deadline must be struck down as unconstitutional.[2] In reaching a different conclusion, the Court of Appeals rejected the parties' attempt to "affect the entire state by means of an agreement as to the proper interpretation of . . . the Constitution that will be applied generally." *League of Women Voters of Mich*, 333 Mich App 1, 10 (2020) (opinion of SAWYER P.J.). Apparently disappointed by her nominal victory below, the Secretary of

[1] Also important is that the ruling below did not change the status quo: the statute was enforceable before and remains so now. Moreover, nothing precludes us from examining its constitutionality in an appropriate future case—one without this case's serious problems, which I describe below.

[2] The parties disagree on plaintiffs' alternative constitutional arguments against the statute and plaintiffs' claims that their constitutional rights to vote and vote by absentee ballot are violated by local clerks who fail to immediately process absentee-ballot applications and by requiring absentee voters to pay postage to mail the ballots.

State has consented to plaintiffs' efforts to have this Court rule against her and declare unconstitutional the statute she would normally be charged with defending. The Secretary of State did not file a response to plaintiffs' application for leave in this Court but instead agreed to plaintiffs' motion for immediate consideration. And now she has given plaintiffs' motion for reconsideration her blessing. Indeed, the motion purports to speak for both sides of this conjured dispute.

This is not the way the judiciary works. In our adversary system, the parties' competing interests lead to arguments that sharpen the issues so that courts will "not sit as self-directed boards of legal inquiry and research . . . ." *Carducci v Regan*, 230 US App DC 80, 86 (1983) (Scalia, J.); see also Fuller, *The Adversary System*, in Berman, ed, *Talks on American Law* (New York: Vintage Books, 1971), p 35 ("[B]efore a judge can gauge the full force of an argument, it must be presented to him with partisan zeal by one not subject to the restraints of judicial office. The judge cannot know how strong an argument is until he has heard it from the lips of one who has dedicated all the powers of his mind to its formulation."). Our role, therefore, is to act as neutral arbiters of real disputes brought by adverse parties. *Carducci*, 230 US App DC at 86.

Courts cannot fulfill this role when the parties agree on the merits to such an extent that no honest dispute exists. Cf. *United States v Windsor*, 570 US 744, 782 (2013) (Scalia, J., dissenting) ("We have never before agreed to speak—to 'say what the law is'—where there is no controversy before us."). Such agreements among parties have long been condemned by the United States Supreme Court:

> [A]ny attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court. [*Lord v Veazie*, 49 US (8 How) 251, 255 (1850).]

This is particularly true when the constitutional validity of a statute is at stake:

> Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must . . . determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act. [*Chicago & Grand Trunk R Co v Wellman*, 143 US 339, 345 (1892).]

The Supreme Court has accordingly declared that no controversy exists to adjudicate when both sides seek the same result. See *Moore v Charlotte-Mecklenburg Bd of Ed*, 402 US 47, 47-48 (1971) (dismissing case when both sides argued that a law was constitutional and should be upheld). And the Court has dismissed individual claims and vacated judgments on such claims when no controversy existed as to those claims, even in situations like the present case, where the parties have adequately disputed other issues. See *Webster v Reproductive Health Servs*, 492 US 490, 512-513 (1989) (dismissing one of several claims because no controversy existed regarding it when appellees abandoned their argument); *Williams v Zbaraz*, 448 US 358, 367 (1980) (vacating the portion of a judgment regarding a constitutional claim that the district court had no jurisdiction to decide because of the lack of adverse contentions and controversy, but reaching other issues in the case).

We have likewise endorsed the proposition that the parties' "controversy must be real and not *pro forma* . . . . Courts cannot be used for the purpose of deciding even real questions in *pro forma* suits," or else "the most complicated and difficult questions of law, and the constitutionality of statutes might be settled by the court upon such *pro forma* proceedings, when no real controversy or adverse interests exist, and no proper examination of the important questions is made by counsel or the court." *Anway v Grand Rapids R Co*, 211 Mich 592, 612 (1920) (quotation marks and citation omitted). Accordingly, we are "limited to determining rights of persons or of property, which are *actually controverted in the particular case* before" us. *Id*. at 615 (quotation marks and citation omitted; emphasis added). "The judicial power . . . is the right to determine actual controversies arising between *adverse* litigants . . . ." *Id*. at 616 (quotation marks and citation omitted; emphasis added). Thus, for example, to obtain a declaratory judgment on the constitutionality of a statute—which is essentially what plaintiffs seek here—the parties must have "adverse interests" forming an actual controversy. See *Assoc Builders & Contractors v Dir of Consumer & Indus Servs*, 472 Mich 117, 126 (2005), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 n 20 (2010).

We do not, therefore, simply scan the horizon for important legal issues to opine on—we address such issues only as they arise in the genuine controversies between adverse parties that come before us. On the central legal issue in this case, the parties are companions, not opponents. At best, this cooperation deprives courts of the adversarial back-and-forth required to fully and fairly decide legal issues big and small. At worst, the agreement might undermine the courts' power to hear the constitutional challenge. In an appropriate future case, the Court may need to consider whether these types of friendly lawsuits or claims must be dismissed for lack of jurisdiction. But we need not decide that issue here. Instead, it is sufficient to note that these concerns provide additional justification for our decision to deny leave in this case and reject the present motion for reconsideration.

These concerns flow from the executive branch's refusal to defend a statute. Executive nondefense of legislation presents problems that stretch beyond the legal points mentioned above. See Meltzer, *Executive*

Defense of Congressional Acts, 61 Duke L J 1183, 1186-1187 (2012) (advocating the traditional practice of executive defense of statutes for a host of reasons: the difference between the legislative and executive branches, "institutional continuity within the executive branch," and the likelihood that normalizing such nondefense will cause it to become pervasive and further erode perceptions of judicial restraint due to political polarization and the "temptation to equate what is misguided or immoral with what is unconstitutional"). At the very least, courts should be wary of encouraging this practice without having structures in place to accommodate the dislocations it causes in what should be adversarial litigation. Cf. Shaw, *Constitutional Nondefense in the States*, 114 Colum L Rev 213, 247-256 (2014) (noting various options adopted by other jurisdictions, such as enacting statutes that require the executive to notify the legislature when it intends not to defend a law, providing for legislative standing, or selecting an alternative executive branch actor (such as the governor) or outside counsel to defend the statute).

Michigan lacks most such tools. The Attorney General does have the statutory authority to intervene to protect any right or interest of the state. See MCL 14.101; MCL 14.28. But the Attorney General represents the Secretary of State here, and she did not attempt to intervene in opposition to her client. Defending both sides of an actual case might raise ethical concerns. See *Attorney General v Pub Serv Comm*, 243 Mich App 487, 518 (2000) (holding that "pursuant to the rules of professional conduct, if the Attorney General chooses to stand in opposition to a state agency or department as an actual party litigant and yet simultaneously attempts to represent that state agency in the litigation, such dual representation creates a conflict of interest that must be addressed and rectified") (emphasis omitted); but see *League of Women Voters of Mich v Secretary of State*, 331 Mich App 156, 202 n 1 (2020) (BOONSTRA, J., concurring in part and dissenting in part) (noting the Legislature's contention that the Attorney General historically set up conflict walls when arguing both sides of a case). Even so, we have no history of forcing the Attorney General to argue both sides in an actual case when she has already staked out a position. In her dissent, the Chief Justice cites two orders in which we directed the Attorney General to brief the opposing positions, but both orders involved requests for advisory opinions. See *post* at 911 n 1, citing *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*, 924 NW2d 882 (2019), and *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 474 Mich 1230 (2006). By definition, they involve no case or controversy or even any parties; we can hear these matters only because the Constitution explicitly allows it. Const 1963, art 3, § 8.[3]

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[3] A majority of this Court has recently directed the Attorney General to argue both sides of a question when the Attorney General changed her view of the proper interpretation of a statute before our Court. See *Maples v Michigan*, 505 Mich 1088 (2020).

The Chief Justice also suggests that, like the United States Supreme Court, we could begin appointing amici curiae to file briefs defending the constitutionality of undefended statutes. It is not clear to me, however, that the Supreme Court has ever employed amici in a case like the present one, where the parties have agreed on the merits almost from the beginning. Rather, these appointments appear to occur when the government confesses error or changes its view before the Supreme Court, when the Court of Appeals below or the Supreme Court raises an issue sua sponte, or when the respondent fails to appear before the Supreme Court. See Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 Stan L Rev 907, 920-939 (2011).

In my view, this proposed solution places courts well outside their lane as passive tribunals. It departs from the principle that parties, and not the courts, choose the issues to be resolved. *Id*. at 943-944. It further risks tarnishing the courts' neutrality by forcing judges to decide which cases merit an amicus and which do not. The United States Supreme Court's practice sheds little light on this point. For example, in roughly the last quarter of the twentieth century, when the government confessed error, the Supreme Court sometimes denied certiorari, sometimes vacated the decision below and remanded, and sometimes appointed amici. *Id*. at 948. No official or discernable principles govern why some cases get singled out for appointment of amici and others do not. Cf. Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 Cornell L Rev 1533, 1535 (2016) ("The Court keeps no official records of such invitations, and its rules do not reference them. Similarly, there is no official guidance on when the Court will invite such an amicus, whom it will invite, how it makes its selections, or the precise nature of the amicus's mandate.") (citations omitted). And, as a practical matter, who will pay for the added cost of court-appointed amici? Even if these concerns could be waved aside, appointing an amicus at the appellate level will do nothing to develop the factual record in the trial court if, as here, the parties were never adverse regarding the issue at stake. See *Executive Defense*, 61 Duke L J at 1210 ("In many cases . . . a court's judgment about constitutionality might depend on the evidentiary record assembled in the district court concerning the strength or weakness of the asserted government interests."). Thus, the problems presented by executive nondefense of a statute would only be exacerbated if the Court appointed amici to create the semblance of an adversary proceeding where one never existed.

We should think long and hard before we go out of our way to adopt any unprecedented measures to facilitate executive nondefense of statutes. I fear that the pervasiveness of this practice poses serious dangers to our system of government, and our accommodation of it will only exacerbate these dangers. Courts require real disputes, and thus the better course from our vantage is for the executive branch to enforce and defend statutes—even when it disagrees with them or thinks they are unconstitutional. Cf. *Executive Defense*, 61 Duke L J at 1235 ("I have tried to set forth a range of reasons why the executive branch should enforce and defend statutes such as Don't Ask, Don't Tell and [the Defense of

Marriage Act]—even when it views them as wrongheaded, discriminatory, and indeed as shameful denials of equal protection."). But even aside from my larger concerns with the practice, there is absolutely no warrant to appoint amici in this case since the parties have been joint adventurers nearly from the start. For all these reasons, I concur in the denial of the motion for reconsideration.

MCCORMACK, C.J. (*dissenting*). I would grant reconsideration, grant the plaintiffs' application for leave to appeal, and order expedited consideration. I agreed with the reasons identified in Justice BERNSTEIN's statement dissenting from our previous order denying leave to appeal, *League of Women Voters of Mich v Secretary of State*, 506 Mich 886, 886-888 (2020), about why this case deserved our consideration. Now there is more.

The plaintiffs present a letter from the General Counsel and Executive Vice President of the United States Postal Service (USPS) stating that Michigan's deadline for receiving absentee ballots is "incompatible" and "incongruous" with the USPS's delivery standards, creating a risk that ballots requested close to the election will not be returned in time to be counted; the letter encourages election officials to keep those standards in mind when communicating with voters about how to successfully vote by mail. The risk of late-arriving ballots is heightened by the USPS's recent decommissioning of mail sorting machines and other cost-cutting measures likely to lead to further delays in mail delivery highlighted in news reports the plaintiffs submitted. Finally, the plaintiffs present evidence that is not merely hypothetical—they point to the volume of absentee ballots not received until after the August 2020 primary election that went uncounted, a volume that had the potential to be outcome-determinative in at least one election.

The potential deprivation of thousands of Michiganders' fundamental right to vote deserves our attention. In my view, with this new evidence, the plaintiffs have demonstrated that our prior order denying leave to appeal was based on a "palpable error." MCR 2.119(F)(3); see also MCR 7.311(G). Moreover, they have shown that their application involves "a substantial question about the validity of a legislative act," an issue that "has significant public interest and . . . is one by or against the state or one of its agencies," and "a legal principle of major significance to the state's jurisprudence," MCR 7.305(B)(1) through (3), and that the Court of Appeals' decision "will cause material injustice," MCR 7.305(B)(5)(a). It's not often we see a case that checks all those boxes. We should acknowledge as much by exercising our responsibility as the state's highest court and further considering this case;[1] I respectfully dissent from the Court's order denying reconsideration.

BERNSTEIN and CAVANAGH, JJ., join the statement of MCCORMACK, C.J.

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[1] Justice VIVIANO argues that denying review is appropriate because the parties to this case are not truly adversarial, as the Secretary of State agrees with the plaintiffs that the statutory requirement that ballots be received by the time the polls close on Election Day is unconstitutional under Const 1963, art 2, § 4(1). I agree with Justice

Application for Leave to Appeal Dismissed September 11, 2020:

PEOPLE v DARRELL WILDER, No. 160339; Court of Appeals No. 327491. On order of the Court, the stipulated motion to vacate the defendant's convictions, remand for a new trial and dismiss the appeal is considered, and it is granted, in part. The application for leave to appeal is dismissed with prejudice and without costs. We remand this case to the Wayne Circuit Court for any further necessary proceedings.

VIVIANO that there are important reasons why courts generally rely on the parties to a lawsuit to present adversarial arguments, but I am not persuaded that the plaintiffs here should be penalized by the Secretary of State's acquiescence in their argument, a position over which the plaintiffs have no control. Notwithstanding the Secretary of State's position, the statute remains binding, and the plaintiffs' purported injury stands. I would not insulate that injury from appellate review for reasons beyond the plaintiffs' control.

Moreover, the Court is not without recourse for obtaining a fully aired argument on the issues presented. It could invite amici curiae to file briefs, including the Legislature—an entity that certainly has an interest in defending its own work. The Court could also appoint an attorney to act as amicus curiae to defend the judgment below—a measure the United States Supreme Court takes regularly. See, e.g., *Seila Law, LLC v Consumer Fin Protection Bureau*, ___ US ___; 140 S Ct 2183, 2195 (2020) (noting that the Court appointed Paul Clement as amicus curiae to defend the judgment below because the parties agreed on the merits of the constitutional questions). While that has not previously been our practice, we have issued similar orders when concerned with receiving robust arguments on both sides of an issue. See, e.g., *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 474 Mich 1230 (2006) (granting the request to issue an advisory opinion and directing the Attorney General to brief both sides of the issue presented); *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*, 924 NW2d 882 (2019) (requesting the Attorney General to submit separate briefs arguing both sides of the issues presented and inviting the House of Representatives and the Senate, and any member of either chamber, to file briefs). I would use one of these strategies here to address the important issue Justice VIVIANO flags. I am sympathetic to his concerns about the difficulties that may arise in implementing these proposals. But I am not convinced that if the choice is to grapple with those difficulties or tell the plaintiffs they can't access the Court because the Secretary of State shares their view that the statute unconstitutionally disenfranchises Michigan voters, the latter is the better option. Closing the courthouse doors to a party in an important case for that reason strikes me as particularly bitter medicine.

Leave to Appeal Denied September 14, 2020:

ECONOMIC INVESTMENT FOR SOUTHGATE 2020 v SOUTHGATE CITY CLERK, No. 161980; Court of Appeals No. 354715.

Reconsideration Granted September 18, 2020:

SULLIVAN v MICHIGAN REFORMATORY WARDEN, No. 161597; Court of Appeals No. 352985. On order of the Chief Justice, the motion of plaintiff-appellant for reconsideration of the August 17, 2020 order that administratively closed this case is granted. Plaintiff-appellant shall have 28 days from the date of this order to file a motion for the temporary waiver of fees and a certificate of prisoner account activity for the past twelve months. If those documents are timely filed, the case will be re-opened to give plaintiff-appellant the opportunity to comply with the requirements of MCL 600.2963 and proceed to a decision on the merits of his application.

Leave to Appeal Denied September 18, 2020:

SLIS v STATE OF MICHIGAN and A CLEAN CIGARETTE CORPORATION v GOVERNOR, Nos. 161625 and 161626; Court of Appeals Nos. 351211 and 351212.

In re BARRETT, MINORS, No. 161673; Court of Appeals No. 349859.

Rehearing Denied September 18, 2020:

MEEMIC INSURANCE COMPANY v FORTSON, No. 158302; Court of Appeals No. 337728. Opinion at 506 Mich 287.

Summary Disposition September 23, 2020:

PEOPLE v LATAUSHA SIMMONS, No. 160534; Court of Appeals No. 349547. 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 motions for immediate consideration and for stay of proceedings in the 37th District Court are granted. 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.

PEOPLE v TAWFIK, No. 160949; Court of Appeals No. 345690. On order of the Court, the motion to expand the record is granted for the limited purpose of providing an offer of proof in support of the defendant's request for an evidentiary hearing. The application for leave to appeal the December 19, 2019 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 Wayne Circuit Court for an evidentiary

hearing on the defendant's ineffective assistance of trial counsel claim. See *People v Ginther*, 390 Mich 436 (1973), and *People v Ackley*, 497 Mich 381 (2015). We do not retain jurisdiction.

Orders Directing Oral Argument in Cases Pending on Application for Leave to Appeal Entered September 23, 2020:

COUNTY OF INGHAM v MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL, No. 160186; Court of Appeals No. 334077. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the Court of Appeals properly held that the plaintiff Counties are successors in interest to their respective road commissions, which were dissolved pursuant to MCL 46.1 *et seq*., and MCL 224.1 *et seq*.; (2) whether the Court of Appeals properly held that plaintiff Jackson County was a member of defendant Michigan County Road Commission Self-Insurance Pool (Pool) despite having dissolved its road commission; and (3) whether the Court of Appeals properly held that the plaintiff Counties are entitled to refunds of surplus premiums paid to the Pool because the forfeiture provisions in the defendant Pool's governing documents, which comprise the parties' binding contractual agreement, are unenforceable as against public policy and must be severed, and whether this issue was properly preserved by the plaintiff Counties. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). 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. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. 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.

The Boards of County Road Commissioners and the Government Law and Insurance Law 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.

ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY v MICHIGAN ASSIGNED CLAIMS PLAN, No. 160592; Court of Appeals No. 344715. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether a finding that an insurance policy was void *ab initio* because it was procured by fraud bars a subsequent claim for equitable subrogation for benefits that were paid pursuant to that policy before it was found to be void. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). 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. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the

appellant. 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.

In re SMITH, MINORS, No. 161525; Court of Appeals No. 351095. The respondent-appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether a child's chronic absence from school is, on its own, a sufficient basis for the trial court to assume jurisdiction on the ground of educational neglect as contemplated by MCL 712A.2(b)(2); (2) whether proving allegations of educational neglect requires demonstrating that the child has suffered harm, see MCL 712A.2(b)(1)(b), and, if so, what constitutes harm for these purposes; and (3) whether the trial court clearly erred when it exercised jurisdiction over the minor children solely on the basis of educational neglect pursuant to MCL 712A.2(b)(1). In addition to the brief, the respondent-appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The petitioner-appellee shall file a supplemental brief within 21 days of being served with the respondent-appellant's brief. The petitioner-appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the respondent-appellant. The lawyer-guardian ad litem for the minor children is invited to file a supplemental brief within 21 days of being served with the respondent-appellant's brief. A reply, if any, must be filed by the respondent-appellant within 14 days of being served with the petitioner-appellee's brief. The parties should not submit mere restatements of their application papers.

The Legal Services Association of Michigan and the Michigan State Planning Body for Legal Services 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 September 23, 2020:

PEOPLE V NESTO, No. 160357; Court of Appeals No. 339986.

JACKSON V CITY OF ALLEN PARK, No. 160729; Court of Appeals No. 343862.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

PEOPLE V BURGER, No. 161198; Court of Appeals No. 343332.

WILLIAMS V CITY OF SAGINAW, No. 161240; Court of Appeals No. 348910.

Summary Disposition September 25, 2020:

PEOPLE V JUREWICZ, No. 160318; reported below: 329 Mich App 377. 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 of the defendant's ineffective assistance of counsel claim under the correct standard. The Court of Appeals erred in holding that " '[t]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.' " *People v Jurewicz*, 329 Mich App 377, 382 (2019), quoting *People v Russell*, 297 Mich App 707, 716 (2012). The defendant was not required to show, in order to obtain relief for ineffective assistance of counsel, that trial counsel's failure to call witnesses deprived him of a substantial defense. Rather, a claim of ineffective assistance of counsel premised on the failure to call witnesses is analyzed under the same standard as all other claims of ineffective assistance of counsel, i.e., a defendant must show that "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51 (2012); see also *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d (1984). On remand, the Court of Appeals should resolve the defendant's claim of ineffective assistance of counsel under this standard.

Leave to Appeal Denied September 25, 2020:

In re KORDUPEL, MINOR, No. 161584; Court of Appeals No. 350559.

PREYDE ONE, LLC v HOFFMAN CONSULTANTS, LLC, No. 161682; Court of Appeals No. 346192.

In re PENDER, MINOR, No. 161950; Court of Appeals No. 354507.

KEEP MICHIGAN SAFE v BOARD OF STATE CANVASSERS, No. 161960; Court of Appeals No. 354188.

Leave to Appeal Before Decision by the Court of Appeals Denied September 25, 2020:

NYKORIAK v NAPOLEON, No. 161990; Court of Appeals No. 354410.

Motion for Immediate Consideration Granted September 25, 2020:

MICHIGAN ALLIANCE FOR RETIRED AMERICANS v SECRETARY OF STATE, No. 161837; Court of Appeals No. 354429. On order of the Court, the motion for immediate consideration is granted. We direct the parties to file briefs by 5:00 p.m. on Wednesday, September 30, 2020, responding to petitioners' motion for reconsideration and addressing whether *Council of Orgs & Others for Ed About Parochiaid v Michigan*, 321 Mich App 456 (2017), should be overruled and whether petitioners should be allowed to intervene, MCR 2.209. We further direct the Court of Claims to issue a decision on the House of Representatives and Senate's motion for intervention no later than Wednesday, September 30, 2020. The Court of Appeals shall expedite its consideration of any appeal from the Court of Claims in this case.

Summary Disposition September 29, 2020:

CHARTER TOWNSHIP OF YORK v MILLER, No. 157257; reported below: 322 Mich App 648. By order of January 23, 2019, the application for leave to appeal the January 18, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *DeRuiter v Byron Twp* (Docket No. 158311). On order of the Court, the case having been decided on April 27, 2020, 505 Mich 130 (2020), the application is again 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 the Court of Appeals for reconsideration in light of *DeRuiter*.

CHARTER TOWNSHIP OF YPSILANTI v PONTIUS, No. 158816; Court of Appeals No. 340487. By order of April 30, 2019, the application for leave to appeal the October 30, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *DeRuiter v Byron Twp* (Docket No. 158311). On order of the Court, the case having been decided on April 27, 2020, 505 Mich 130 (2020), the application is again 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 the Court of Appeals for reconsideration in light of *DeRuiter*.

PEOPLE v STANTON, No. 160776; Court of Appeals No. 350915. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Ottawa Circuit Court, and we remand this case to that court for resentencing. The prosecuting attorney has conceded that the trial court erred in scoring Offense Variable (OV) 4, MCL 777.34. Because correcting the OV score would change the applicable guidelines range, resentencing is required. *People v Francisco*, 474 Mich 82 (2006). 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 SHERBURNE, No. 160937; Court of Appeals No. 351262. 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 ELLIOTT, No. 161235; Court of Appeals No. 352342. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for the ministerial correction of the judgment of sentence to reflect that the defendant entered a *nolo contendere* plea, not a guilty plea, and, in accordance with the plea agreement, the habitual offender, fourth offense, supplement was dismissed. We further order the trial court to ensure that the corrected judgment of sentence is transmitted to the Michigan Department of Corrections. 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 correct presentence report and to hold proceedings in abeyance are denied. We do not retain jurisdiction.

PEOPLE v GRIGGS, No. 161497; Court of Appeals No. 347575. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals. A trial court's factual findings at a suppression hearing are reviewed for clear error, and the application of the underlying law—the Fourth Amendment of the United States Constitution and article 1, § 11 of the Michigan Constitution—is reviewed de novo. *People v Slaughter*, 489 Mich 302, 310 (2011). The Court of Appeals erred by failing to address the Oakland Circuit Court's factual findings in deciding whether a Fourth Amendment violation occurred. Accordingly, we remand this case to the Court of Appeals for reconsideration of the defendant's argument under the appropriate legal standard to determine whether the defendant consented to the search of his backpack in light of the trial court's factual findings. We do not retain jurisdiction.

Leave to Appeal Denied September 29, 2020:

PEOPLE v TYRONE SMITH, No. 159455; Court of Appeals No. 347273.

PEOPLE v MARGOSIAN, No. 159724; Court of Appeals No. 346786.

BIRD v GUS HARRISON CORRECTIONAL FACILITY WARDEN, No. 160082; Court of Appeals No. 348319.

PEOPLE v DEW, No. 160698; Court of Appeals No. 350723.

PEOPLE v SAARIO, No. 160797; Court of Appeals No. 344842.

PEOPLE v JAY CLARK, No. 160802; reported below: 330 Mich App 392.

PEOPLE v JENDRZEJEWSKI, No. 160804; Court of Appeals No. 349885.

PEOPLE v LEGRONE, No. 160830; Court of Appeals No. 350572.

KNIGHT v BANK OF AMERICA CORPORATION, No. 160859; Court of Appeals No. 344919.

PEOPLE v ROLLINS, No. 160866; Court of Appeals No. 350730.

HANEY v MICHIGAN TOWNSHIPS ASSOCIATION, No. 160920; Court of Appeals No. 348163.

PEOPLE v LEAHY, No. 160921; Court of Appeals No. 346785.

RICHARDS v FOX TELEVISION STATION, No. 160922; Court of Appeals No. 347077.

PEOPLE v DAVID, No. 160926; Court of Appeals No. 350917.

MEYER v OAKLAND COMMUNITY COLLEGE BOARD OF TRUSTEES, No. 160970; Court of Appeals No. 345738.

In re PKR, Nos. 160972 and 160973; Court of Appeals Nos. 351711 and 351938.

PEOPLE v DONALD MCCOY, No. 160999; Court of Appeals No. 343160.

PEOPLE v MCHALPINE, No. 161000; Court of Appeals No. 351584.

PEOPLE v METCALFE, No. 161009; Court of Appeals No. 343597.

PEOPLE v WELLER, Nos. 161021 and 161022; Court of Appeals Nos. 351535 and 351536.

PEOPLE v ROMMEL REED, No. 161053; Court of Appeals No. 350524.

PEOPLE v GOBLE, No. 161096; Court of Appeals No. 351310.

PEOPLE v MARCELL DAVIS, No. 161112; Court of Appeals No. 343734.

PEOPLE v SHAMONTE-HALL, No. 161123; Court of Appeals No. 345861.

PEOPLE v MIX, No. 161124; Court of Appeals No. 343920.

PEOPLE v FULLER, No. 161132; Court of Appeals No. 351596.

PEOPLE v BALLINGER, No. 161141; Court of Appeals No. 344038.

PEOPLE v BOGSETH, No. 161143; Court of Appeals No. 351227.

PEOPLE v JURICH, No. 161144; Court of Appeals No. 351721.

VIVIANO, J., not participating due to a familial relationship with the defendant's trial counsel.

PEOPLE v CARTHELL, No. 161160; Court of Appeals No. 346123.

PEOPLE v RAYMOND SMITH, No. 161167; Court of Appeals No. 351002.

PEOPLE v YATES, No. 161185; Court of Appeals No. 351250.

PEOPLE v KINCADE, No. 161186; Court of Appeals No. 344822.

PEOPLE v MAYES, No. 161188; Court of Appeals No. 351722.

PEOPLE v SHAVEZ BUTLER, No. 161201; Court of Appeals No. 351925.

PEOPLE v REDMAN, No. 161213; Court of Appeals No. 345548.

JPMORGAN CHASE BANK, NA v ERWIN PROPERTIES, LLC, No. 161216; Court of Appeals No. 351512.

PEOPLE v VILLEGAS-GUZMAN, No. 161223; Court of Appeals No. 351338.

PEOPLE v EPHARIM HARRIS, No. 161224; Court of Appeals No. 352138.

PEOPLE v LONGENECKER, No. 161230; Court of Appeals No. 344444.

PEOPLE v NOLAN, No. 161231; Court of Appeals No. 352260.

PEOPLE v SAMMY HALL, No. 161234; Court of Appeals No. 351726.

PEOPLE v KARACSON, No. 161236; Court of Appeals No. 346236.

PEOPLE v JOHNSTON, No. 161237; Court of Appeals No. 351603.

PEOPLE v ZAVODA, No. 161246; Court of Appeals No. 352155.

PEOPLE v BENTLEY, No. 161252; Court of Appeals No. 352459.

PEOPLE v VINSON-JACKSON, No. 161279; Court of Appeals No. 344742.

PEOPLE v WATTS, No. 161284; Court of Appeals No. 351275.

PEOPLE v HILL, No. 161292; Court of Appeals No. 347009.

PEOPLE v ONYEMA SIMMONS, No. 161293; Court of Appeals No. 351239.

PEOPLE v ADAM REYNOLDS, No. 161294; Court of Appeals No. 351594.

PEOPLE v LISTER, No. 161308; Court of Appeals No. 352678.

PEOPLE v TIMMY COLLIER, No. 161312; Court of Appeals No. 352229.

STATE TREASURER v GARLAND, No. 161319; Court of Appeals No. 351015.

PEOPLE v CEDRICK TAYLOR, No. 161334; Court of Appeals No. 352754.

DUNN v GENESEE COUNTY ROAD COMMISSION, No. 161340; Court of Appeals No. 341907.

PEOPLE v ST CLAIR, No. 161345; Court of Appeals No. 346741.

PEOPLE v GILBERT, No. 161376; Court of Appeals No. 344643.

PEOPLE v PEETE, No. 161384; Court of Appeals No. 331568.

PEOPLE v STEPHENS, No. 161402; Court of Appeals No. 347012.

PEOPLE v PATTERSON, No. 161403; Court of Appeals No. 347055.

PEOPLE v CRUMP, No. 161405; Court of Appeals No. 343438.

PEOPLE v DORIAN COLLIER, No. 161406; Court of Appeals No. 344717.

PEOPLE v POTTS, No. 161411; Court of Appeals No. 352028.

PEOPLE v HOUGHTALING, No. 161412; Court of Appeals No. 352372.

PEOPLE v MINICHIELLO, No. 161415; Court of Appeals No. 353078.

MAY v SECRETARY OF STATE, No. 161427; Court of Appeals No. 346687.

LIGHTNINGBOLT v CENTRAL MICHIGAN CORRECTIONAL FACILITY WARDEN, No. 161428; Court of Appeals No. 352567.

PEOPLE v MORRISON, No. 161443; Court of Appeals No. 352664.

PEOPLE v FENTON, No. 161446; Court of Appeals No. 352896.

In re CITIZENS FOR HIGGINS LAKE LEGAL LEVELS, No. 161462; Court of Appeals No. 351964.

METRO DEVELOPERS, LLC v KNIGHT, No. 161504; Court of Appeals No. 353311.

PEOPLE v EMERY, Nos. 161511 and 161512; Court of Appeals Nos. 346224 and 346225.

THOMPKINS v ZAMLER, No. 161522; Court of Appeals No. 345138.

PEOPLE v REGINALD BELL, No. 161536; Court of Appeals No. 346238.

PEOPLE v JALEN TRAPP, No. 161558; Court of Appeals No. 352335.

PEOPLE v JALEN TRAPP, No. 161560; Court of Appeals No. 352337.

PEOPLE v MAIGA, No. 161574; Court of Appeals No. 347852.

In re ESTATE OF JOANNE THOMPSON VATTER, No. 161580; Court of Appeals No. 352560.

PEOPLE v GARNER, No. 161586; Court of Appeals No. 353019.

PEOPLE v CANNON, No. 161587; Court of Appeals No. 347438.

PEOPLE v LOWERY, No. 161590; Court of Appeals No. 345646.

PEOPLE v CASNAVE, No. 161591; Court of Appeals No. 351727.

KROLL v DEMORROW, No. 161610; Court of Appeals No. 341895.

PEOPLE v BRANDON BROWN, No. 161632; Court of Appeals No. 351620.

MAJID v VHS SINAI-GRACE HOSPITAL, INC, No. 161749; Court of Appeals No. 352586.

PEOPLE v COX, No. 161827; Court of Appeals No. 350033.

MCGEE v GEORGE, No. 161914; Court of Appeals No. 352362.

Reconsideration Denied September 29, 2020:

PEOPLE v MCARTHUR TAYLOR, No. 159763; Court of Appeals No. 347052. Leave to appeal denied at 505 Mich 1132.

FORNER v ALLENDALE CHARTER TOWNSHIP SUPERVISOR, No. 159768; Court of Appeals No. 339072. Leave to appeal denied at 505 Mich 1068.

FARM BUREAU INSURANCE COMPANY v TNT EQUIPMENT, INC, No. 160009; reported below 328 Mich App 667. Leave to appeal denied at 505 Mich 1015.

PEOPLE v HOLLIS, No. 160132; Court of Appeals No. 348016. Leave to appeal denied at 505 Mich 1132.

PEOPLE v ZAHRAIE, No. 160308; Court of Appeals No. 347720. Leave to appeal denied at 505 Mich 1132.

CITY OF EAST LANSING v WILSON, No. 160344; Court of Appeals No. 348391. Leave to appeal denied at 505 Mich 1132.

LANSING PARKVIEW, LLC v K2M GROUP, LLC, No. 160421; Court of Appeals No. 344192. Leave to appeal denied at 505 Mich 1040.

NOEL v SCHOLASTIC SOLUTIONS, LLC, Nos. 160574 and 160575; Court of Appeals Nos. 343580 and 347056. Leave to appeal denied at 505 Mich 1133.

PEOPLE v DALLAS WALKER, No. 160780; reported below: 330 Mich App 378. Leave to appeal denied at 505 Mich 1081.

HICKS v HEALY, No. 160825; Court of Appeals No. 343015. Leave to appeal denied at 505 Mich 1043.

FLOEN v LEWIN, No. 160858; Court of Appeals No. 350477. Leave to appeal denied at 505 Mich 1082.

THOMPSON v THOMPSON, No. 161043; Court of Appeals No. 347346. Leave to appeal denied at 506 Mich 853.

In re SMITH, No. 161058; Court of Appeals No. 352572. Leave to appeal denied at 505 Mich 1134.

PEOPLE v JAMISON-LAWS, No. 161065; Court of Appeals No. 345285. Leave to appeal denied at 505 Mich 1134.

MOORE v OCWEN LOAN SERVICING, LLC, No. 161079; Court of Appeals No. 347974. Leave to appeal denied at 505 Mich 1134.

PEOPLE v TYSON, No. 161084; Court of Appeals No. 338299. Leave to appeal denied at 505 Mich 1134.

STATE TREASURER v URAZ, No. 161163; Court of Appeals No. 349487. Leave to appeal denied at 505 Mich 1135.

PEOPLE v WARREN, No. 161182; Court of Appeals No. 351202. Leave to appeal denied at 505 Mich 1141.

SIMMONS v DEPARTMENT OF CORRECTIONS, No. 161195; Court of Appeals No. 351927. Leave to appeal denied at 505 Mich 854.

Motion to Docket the Application Denied September 29, 2020:

PEOPLE v MCDADE, No. 161496; Court of Appeals No. 323614.

Summary Disposition September 30, 2020:

STOMBER v SANILAC COUNTY DRAIN COMMISSIONER, No. 160826; Court of Appeals No. 347360. 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.

The claims in this case required the Court of Appeals to determine the actual extent of an easement for a drain that runs across the southern edge of the plaintiff's property. The releases at issue conveyed

rights to fifty-foot strips of land on either side of the centerline of the drain. The fifty-foot strips were legally described, in part, as "land 50 feet wide on each side of a line . . . for construction of drain and deposition of earth. . . ." The releases also contained the following provision:

> **This conveyance** is based upon the above described line of Route and **shall be deemed to include the extreme width of said drain as shown in the survey thereof,** to which reference is hereby made for a more particular measurement, and includes a release for all claims to damages in any way arising from or incident to the opening and maintaining of said drain across said premises, ***and also*** **sufficient ground on either side of the center line of said drain for the construction thereof and for the deposit of the excavations therefrom.** [Emphasis added.]

In interpreting this provision, the Court of Appeals determined that the easement actually extends beyond the fifty-foot strips explicitly described in the releases based on the "and also" language. The Court of Appeals explained, in part:

> A "survey" can be "[t]he measuring of a tract of land and its boundaries and contents." *Black's Law Dictionary (8th ed)*. The drafters of the releases would have understood the formal property descriptions to be the "surveys" referenced in the above language.
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> * * *
>
> If the "and also" clause was merely a reference back to the same fifty-foot strips, the clause would be surplusage or nugatory; it would also make little grammatical sense. Thus, the language "and also" unambiguously signifies the conveyance of something beyond or in addition to the formally-described fifty-foot strips. [Unpub op at 6.]

The Court of Appeals did not clearly articulate how it arrived at this conclusion. On remand, the Court of Appeals shall reconsider whether the easement actually extends beyond the fifty-foot strips explicitly described in the releases by addressing: (1) the basis for the conclusion that "[t]he drafters of the releases would have understood the formal property descriptions to be the 'surveys' referenced in the above language[;]" (2) whether the "formal property descriptions" of the fifty-foot strips referred only to "the extreme width of said drain as shown in the survey thereof," and, if so, the basis for this determination; (3) whether "the 'and also' clause was merely a reference back to the same fifty-foot strips," and, if so, the basis for this determination; (4) whether the inclusion of the phrase "for construction of drain and deposition of earth" within the "formal property descriptions" contemplates land other than

the drain itself located within the fifty-foot strips that was reserved for maintenance; and (5) whether "and also" merely conjoined "the extreme width of said drain as shown in the survey thereof" with "sufficient ground on either side of the center line of said drain" in describing in plain language what the conveyance included.

In reconsidering whether the easement actually extends beyond the fifty-foot strips explicitly described in the releases, the Court of Appeals shall also reconsider those claims impacted by this determination that were disposed of on summary disposition pursuant to MCR 2.116(C)(7) and (8). The Court of Appeals should not conduct an analysis of those claims under MCR 2.116(C)(10). See *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152 (2019). We do not retain jurisdiction.

PEOPLE v KUHNS, No. 161012; Court of Appeals No. 352179. 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 September 30, 2020:

CHARTER COUNTY OF WAYNE v WAYNE COUNTY RETIREMENT COMMISSION, No. 160049; Court of Appeals No. 339714.

PEOPLE v HUDSON, No. 160415; Court of Appeals No. 342001.

EL-KHALIL v OAKWOOD HEALTH CARE INC, No. 160721; Court of Appeals No. 329986.

LE GASSICK v UNIVERSITY OF MICHIGAN REGENTS, No. 160736; reported below: 330 Mich App 487.

BERNSTEIN, J., did not participate due to a familial relationship.

COWAN v STATE OF MICHIGAN DEPARTMENT OF CORRECTIONS, No. 160790; Court of Appeals No. 345602.

PEOPLE v MORENCE, No. 161101; Court of Appeals No. 344527.

KOJAIAN MANAGEMENT CORPORATION AND AFFILIATES v DEPARTMENT OF TREASURY, No. 161116; Court of Appeals No. 344697.

In re PML, MINOR and *In re* SRL, MINOR, Nos. 161719 and 161720; Court of Appeals Nos. 351143 and 351144.

REED v REED, No. 161936; Court of Appeals No. 353813.

REED v REED, No. 162042; Court of Appeals No. 353935.

Rehearing Denied September 30, 2020:

BISIO v THE CITY OF THE VILLAGE OF CLARKSTON, No. 158240; opinion at 506 Mich 37.

VIVIANO, J. (*dissenting*). I would grant defendant-appellee's motion for rehearing and vacate the Court's opinion in order to allow the parties

and amici curiae an opportunity to address the merits of the new legal theory adopted by the majority opinion.

Summary Disposition October 2, 2020:

SCOLA V JPMORGAN CHASE BANK, No. 158903; Court of Appeals No. 338966. On December 11, 2019, the Court heard oral argument on the application for leave to appeal the October 4, 2018 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, vacate the January 31, 2017 order of the Wayne Circuit Court, and remand this case to the Wayne Circuit Court for further proceedings.

The plaintiff was injured in a head-on collision after his mother, the driver of the vehicle in which he was riding, turned the wrong way onto a one-way street when exiting the defendants' parking lot. The plaintiff sued the defendants in part for negligence, asserting that the bank had a duty to warn exiting drivers that they were turning onto a one-way street. The circuit court granted summary disposition to the defendants under MCR 2.116(C)(10), finding that the action sounded in premises liability and concluding that the defendants did not have a duty to post warning signs because any danger associated with turning the wrong way on a one-way road was open and obvious. The Court of Appeals affirmed the circuit court in a split decision.

The issue we consider is whether the plaintiff's complaint sounded in premises liability or ordinary negligence. When determining the gravamen of an action, we must read the whole complaint and look beyond its labels to determine the nature of the claim. *Altobelli v Hartmann*, 499 Mich 284, 299 (2016). This plaintiff's complaint sounds in ordinary negligence.

Premises liability is conditioned on the presence of both possession and control over the land. *Merritt v Nickelson*, 407 Mich 544, 552 (1980). "The invitor's legal duty is to exercise reasonable care to protect invitees from an unreasonable risk of harm *caused by a dangerous condition of the land* that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609 (1995) (quotation marks and citations omitted; emphasis added). Here, the dangerous condition that caused the plaintiff's injury—oncoming one-way traffic on a public street—was not on the defendants' land. As such, the defendants owed no duty under premises-liability principles to protect the plaintiff from that hazard.

The gravamen of the plaintiff's complaint is that the defendants assumed responsibility for placing traffic control signs on the bank's premises but failed to warn exiting motorists that the parking lot exit required motorists to turn onto a one-way street. In essence, the plaintiff claimed that although he was injured by a hazard outside of the defendants' land, the defendants nevertheless owed or assumed a duty

to warn him of that danger. If such a duty exists, an issue we do not reach, it arises under principles of ordinary negligence, not premises liability.

ZAHRA, J. (*dissenting*). I respectfully dissent. I agree with the Court of Appeals' conclusion that plaintiff's claim sounds in premises liability given that plaintiff's allegations pertain to defendant bank's failure as a premises owner to make its premises safe. The Court of Appeals majority appropriately rejected plaintiff's argument that the open and obvious danger doctrine does not apply because the subject one-way road was not located on the bank's premises by reasoning that "the alleged dangerous condition, the lack of warning signage at the exit driveway, was located (or should have been located, according to plaintiff) on the bank's premises." *Scola v JP Morgan Chase Bank*, unpublished per curiam opinion of the Court of Appeals, issued October 4, 2018 (Docket No. 338966), p 4. Accordingly, I agree with the majority that "application of the open and obvious doctrine to the lack of signage regarding the one-way nature of Michigan Avenue is not precluded." *Id*. Because I further agree with the majority's conclusion that the lack of signage indicating the one-way nature of Michigan Avenue was open and obvious and that no special aspects of the parking lot removed it from the open and obvious danger doctrine, I would deny leave to appeal.

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

VIVIANO, J. (*dissenting*). I dissent from the majority's decision because I believe that plaintiff's complaint sounds in premises liability. And, under that cause of action, I would hold that defendants are entitled to summary disposition under MCR 2.116(C)(10).

When plaintiff filed his complaint against defendants for "negligence," he did not specify whether he was seeking to recover under ordinary negligence or premises liability. In determining which claim plaintiff has raised, we must look past the labels to the gravamen of the complaint. *Trowell v Providence Hosp & Med Ctrs, Inc*, 502 Mich 509, 529-530 (2018) (opinion by VIVIANO, J.). According to the majority, the nub of a premises-liability claim is that a dangerous condition exists on the defendant's land. Because the alleged hazard here only adjoined defendants' property, the majority concludes that the complaint sounds in ordinary negligence. I disagree.

It is true that, in this context, ordinary negligence claims concern "the overt acts of a premises owner on his or her premises," whereas an allegation of "injury by a condition of the land . . . sounds exclusively in premises liability." *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913, 914 (2010). But here, plaintiff is not focused on defendants' actions. Rather, the gist of the claim is that defendants failed to act; specifically, they failed to warn that the adjacent street, Michigan Avenue, was one-way. The allegations concern what defendants should have done on their land: "post signs and other traffic control devices and warnings in the parking lot/driveway where it meets West Michigan Avenue and in such other positions and places as to give adequate warning of the dangers created when a driver is entering the roadway from its private driveway" and "design, construct[], and maintain . . . its parking

lot/driveway where it meets West Michigan Avenue so that entering West Michigan Avenue would be reasonably safe and convenient for public travel."

This emphasis on defendants' omission removes this claim from the realm of ordinary negligence. "It is axiomatic that there can be no tort liability unless [a] defendant[] owed a duty to [a] plaintiff." *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660 (2012) (alterations in original; quotation marks and citations omitted); see also *Composto v Albrecht*, 328 Mich App 496, 500 (2019) ("Under ordinary-negligence principles, a defendant owes a plaintiff a duty to exercise ordinary care under the circumstances."). The negligence standard does not generally impose a duty to act, but only requires that individuals use reasonable care when they do act. 2 Restatement Torts, 2d, § 314, p 116; 2 Restatement Torts, 3d, Physical & Emotional Harm, § 37, comment *c*, p 3.[1] As we have stated, "It is a basic principle of negligence law that, as a general rule, 'there is no duty that obligates one person to aid or protect another.' " *Bailey v Schaaf*, 494 Mich 595, 604 (2013) (citation omitted); see also 2 Dobbs, Hayden & Bublick, Torts (2d ed), § 405, p 651 ("Absent special relationships or particular circumstances or actions, a defendant is not liable in tort for a pure failure to act for the plaintiff's benefit."). An exception to this general rule is that the "common law imposes a duty of care when a special relationship exists." *Bailey*, 494 Mich at 604. One such relationship is that between landowners, including merchants, and their invitees. *Id*.; see also *United Scaffolding, Inc v Levine*, 537 SW3d 463, 471 (Tex, 2017) ("[N]egligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury, while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe.") (quotation marks and citations omitted).

Plaintiff's claim is premised on this relationship. He does not allege that defendants took any negligent *action* that created a risk of harm. Rather, at base, he says that defendants' failure to act caused the harm. But this assumes that defendants had some duty to act. The only possible source of such a duty would be plaintiff's status as an invitee on defendants' land.[2] In other words, the danger arose from defendants'

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[1] The Third Restatement jettisons the "act" and "omission" terminology but continues to focus on "whether the actor's entire conduct created a risk of harm." 2 Restatement Torts, 3d, Physical & Emotional Harm, § 37, comment *c*; cf. *Moning v Alfono*, 400 Mich 425, 438-439 (1977) (explaining that an actor may be liable if his or her conduct "create[s] a risk of harm to the victim" and the injury caused was "foreseeable").

[2] I will assume, like the trial court and Court of Appeals, that plaintiff had implied consent to enter the parking lot and was therefore an invitee. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597 (2000). Because invitees are owed "the highest level of protection under premises liability law," it is unnecessary to determine whether plaintiff falls within some other class of visitor. *Id*. at 597.

pure omission. And although the majority suggests the dangerous condition was the one-way street, plaintiff does not assert that the street, by itself, constitutes such a hazard. Rather, the street became hazardous because of things defendants failed to place on their own land such as signals or markings. For these reasons, plaintiff's claim sounds in premises liability, not ordinary negligence. And, because defendants had no duty to act, any ordinary negligence claim is doomed to fail.

My characterization of the complaint also finds support in the numerous cases and treatises that have addressed similar claims under a premises-liability framework. These sources likewise show why that claim fails here. The "traditional view—still the decided majority—weighs against imposing a duty to warn or otherwise protect tenants from dangers of traffic on adjacent streets over which the landlord has no right of possession, management, or control." *Guerrero v Alaska Housing Fin Corp*, 123 P3d 966, 971-972 (Alas, 2005) (quotation marks and citation omitted).[3] And, with regard to public highways specifically, the duty to maintain safety generally rests with the government rather

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[3] See, e.g., *Galindo v Clarkstown*, 2 NY3d 633, 636 (2004) (recognizing the general principle of New York law that "an owner owes no duty to warn or to protect others from a defective or dangerous condition on neighboring premises, unless the owner had created or contributed to it"); *Sisk v Union Pacific R Co*, 138 SW3d 799, 808 (Mo App, 2004) ("[The landowner] has no such duty [to warn of a dangerous condition on adjacent property] and is not liable for allegedly dangerous conditions on adjacent property that it does not own or exclusively possess or control."); *McMann v Benton Co, Angeles Park Communities, Ltd*, 88 Wash App 737, 742-743 (1997) (noting this to be the majority rule and collecting cases); *Cruet v Certain-Teed Corp*, 639 A2d 478, 482 (Pa Super, 1994) (stating that a defendant business has "no duty to control the movement of vehicles on the public highway or warn of dangerous conditions thereon"); *MacGrath v Levin Props*, 256 NJ Super 247, 253 (1992) (reasoning that a defendant landowner owes "no duty to maintain the public way or warn pedestrians of the apparent dangers of crossing this well-travelled highway"); *Jump v Bank of Versailles*, 586 NE2d 873 (Ind App, 1992) (concluding that a business owner owed no duty to an invitee when the dangerous condition occurred outside the owner's land); *Owens v Kings Supermarket*, 198 Cal App 3d 379, 386 (1988) ("The courts . . . have consistently refused to recognize a duty to persons injured in adjacent streets or parking lots over which the defendant does not have the right of possession, management and control."); *McKinney v Hartz & Restle Realtors, Inc*, 31 Ohio St 3d 244, 250 (1987) ("No common-law provision or Ohio statute imposes a duty on a landlord to fence rental property to protect tenants from traffic on adjacent streets or roads."); 65A CJS, Negligence, § 410, p 212 ("An owner or occupier of land generally owes no duty to warn or protect others from a dangerous condition on adjacent property unless the owner creates or contributes

than private landowners. 2 Restatement Torts, 2d, § 349, p 230; MCL 224.21(2); MCL 691.1402. The minority rule, by contrast, applies a "totality of the circumstances" test that "considers possession, management, and control over conditions at the accident site to be relevant factors but does not make their absence dispositive as a matter of law." *Guerrero*, 123 P3d at 972 (quotation marks and citation omitted); cf. *Wilmington Country Club v Cowee*, 747 A2d 1087, 1092 (Del, 2000) (holding that the duty to provide safe ingress and egress encompassed "the duty to warn or protect against hazards on adjacent property").[4]

This Court has not yet weighed in on the split. Like the majority of jurisdictions, however, we have generally recognized that the determinative factor justifying and defining the scope of premises liability is the "control that a possessor of premises . . . exerts over the premises." *Bailey*, 494 Mich at 604. Consequently, the duty extends to "areas over which [the defendants] exert control." *Id*. at 605. We have also recognized that landowners have a duty to provide safe entry onto and exit from their property. See *Perl v Cohodas, Peterson, Paoli, Nast Co*, 295 Mich 325, 330 (1940). But we have never suggested that this duty requires warnings about adjacent property—in fact, we have indicated the opposite. *Woods v White Star Line*, 160 Mich 540, 544 (1910) ("[O]ne inviting another upon his premises must use care to prevent injuries, by keeping the premises in a reasonably safe condition, and to keep in repair all ways for ingress and egress which it holds out or recognizes as such *upon its own grounds* to one who uses it in reliance upon a belief that the company has provided or so holds it out.") (emphasis added). The Court of Appeals has declined to find a duty when the hazardous condition—a tree obscuring the view of a highway—was located just off the defendant's property and the defendant had not undertaken any responsibility for maintaining the tree. *Stevens v Drekich*, 178 Mich App 273 (1989); compare *Langen v Rushton*, 138 Mich App 672 (1984)

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to such a condition, or the owner has sufficient control over the adjoining property."); 62A Am Jur 2d, Premises Liability, § 579, p 190 ("[T]he owner of premises adjacent to a dangerous condition not caused or maintained by the landowner and over which the landowner has no control has no duty to erect fencing or provide warnings so as to deter persons from entering a third party's property.").

[4] Certain cases focus more specifically on whether a landowner's duty to provide safe entry and exit to the premises includes a duty to warn of hazards on adjoining property. See, e.g., *Wilmington Country Club*, 747 A2d at 1092 (finding such a duty to warn); *Sizemore v Templeton Oil Co, Inc*, 724 NE2d 647, 653 (Ind App, 2000) (holding that the duty as to ingress and egress applies only to conditions "created by or related to a defendant's use of his own property"). But even courts following the minority rule in such circumstances will not find a duty with regard to open and obvious hazards on adjacent lands. See *Wilmington Country Club*, 747 A2d at 1092.

(finding a duty for an accident on an adjacent highway that resulted from a tree located on the defendant's property).

We need not resolve the issue in this case because, even under the minority approach, the duty applies only to conditions that are not obvious. See *Polak v Whitney*, 21 Mass App 349, 353 (1985); *Wilmington Country Club*, 747 A2d at 1092; 65A CJS, Negligence, § 525, p 348. Our caselaw shows that the open-and-obvious doctrine would have the same effect in Michigan. We have, for example, applied the doctrine in a case involving a dangerous condition at the entry to a fitness center, noting that "[t]he possessor of land 'owes no duty to protect or warn' of dangers that are open and obvious . . . ." *Hoffner v Lanctoe*, 492 Mich 450, 460 (2012) (citation omitted).

In the present case, applying the majority rule would mean that defendants owed no duty unless they created, contributed to, or controlled the condition causing the risk of harm. Plaintiff has made no showing that defendants had control over the one-way nature of Michigan Avenue or somehow created or maintained that condition. Even under the minority rule, plaintiff's claim is barred by the open-and-obvious doctrine.

"Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner*, 492 Mich at 461. Here, the one-way nature of Michigan Avenue was undoubtedly open and obvious. There were white dashed lines on the roadway, not yellow ones. The absence of a middle yellow line would indicate that the road was one-way. In addition, plaintiff's mother had just driven past this stretch of Michigan Avenue at its intersection with Wayne Road before she entered and exited defendants' parking lot. One-way signs were posted at that intersection, and a reasonably prudent person who had already passed through that intersection would have seen those signs.[5] Thus, plaintiff's claim could not survive the open-and-obvious doctrine.

In sum, plaintiff's claim fails as a matter of law and defendants are entitled to summary disposition under MCR 2.116(C)(10). Properly interpreted, the complaint sounds in premises liability. In characterizing the claim as one for ordinary negligence, the majority seems to acknowledge that a premises-liability claim would fail on these facts. By resolving the case in this manner, however, the majority gives short shrift to the complicated issues that arise in premises-liability cases involving adjacent lands. The majority recognizes that possession and

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[5] The open-and-obvious doctrine does not apply when "special aspects" make a condition unreasonably dangerous of effectively unavoidable. *Hoffner*, 492 Mich at 461-462. A common condition, however, will not be considered uniquely dangerous. *Id*. at 463. No special aspects were present here. One-way streets are common enough that they do not pose uniquely dangerous conditions. And the condition was avoidable. Plaintiff's mother could have either turned the correct way onto the street or taken another route.

control of the dangerous conditions generally determine whether a duty exists under a premises-liability theory. But its brief analysis could be read to foreclose the possibility that the duty extends further, whether due to a landowner's creation or maintenance of a risk outside his or her premises or by virtue of the duty to provide safe ingress and egress. There is no need to render such a broad decision in this case, as plaintiff's claim fails under any existing conception of the duty.

Because this is a premises-liability claim, I see no reason to remand it for further consideration of plaintiff's ill-fated ordinary-negligence allegations. As shown above, the cases and concepts relevant to this case all involve premises liability in a context we have not yet fully addressed. Forcing the trial court to sift through these matters of first impression—which have been fully and fairly presented in this Court—is a confusing outcome and a poor use of judicial resources.

For these reasons, I respectfully dissent.

Oral Argument Ordered on the Application for Leave to Appeal October 2, 2020:

PEOPLE V STOCK, No. 160968; Court of Appeals No. 340541. On order of the Court, the application for leave to appeal the December 26, 2019 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1).

We further order the Wayne Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint attorney Ian Kierpaul, if feasible, to represent the defendant in this Court. If this appointment is not feasible, the trial court shall, within the same time frame, appoint other counsel to represent the defendant in this Court.

The appellant shall file a supplemental brief within 42 days of the date of the order appointing counsel addressing whether: (1) under *People v Feezel*, 486 Mich 184, 204-212 (2010), the prosecution failed to present sufficient evidence that the defendant had cocaine in her system at the time of the crash based only on the presence of a cocaine metabolite in the defendant's urine; and (2) defense counsel was ineffective for failing to challenge the use of cocaine metabolites to establish intoxication. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). 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. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. 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 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.

Leave to Appeal Denied October 2, 2020:

In re RJ WHISMAN, MINOR, No. 161127; Court of Appeals No. 349933.

MCCORMACK, C.J. (*dissenting*). I would peremptorily reverse the Court of Appeals and vacate the trial court's order terminating the respondent's parental rights. This father looks a lot like the father in *In re Mason*, 486 Mich 142 (2010), a case where we held that the trial court had clearly erred by terminating the respondent's parental rights.

We said in *Mason* that "a parent's past failure to provide care because of his incarceration . . . is not decisive." *Mason*, 486 Mich at 161. In concluding that the respondent wouldn't be able to provide proper care and custody within a reasonable time considering the child's age, I believe the referee focused unduly on his incarceration, contrary to *Mason*. The referee also relied on the respondent's extensive criminal record, but in *Mason* we also stated that "just as incarceration alone does not constitute grounds for termination, a criminal history alone does not justify termination." *Id*. at 165.

Once paternity was conclusively established, the respondent urged the Department of Health and Human Services to place the child (RW) with his mother, executed a delegation of parental authority and kept it current throughout the proceedings, provided his mother with all the documentation needed to care for RW, and spoke to RW by telephone on several occasions. He also participated in services in prison. If incarceration alone is insufficient to justify termination of parental rights, as we held in *Mason*, it isn't clear to me there is much more this respondent could have done to provide proper care and custody for RW under the circumstances.

At the time of the termination hearing in December 2018, the respondent asserted he would be able to provide proper care and custody for RW in 12 months, assuming he was paroled in October 2019.[1] The referee nonetheless concluded that the respondent would be unable to provide proper care and custody for RW within a reasonable time because "[the lawyer-guardian ad litem (LGAL)] pointed out that, by the time that [the respondent] might be in a position to even think about providing care for [RW], she'd be five years old, perhaps older." But I see no place in the record where the LGAL said that, and to the extent that the referee relied on the respondent's criminal history and substance abuse to conclude that he couldn't provide care and custody for RW within a reasonable time, the referee's conclusions seem like mere speculation. See *Mason*, 486 Mich at 162 (concluding that "the court clearly erred by concluding, on the basis of [a foster-care worker's]

[1] Respondent was in fact paroled in October 2019.

largely unsupported opinion, that it would take at least six months for respondent to be ready to care for his children after he was released from prison").

Finally, the referee failed to give RW's placement with a relative proper weight as a factor counseling against termination. See *Mason*, 486 Mich at 163-164; MCL 712A.19a(8)(a).[2] Indeed, if anything the referee appears to have weighed the relative placement *in favor of termination* based on its observation that "[RW] has permanence with her paternal grandmother. It is that permanence that she deserves to have continued and it's on the [sic] basis that the Court finds that it would be in [RW]'s best interest for [the respondent's] parental rights to be terminated."

For these reasons, I respectfully dissent from the Court's order denying leave to appeal.

CAVANAGH, J., joins the statement of MCCORMACK, C.J.

Reconsideration Denied October 9, 2020:

HART V STATE OF MICHIGAN, No. 159539; Court of Appeals No. 338171. Leave to appeal denied at 506 Mich 857.

CLEMENT, J. (*dissenting*). I dissent from the Court's decision to deny plaintiff's motion for reconsideration. While I would not grant peremptory relief to plaintiff, I would order briefing and schedule argument on his motion. He argues that the Court of Appeals lacked jurisdiction to dispose of this case because the defendant never filed an application for leave to appeal and, therefore, the Court of Appeals never granted leave to appeal, pointing to the reasoning I articulated in my statement concurring with our prior disposition. See *Hart v Michigan*, 506 Mich 857 (2020) (CLEMENT, J., concurring). The premise of his motion is that a court's lack of jurisdiction can be raised at any time and that he was denied "a meaningful opportunity to argue that leave should not be granted." I disagree with this latter assertion; in the Court of Appeals, plaintiff had the option to file a motion to dismiss under MCR 7.211(C)(2)(a) for lack of jurisdiction, and had he done so, he would have been heard on the matter. Moreover, it is only a defect in *subject-matter* jurisdiction that can be raised at any time; a defect in *personal* jurisdiction can be waived. See *People v Phillips*, 383 Mich 464, 469-470 (1970) ("Jurisdiction over the subject matter, of course, could not be conferred by consent or waiver, but no reason appears why an accused could not subject himself to the court's personal jurisdiction."). So near as I can tell, the only time the Court of Appeals has examined this jurisdictional question at any length, it has concluded that an application for leave to appeal is more akin to a failure of personal jurisdiction than of subject-matter jurisdiction, and the jurisdictional defect is therefore waived if the appellee does not bring the defect to the Court's attention. See *Guzowski v Detroit Racing Ass'n*, 130 Mich App 322,

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[2] When *Mason* was decided, this provision was codified at MCL 712A.19a(6)(a). See 2008 PA 200.

325-326 (1983). Under this reasoning, plaintiff's failure to file a motion to dismiss could be construed as a waiver of the jurisdictional defect. However, because it was issued before November 1, 1990, *Guzowski* is not binding on the Court of Appeals. See MCR 7.215(J)(1). Moreover, *Guzowski* was decided nearly two decades before this Court created the possibility of what we might call an "interlocutory appeal of right" limited solely to the issue of whether a governmental defendant should be protected by governmental immunity. See 466 Mich xc (2002). In any event, *Guzowski* is not a decision of this Court and is not binding on us. See *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 23 (2004). Consequently, while I do not believe the answer here is clear enough to grant peremptory relief to plaintiff, I believe his position is sufficiently colorable that we should order briefing and hold argument on this motion.

Motion to Stay Precedential Effect of Opinion Denied October 12, 2020:

In re CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, No. 161492. On order of the Court, the motion for immediate consideration is granted. The motion to stay the precedential effect of the October 2, 2020 opinion is considered, and it is denied.

MCCORMACK, C.J. (*concurring*). While I disagreed with the majority's holding the Emergency Powers of the Governor Act, MCL 10.31 *et seq*., unconstitutional for the reasons I've already expressed, see *In re Certified Questions from the United States Dist Court*, 506 Mich 332, 421 (2020) (MCCORMACK, C.J., concurring in part and dissenting in part), I concur in the order denying the motion to stay that decision because I do not believe the Court has the authority to grant the remedy the Governor requests. The federal district court certified to us two questions of Michigan law. We answered those questions and sent that answer to the district court, as our rules require. See MCR 7.308(A)(5). Our court rules do not provide a way for any party to the lawsuit in the district court to challenge our answer in this Court.[1] Respectfully, I believe that the defendants' motion (and the dissent's view that the majority should have delayed the "precedential effect" of our answer to the district court) relies on a misunderstanding—there simply is no "precedential effect" for this Court to stay.[2]

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[1] The Governor and the Attorney General cite MCR 7.315(C)(2)(a) and a related internal operating procedure, but as the Legislature notes, that provision contains this Court's mandate rule. This is a certified questions case, so no order or judgment is entered.

[2] And even if it were possible for us to grant the relief sought by the defendants, to do so in this case would be a purely academic exercise given the majority's decision in *House of Representatives v Governor*, 506 Mich 934 (2020), to reverse the Court of Appeals and give this Court's judgment immediate effect.

CAVANAGH, J., joins the statement of MCCORMACK, C.J.

BERNSTEIN, J. (*dissenting*). A majority of this Court has voted to deny defendants' motion to delay the precedential effect of this Court's opinion until October 30. Assuming without deciding that we cannot grant the motion filed by defendants, I would have preferred to exercise our discretion and clarify that when this Court's opinion originally entered on October 2, it should not have had immediate precedential effect.

I agree with defendants that a delay here could only allow the Governor and the Legislature the time to better prepare for an appropriate transition. Importantly, one of the executive orders that will be impacted by this Court's opinion concerns unemployment benefits. See Executive Order No. 2020-76. Even assuming that the Legislature will be able to respond quickly, the Governor notes that up to 830,000 active claimants may lose their benefits once this Court's opinion takes effect. This represents a significant potential disruption to the livelihoods of the people of Michigan in a time of great public crisis. See also Executive Order No. 2020-125 (extending protections under the Workers' Disability Compensation Act of 1969, MCL 418.101 *et seq*., to COVID-19-response employees). Although I note Chief Justice MCCORMACK's concern that there is no precedential effect to be stayed here, I would have preferred to delay the precedential effect of this Court's opinion both here and in *House of Representatives v Governor*, 506 Mich 934 (2020), in order to prevent confusion and to ensure that the Governor and the Legislature have an adequate amount of time to coordinate their efforts and guard against such unintended consequences.

Motion for Preemptory Reversal Granted October 12, 2020:

HOUSE OF REPRESENTATIVES AND SENATE V GOVERNOR, No. 161917; reported below: 333 Mich App 325. On order of the Court, the motions for immediate consideration are granted. The motion for peremptory reversal is considered and, for the reasons stated in this Court's decision in *In re Certified Questions from the United States Dist Court*, 506 Mich 332 (2020), is granted. We reverse that part of the judgment of the Court of Appeals holding that the Governor possesses the authority to issue executive orders under the Emergency Powers of the Governor Act, MCL 10.31 *et seq*. As stated in *In re Certified Questions*, the Emergency Powers of the Governor Act is incompatible with the Constitution of our state, and therefore, executive orders issued under that act are of no continuing legal effect. This order is effective upon entry. MCR 7.315(D). We remand this case to the Court of Claims for the immediate entry of an order granting declaratory relief consistent with this order.

It should again be emphasized, see *In re Certified Questions*, 506 Mich at 338 n 1, that our decision today, like our decision in *In re Certified Questions*, leaves open many avenues for our Governor and Legislature to work together in a cooperative spirit and constitutional manner to respond to the COVID-19 pandemic.

MCCORMACK, C.J. (*dissenting*). For the reasons already set forth in my opinion concurring in part and dissenting in part in *In re Certified Questions from the United States Dist Court*, 506 Mich 332, 421 (2020) (MCCORMACK, C.J., concurring in part and dissenting in part), I dissent from the majority's order reversing the Court of Appeals in this case. I do not believe the Emergency Powers of the Governor Act, MCL 10.31 *et seq*., is an unconstitutional delegation of legislative power under any reasonable reading of our (or the United States Supreme Court's) nondelegation jurisprudence. Indeed, that's why the majority had to rely so heavily on Justice Gorsuch's nonbinding dissenting opinion in *Gundy v United States*, 588 US ____, ____; 139 S Ct 2116, 2131 (2019) (Gorsuch, J., dissenting).

Finally, while I do not believe there is any rule that permits the Court to delay its answer to the certified questions, see *In re Certified Questions from the United States Dist Court*, 506 Mich 933 (2020) (MCCORMACK, C.J., concurring), I would not give the decision in this separate case immediate effect. I share the majority's hope that the Governor and Legislature will work cooperatively, and as a result, I would not deviate from our regular procedure to rush the enforcement of this order. I respectfully dissent.

CAVANAGH, J., joins the statement of MCCORMACK, C.J.

BERNSTEIN, J. (*dissenting*). For the reasons stated in my dissenting statement in *In re Certified Questions from the United States Dist Court*, 506 Mich 934 (2020), I would decline to give the Court's order in this case immediate effect. Instead, consistently with my response to the motion to delay filed by defendants in *In re Certified Questions*, I would exercise our discretion to stay the precedential effect of our decision until October 30.

Leave to Appeal Before Decision by the Court of Appeals Denied October 14, 2020:

PEOPLE v WINBURN, No. 161963; Court of Appeals No. 354482.

Summary Disposition October 16, 2020:

PEOPLE v REGINALD DAVIS, No. 162058; Court of Appeals No. 354927. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to that court for consideration as on reconsideration granted. The Court of Appeals erred in its analysis of the trial court's order granting the defendant's motion for pretrial release. The trial court acknowledged MCL 765.5, which provides that "[n]o person charged with treason or murder shall be admitted to bail if the proof of his guilt is evident or the presumption great." But the trial court declined to apply this statute based on its conclusion that MCR 6.106(B)(1)(a) gave it the discretion to grant bond regardless of the strength of the prosecution's case. Consequently, it did not determine whether "the proof of his guilt is evident or the presumption great." In the trial court's view, the statute conflicted

with the court rule, and the court rule prevailed. This was the pivotal issue on appeal, but the Court of Appeals failed to address it. Instead, the Court of Appeals usurped the trial court's role and made its own determination that "the proof of his guilt is evident or the presumption great." MCL 765.5.

We direct the Court of Appeals to address whether MCL 765.5 conflicts with MCR 6.106(B)(1) and, if it does, whether the statute prevails over the court rule. See, e.g., *People v Watkins*, 491 Mich 450 (2012); *McDougall v Schanz*, 461 Mich 15 (1999). We further direct the Court of Appeals to decide the case on an expedited basis. If the Court of Appeals determines that the statute prevails, then it shall remand the case to the trial court to assess whether "the proof of [the defendant's] guilt is evident or the presumption great" for purposes of MCL 765.5. If the Court of Appeals determines that the court rule prevails, then it shall address whether the trial court abused its discretion by granting the defendant's request for pretrial release. See MCR 6.106(H)(1). We do not retain jurisdiction.

Leave to Appeal Denied October 16, 2020:

CITY OF DEARBORN V BANK OF AMERICA, No. 159691; Court of Appeals No. 339704. On October 8, 2020, the Court heard oral argument on the application for leave to appeal the February 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.

SHAW V SHAW, No. 161945; Court of Appeals No. 352851.

In re THOMAS, MINORS, No. 161957; Court of Appeals No. 352575.

Summary Disposition October 21, 2020:

PEOPLE V GARAY, No. 155886; reported below: 320 Mich App 29. By order of April 5, 2019, the application for leave to appeal the June 8, 2017 judgment of the Court of Appeals and the application for leave to appeal as cross-appellant were held in abeyance pending the decision in *People v Masalmani* (Docket No. 154773). On order of the Court, leave to appeal having been denied in *Masalmani* on May 29, 2020, 505 Mich 1090 (2020), the applications are 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 to the extent that it would broadly preclude sentencing courts from considering, at all, the traditional objectives of sentencing—punishment, deterrence, protection, retribution, and rehabilitation—when considering whether to sentence persons who were under the age of 18 when they committed their offenses to a term of life without parole. Although reliance on other criteria to the exclusion of, or without proper consideration of, *Miller v Alabama*, 567 US 460 (2012), would be an abuse of discretion, mere consideration of the

traditional objectives of sentencing or other factors is not, per se, an error of law. See MCL 769.25(6)-(7).

In addition, in light of *People v Skinner*, 502 Mich 89 (2018), we vacate the remainder of Part IV of the Court of Appeals judgment and we remand this case to that court to determine whether the trial court properly considered the "factors listed in *Miller v Alabama*, [567 US 460] (2012)," MCL 769.25(6), or otherwise abused its discretion. The application for leave to appeal as cross-appellant is denied, because we are not persuaded that the questions presented should be reviewed by this Court. We do not retain jurisdiction.

In re PAROLE OF FREDERICK WILKINS, No. 159936; Court of Appeals No. 344426. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the June 3, 2019 order of the Court of Appeals and the May 16, 2019 order of the Monroe Circuit Court, and we reinstate the decision of the Parole Board. It is the judgment of the Parole Board, not the circuit court, that is entitled to deference in this appeal from the decision of an administrative agency. The Parole Board did not clearly abuse its discretion or violate the Michigan Constitution or any statute, rule, or regulation by granting parole in this case. See MCR 7.118(H)(3). Because the prisoner's parole-guidelines score gave him a high probability of parole, the Parole Board was required to grant parole absent substantial and compelling reasons for a departure. See MCL 791.233e(6). The circuit court erred by ignoring this restriction on the Parole Board's exercise of its discretion. The circuit court also impermissibly substituted its judgment for that of the Parole Board. After interviewing the prisoner and conducting a thorough review of his file, the Parole Board found reasonable assurance that he would not become a menace to society or to the public safety. See MCL 791.233(1)(a). Further, in light of the detailed mental-health aftercare plan prepared on the prisoner's behalf, the Parole Board had "satisfactory evidence that arrangements have been made . . . for the prisoner's care if the prisoner is mentally or physically ill or incapacitated." See MCL 791.233(1)(e). In light of the record evidence, the Parole Board's decision to grant parole fell within the range of principled outcomes and the Court of Appeals erred by affirming the circuit court's reversal of the Parole Board's decision.

WOODS V CITY OF SAGINAW, No. 160597; Court of Appeals No. 344025. 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 the trial court properly granted summary disposition of the plaintiff's quantum meruit claim under MCR 2.116(C)(8). The plaintiff's amended complaint and attached exhibits were legally sufficient to plead his claim that the defendant was unjustly enriched by extra-contractual work completed by the plaintiff. See *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160 (2019); *Wright v Genesee County*, 504 Mich 410 (2019). Moreover, the Court of Appeals clearly erred by engaging in appellate fact-finding when it stated that the plaintiff had been "fairly compensated." We remand this case to the Court of Appeals for consideration of the plaintiff's arguments regarding the trial court's alternative ruling

that granted summary disposition to the defendant under MCR 2.116(C)(10). The plaintiff's motion to disqualify the trial judge is denied, without prejudice to the plaintiff seeking such relief on remand. 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 LADARRIUS WOODS, No. 160948; Court of Appeals No. 344313. 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 trial court's assessment of court costs pursuant to MCL 769.1k(1)(b)(*iii*), and we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *People v Lewis* (Court of Appeals Docket No. 350287). After *Lewis* is decided, the Court of Appeals shall reconsider this case in light of Lewis. 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 ROBERT WILSON, No. 160980; Court of Appeals No. 351185. 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 TERRELL ROBERTS, No. 161263; reported below: 331 Mich App 680. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, vacate the sentence for felon in possession of a firearm, and remand this case to the Ingham Circuit Court for resentencing. As argued by both the prosecution and defense at trial, the factual issue facing the jury in determining the defendant's guilt or innocence of the assault with intent to murder charge was whether he passed a gun to another individual, who it is undisputed then fired the gun into a crowd on a city street. The jury acquitted the defendant of this charge. As such, when the trial court assigned 25 points to Offense Variable 9, MCL 777.39(1)(b), for endangering the crowd, and when it departed upward from the recommended guidelines range in order to deter gun violence on the city's streets, it improperly sentenced the defendant based on acquitted conduct. *People v Beck*, 504 Mich 605 (2019).

PEOPLE v CLEMENTS, No. 161379; Court of Appeals No. 352697. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *People v Lewis* (Court of Appeals Docket No. 350287). After *Lewis* is decided, the Court of Appeals shall reconsider this case in light of *Lewis*. We do not retain jurisdiction.

PEOPLE v BRYAN REYNOLDS, No. 161490; Court of Appeals No. 346665. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. As noted by dissenting Judge GLEICHER, the lawfulness of the stop was uncontested at trial and not subject to dispute. The defendant admitted that he violated two

traffic laws. The officers therefore had reasonable cause to stop the defendant and the stop was lawful. On this record, the defendant cannot establish a reasonable probability that, but for the trial court's failure to instruct the jury on the third element of the resisting and obstructing charge, the result of his trial would have been different. *People v Randolph*, 502 Mich 1, 9 (2018). Accordingly, the Court of Appeals erred in concluding that the defendant was entitled to a new trial.

Leave to Appeal Granted October 21, 2020:

PEOPLE v PROPP, No. 160551; reported below: 330 Mich App 151. The parties shall address: (1) whether the Court of Appeals correctly applied *People v Kennedy*, 502 Mich 206 (2018), when it affirmed the trial court's decision to deny the defendant's motion for expert funding; and (2) whether the Court of Appeals correctly held that evidence of other acts of domestic violence is admissible under MCL 768.27b regardless of whether it might be otherwise inadmissible under the hearsay rules of evidence. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

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.

Leave to Appeal Denied October 21, 2020:

LOPEZ v SEILER, No. 160887; Court of Appeals No. 347902.

PEOPLE v LUKE and PEOPLE v STARR, Nos.161353 and 161354; Court of Appeals Nos. 348530 and 348533.

PEOPLE v ALLEN, No. 162091; Court of Appeals No. 354889.

Summary Disposition October 27, 2020:

In re GUARDIANSHIP OF ETHAN PREPODNIK, MINOR, No. 161503; Court of Appeals No. 352041. 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 DERRICK SMITH, No. 161577; Court of Appeals No. 353503. On order of the Court, the motions to hold application in abeyance and stay proceedings are denied. The application for leave to appeal the May 12, 2020 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 whether the defendant's delayed application for leave to appeal was subject to dismissal as

untimely filed pursuant to MCR 7.205(G). We note that the defendant claimed in his delayed application for leave to appeal that he was appealing the May 2, 2019 judgment of sentence and the trial court's November 13, 2019 order denying his motion(s) to withdraw his plea. We do not retain jurisdiction.

Leave to Appeal Denied October 27, 2020:

BACON v STATE OF MICHIGAN, No. 158462; Court of Appeals No. 339009.

CLEMENT, J., not participating due to her prior involvement as chief legal counsel for the Governor.

GULLA v STATE OF MICHIGAN, WASHINGTON v GOVERNOR, and GULLA v MICHIGAN, Nos. 159235, 159236, 159237, and 159238; Court of Appeals Nos. 340017, 340275, 340458, and 340890.

CLEMENT, J., not participating due to her prior involvement as chief legal counsel for the Governor.

GULLA v STATE OF MICHIGAN and WASHINGTON v GOVERNOR, Nos. 159239 and 159240; Court of Appeals Nos. 340017 and 340275.

CLEMENT, J., not participating due to her prior involvement as chief legal counsel for the Governor.

NAPPIER v GOVERNOR, No. 159497; Court of Appeals No. 344363.

CLEMENT, J., not participating due to her prior involvement as chief legal counsel for the Governor.

PEOPLE v FRANKS, No. 160450; Court of Appeals No. 341238.

PEOPLE v VOELKERT, No. 160901; Court of Appeals No. 344564.

MACKENZIE v WHITE and MACKENZIE v CROCKETT, Nos. 160955 and 160956; Court of Appeals Nos. 346331 and 347826.

LONEY v SLEEVA, No. 161020; Court of Appeals No. 345655.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

PEOPLE v CHRISTOPHER TAYLOR, No. 161063; Court of Appeals No. 350643.

PEOPLE v BRANDEN PARK, No. 161083; Court of Appeals No. 351642.

PEOPLE v KING, No. 161114; Court of Appeals No. 350373.

PEOPLE v DEON MORGAN, No. 161129; Court of Appeals No. 343809.

PEOPLE v LUTZ, No. 161145; Court of Appeals No. 351597.

PEOPLE v CHESTER MOORE, No. 161162; Court of Appeals No. 352030.

THOMAS v THOMAS, No. 161170; Court of Appeals No. 350695.

PEOPLE v MASON, No. 161173; Court of Appeals No. 352009.

PEOPLE v CLEMMONS, No. 161180; Court of Appeals No. 351053.

PEOPLE v BRANDEN PARK, No. 161184; Court of Appeals No. 352398.

PEOPLE v ALFORD, No. 161190; Court of Appeals No. 351068.

PEGASUS WIND, LLC v JUNIATA TOWNSHIP, Nos. 161241 and 161242; Court of Appeals Nos. 351532 and 351644.

PEOPLE v GONZALES, No. 161247; Court of Appeals No. 346642.

PEOPLE v CLAPPER, No. 161256; Court of Appeals No. 347724.

PEOPLE v BRANSCUMB, No. 161259; Court of Appeals No. 352268.

PEOPLE v HYMAN, No. 161283; Court of Appeals No. 346738.

PEOPLE v GARRETT, No. 161285; Court of Appeals No. 352331.

PEGASUS WIND, LLC v TUSCOLA AREA AIRPORT ZONING BOARD OF APPEALS, No. 161290; Court of Appeals No. 351915.

PEOPLE v GAILAN SMITH, No. 161297; Court of Appeals No. 352492.

PEOPLE v PERNELL, No. 161302; Court of Appeals No. 352679.

PEOPLE v ROCHON, No. 161315; Court of Appeals No. 345850.

PEOPLE v WILBERT SMITH, No. 161316; Court of Appeals No. 352463.

PEOPLE v BALDRIDGE, No. 161318; Court of Appeals No. 348590.

PEOPLE v ALBARATI, No. 161320; Court of Appeals No. 351847.

SMITH v DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY, No. 161327; Court of Appeals No. 352065.

PEOPLE v HOWARD-LARKIN, No. 161329; Court of Appeals No. 343420.

PEOPLE v RUSSELL, No. 161344; Court of Appeals No. 352289.

PEOPLE v JARRIEL REED and PEOPLE v DEVAUN LOPEZ, Nos. 161361, 161362, and 161363; Court of Appeals Nos. 327639, 350189, and 350190.

PEOPLE v MICHAEL WITHERSPOON, No. 161369; Court of Appeals No. 350319.

PEOPLE v AURELIAS MARSHALL, No. 161370; Court of Appeals No. 351587.

PEOPLE v PEATS, No. 161372; Court of Appeals No. 352224.

PEOPLE v TOOMER, No. 161380; Court of Appeals No. 345145.

PEOPLE v BEACH, No. 161381; Court of Appeals No. 346740.

PEOPLE v MAINE, No. 161391; Court of Appeals No. 353111.

PEOPLE v CLEMENS, No. 161399; Court of Appeals No. 352776.

PEOPLE v CURRINGTON, No. 161400; Court of Appeals No. 352436.

PEOPLE v GONZALEZ, No. 161401; Court of Appeals No. 344076.

PEOPLE v WILKINS, No. 161407; Court of Appeals No. 344633.

PEOPLE v FIELDS, No. 161408; Court of Appeals No. 346235.

PEOPLE v TIMOTHY ANDERSON, No. 161413; Court of Appeals No. 352520.

PEOPLE v ANTHONY BOLES, No. 161416; Court of Appeals No. 345630.

PEOPLE v COLEMAN, No. 161419; Court of Appeals No. 352794.

PEOPLE v JOHN WAGNER, No. 161438; Court of Appeals No. 346404.

PEOPLE v RAGLAND, No. 161448; Court of Appeals No. 352691.

PEOPLE v STAGGS, No. 161451; Court of Appeals No. 351303.

GEICO INDEMNITY v DABAJA, No. 161455; Court of Appeals No. 346911.

PEOPLE v AVERY, No. 161459; Court of Appeals No. 344570.

PEOPLE v ANTHONY WILLIAMS, No. 161460; Court of Appeals No. 352555.

HOLMES v HICKS, No. 161463; Court of Appeals No. 346065.

PEOPLE v CONFERE, No. 161478; Court of Appeals No. 345141.

In re ESTATE OF NILA JEAN OXENDER, No. 161488; Court of Appeals No. 346316.

PEOPLE v JENKINS, No. 161502; Court of Appeals No. 353343.

PEOPLE v RUBIO-MARTINEZ, No. 161510; Court of Appeals No. 346101.

PEOPLE v HENRY PERRY, No. 161514; Court of Appeals No. 347634.

In re ZAYQUAN LAQUIN NICHOLS-O'NEAL, MINOR, No. 161516; Court of Appeals No. 348258.

PEOPLE v PERRON, No. 161517; Court of Appeals No. 352178.

PEOPLE v DEANDRE HARRIS, No. 161524; Court of Appeals No. 345136.

In re PETER & LOIS O'DOVERO IRREVOCABLE TRUST, No. 161526; Court of Appeals No. 346896.

PEOPLE v CASEY, No. 161541; Court of Appeals No. 347260.

GREAT LAKES CAPITAL FUND FOR HOUSING LIMITED PARTNERSHIP XII v ERWIN COMPANIES, LLC, Nos. 161547 and 161548; Court of Appeals Nos. 349763 and 349931.

PEOPLE v FELIX DAVIS, No. 161551; Court of Appeals No. 345792.

PEOPLE v CARLISLE, No. 161554; Court of Appeals No. 352375.

PEOPLE v SEAHORN, No. 161562; Court of Appeals No. 346070.

PEOPLE v BAASE, No. 161583; Court of Appeals No. 346163.

PEOPLE v ARTHUR HALL, No. 161585; Court of Appeals No. 344052.

PEOPLE v KELTY, No. 161604; Court of Appeals No. 352571.

BILLIET FAMILY ASSETS, LLC v LEININGER, Nos. 161620 and 161621; Court of Appeals Nos. 343581 and 345181.

PEOPLE v BONNER, No. 161629; Court of Appeals No. 346460.

PEOPLE v GREG WILLIAMS, No. 161635; Court of Appeals No. 346898.

REIKOWSKY v COVENANT MEDICAL CENTER, INC, No. 161653; Court of Appeals No. 347427.

WINANS v FARMERS INSURANCE EXCHANGE, No. 161677; Court of Appeals No. 347872.

PATRU v CITY OF WAYNE, No. 161680; Court of Appeals No. 346894.

DWYER v ASCENSION CRITTENTON HOSPITAL, No. 161685; Court of Appeals No. 347171.

CAPPELL v WILLOW CREEK GOLF DOME, INC, No. 161688; Court of Appeals No. 345812.

PEOPLE v PARKER-SMITH, No. 161708; Court of Appeals No. 346384.

PEOPLE v DONALD TAYLOR, No. 161710; Court of Appeals No. 348596.

PEOPLE v PRUITTE, No. 161713; Court of Appeals No. 346265.

PEOPLE v RAMME, No. 161738; Court of Appeals No. 344905.

BASSETT v MCLAREN PORT HURON, No. 161741; Court of Appeals No. 352487.

BASSETT v MCLAREN PORT HURON, No. 161743; Court of Appeals No. 352119.

PEOPLE v PARCHMAN, No. 161747; Court of Appeals No. 341726.

PEOPLE v FULKERSON, No. 161791; Court of Appeals No. 346888.

PEOPLE v CALLEAUX, No. 161795; Court of Appeals No. 352895.

PEOPLE v BLAMER, No. 161799; Court of Appeals No. 345907.

PEOPLE v FOY, No. 161821; Court of Appeals No. 346984.

CHOUDHARY v GENERATIONS OB-GYN CENTERS, PC, No. 162018; Court of Appeals No. 354023.

Reconsideration Denied October 27, 2020:

JARRETT-COOPER v UNITED AIRLINES, INC, No. 156913; Court of Appeals No. 331383. Leave to appeal denied at 502 Mich 937.

JARRETT-COOPER v UNITED AIRLINES, INC, No. 156915; Court of Appeals No. 333836. Leave to appeal denied at 502 Mich 937.

PEOPLE v STEVEN JACKSON, No. 160586; Court of Appeals No. 348803. Leave to appeal denied at 505 Mich 1133.

PEOPLE v GREEN, No. 160688; Court of Appeals No. 350713. Leave to appeal denied at 505 Mich 1133.

PEOPLE v LOPP, No. 160782; Court of Appeals No. 350561. Leave to appeal denied at 506 Mich 852.

PEOPLE v AQUARIUS JOHNSON, No. 160785; Court of Appeals No. 350309. Leave to appeal denied at 506 Mich 852.

MAJOR v CITY OF ECORSE, No. 160883; Court of Appeals No. 349769. Leave to appeal denied at 506 Mich 853.

PEOPLE v HUDGENS, No. 160963; Court of Appeals No. 350914. Leave to appeal denied at 506 Mich 853.

HOUTHOOFD v OAKS CORRECTIONAL FACILITY WARDEN, No. 160965; Court of Appeals No. 351654. Leave to appeal denied at 506 Mich 853.

PEOPLE v RODNEY BROWN, No. 160984; Court of Appeals No. 346401. Leave to appeal denied at 505 Mich 1134.

PEOPLE v JERRY ANDERSON, No. 160993; Court of Appeals No. 350687. Leave to appeal denied at 506 Mich 853.

WENNERS v CHISHOLM and SHAUGHNESSY v UNKNOWN OWNERS OF PROPERTY, Nos. 161037 and 161038; Court of Appeals Nos. 345830 and 345831. Leave to appeal denied at 506 Mich 853.

Summary Disposition October 28, 2020:

PEOPLE v WHITLOCK, No. 159843; Court of Appeals No. 341560. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part II and Part III-F of the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration. On remand, the Court of Appeals is to determine whether: (1) the admission of other-act evidence pursuant to MCL 768.27a and *People v Watkins*, 491 Mich 450 (2012), may have confused jurors regarding the nature of the charged acts, and if so, whether the potential for confusion of the issues substantially outweighed the evidence's probative value, MRE 403; and (2) the prosecutor's use of the forensic interviewer's testimony entitles the defendant to a new trial pursuant to *People v Thorpe*, 504 Mich 230 (2019). 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 DANIELS, No. 160829; Court of Appeals No. 350446. 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 RYAN BAILEY, No. 160850; Court of Appeals No. 347548. 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.

GRAHAM v ALTADONNA, No. 161301; Court of Appeals No. 351516. 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.

Oral Argument Ordered on the Application for Leave to Appeal October 28, 2020:

PEOPLE v CLIFFORD MCKEE and PEOPLE v RODNEY MCKEE, Nos. 157581 and 157646; Court of Appeals Nos. 336598 and 333720. By order of May 22, 2019, the applications for leave to appeal the February 27, 2018 judgment of the Court of Appeals were held in abeyance pending the decisions in *People v Furline* (Docket No. 158296) and *People v Jenkins* (Docket No. 158298). On order of the Court, the cases having been decided on March 12, 2020, 505 Mich 16 (2020), the applications are again considered, and we direct the Clerk to schedule oral argument on the applications. MCR 7.305(H)(1).

We further order the Jackson Circuit Court, in accordance with Administrative Order 2003-03, to determine whether defendant Clifford Durell McKee is indigent and, if so, to appoint the State Appellate Defender Office, if feasible, to represent the defendant in this Court.

The appellants shall file a supplemental brief within 42 days of the date of the order appointing counsel addressing whether the trial court erred in failing to grant the appellants' motion for a mistrial because their substantial rights were impaired by the admission of a codefendant's statement to the police. See *Zafiro v United States*, 506 US 534, 539 (1993), and *People v Hana*, 447 Mich 325, 345-346 (1994). In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). 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. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. 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 total time allowed for oral argument shall be 40 minutes: 20 minutes for the appellants to be divided at their discretion and 20 minutes for the appellee. MCR 7.314(B)(2).

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. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *People v Clifford Durell McKee*, Docket No. 157581, only and served on the parties in both cases.

PEOPLE V BECK, Nos. 160668 and 160669; Court of Appeals Nos. 342039 and 342043. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the defendant's retrial in Docket No. 2016-000309-FH was barred by the Double Jeopardy Clauses of the federal or state constitutions, US Const, Am V; Const 1963, art 1, § 15; (2) if so, whether vacating his convictions in that case would also warrant a new trial, resentencing, or any other remedy in the jointly tried case, Docket No. 2017-001376-FC; and (3) whether the trial court improperly imposed a mandatory minimum sentence of 25 years for an act of first-degree criminal sexual conduct (Count II) that was not charged as carrying such a minimum. See *Alleyne v United States*, 570 US 99, 109-111 (2013); *Apprendi v New Jersey*, 530 US 466, 476, 478-479 (2000). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). 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. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. 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 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.

O'BRIEN V D'ANNUNZIO, No. 161335; Court of Appeals No. 347830. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the trial court erred by entering a temporary order granting the appellee full-time parenting time pursuant to MCR 3.207(B) and suspending the appellant's parenting time without first conducting an evidentiary hearing, see MCL 722.27(1)(c); *Daly v Ward*, 501 Mich 897, 898 (2017), and if so, whether that error was harmless, see *Fletcher v Fletcher*, 447 Mich 871, 879 (1994);

(2) whether the trial court palpably abused its discretion by granting the appellee sole legal and sole physical custody and by suspending the appellant's parenting time; and (3) whether the trial court's findings of fact are against the great weight of the evidence. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). 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. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. 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 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.

Leave to Appeal Denied October 28, 2020:

PEOPLE v CORTEZ BUTLER, No. 157578; Court of Appeals No. 335767.

PEOPLE v RANDOLPH, No. 159306; Court of Appeals No. 321551.

PEOPLE v KENYON BAILEY, No. 160427; reported below: 330 Mich App 41.

PEOPLE v SHERMAN, No. 160460; Court of Appeals No. 349804.

PEOPLE v GARTH, No. 160701; Court of Appeals No. 341304.

IVANIKIW v IVANIKIW, Nos. 161039 and 161040; Court of Appeals Nos. 351098 and 351438.

MARTIN v MARTIN, No. 161093; Court of Appeals No. 349261.

IVANIKIW v IVANIKIW, No. 161280; Court of Appeals No. 352251.

PEOPLE v BRETT MARSHALL, No. 161549; Court of Appeals No. 345872.

Superintending Control Denied October 28, 2020:

UNLOCK MICHIGAN v BOARD OF STATE CANVASSERS, No. 162132.

Reconsideration Denied October 28, 2020:

PEOPLE v TIETZ, No. 160261; Court of Appeals No. 342613. Leave to appeal denied at 505 Mich 1011.

JPMORGAN CHASE BANK, NA v ERWIN PROPERTIES, LLC, No. 161216; Court of Appeals No. 351512. Leave to appeal denied at 506 Mich 918.

Summary Disposition October 30, 2020:

SCHAAF V FORBES, No. 160503; Court of Appeals No. 343630. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals judgment and we remand this case to the Court of Appeals to determine whether the circuit court was vested with subject-matter jurisdiction of the case, see MCL 700.1302; MCL 700.1303. The Court of Appeals erred in reaching the merits before the threshold jurisdictional issue was resolved. See *Bowie v Arder*, 441 Mich 23, 56 (1992) ("When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void."). Once the determination of subject-matter jurisdiction is made, the Court of Appeals shall reconsider (if necessary) the legal issue raised by the defendant on appeal. We do not retain jurisdiction.

BYRNES V MARTINEZ, No. 160889; reported below: 331 Mich App 342. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment discussing the inclusion of future medical expenses in the amount of medical expenses subject to reimbursement. The issue of whether any amount of a judgment or settlement that is allocated toward future medical expenses is properly included in the calculation of the amount of medical expenses that are subject to reimbursement under 42 USC §§ 1396a(a)(25)(H) and 1396k(a) should first be addressed by the circuit court on remand. 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 October 30, 2020:

In re TM REED, MINOR, No. 161977; Court of Appeals No. 352203.

SHENANDOAH RIDGE CONDOMINIUM ASSOCIATION V BODARY, No. 162087; Court of Appeals No. 354592.

Superintending Control Denied October 30, 2020:

MORROW V JUDICIAL TENURE COMMISSION, No. 162130.

Summary Disposition November 4, 2020:

PEOPLE V ACKLEY, No. 158455; Court of Appeals No. 336063. By order of October 17, 2019, the application for leave to appeal the August 2, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *People v McFarlane* (Docket No. 158259). On order of the Court, leave to appeal having been denied in *People v McFarlane* on May 15, 2020, 505 Mich 1059 (2020), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals. We remand this case to the Court of Appeals for reconsideration of its analysis of the expert

testimony presented at trial in light of *McFarlane*. 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.

MARKMAN, J. (*dissenting*). For the reasons given in my concurring statement in *People v McFarlane*, 505 Mich 1059 (2020), I would deny leave to appeal.

PEOPLE v CULBERSON, No. 160981; Court of Appeals No. 344075. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for articulation of its reasons for finding a lack of merit in the questions presented in the defendant's supplemental brief, filed under AO 2004-6 (Minimum Standards for Indigent Criminal Appellate Defense Services), Standard 4, as part of his appeal of right. 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 ROGERS, No. 161034; reported below: 338 Mich App 312. 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 *Bostock v Clayton County, Georgia*, ____ US ____; 140 S Ct 1731 (2020). We do not retain jurisdiction.

PEOPLE v FOUNTAIN, No. 161373; Court of Appeals No. 352699. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *People v Lewis* (Court of Appeals Docket No. 350287). After *Lewis* is decided, the Court of Appeals shall reconsider this case in light of *Lewis*. 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 JOIE BELL, No. 161495; Court of Appeals No. 352605. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant at an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973). The circuit court shall determine whether the defendant's former appellate counsel rendered ineffective assistance on direct appeal. If it is determined that appellate counsel was ineffective, the defendant shall be entitled to the assistance of appointed counsel to pursue a motion for relief from judgment pursuant to MCR subchapter 6.500. 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.

Oral Argument Ordered on the Application for Leave to Appeal November 4, 2020:

TRECHA v REMILLARD, No. 161232; Court of Appeals No. 347695. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether, assuming Bradley Trecha was a participant in the recreational activity of tennis when his injuries occurred, the particular risk that caused his injuries was reasonably foreseeable under the circumstances. See *Bertin v Mann*, 502 Mich 603, 619-622 (2018). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). 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. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. 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.

Leave to Appeal Denied November 4, 2020:

PEOPLE v LISKO JONES, No. 159689; Court of Appeals No. 341719.

PEOPLE v KEYS, No. 160565; Court of Appeals No. 349343.

MBK CONSTRUCTORS, INC v LIPCAMAN, No. 160819; Court of Appeals No. 344079.

CYR v FORD MOTOR COMPANY, No. 160927; Court of Appeals No. 345751.

BROZ v PLANTE & MORAN, PLLC, No. 160988; reported below: 331 Mich App 39.

MIGDALEWICZ v HOLLIE, No. 161090; Court of Appeals No. 343981.

PEOPLE v RYCRAW, No. 161325; Court of Appeals No. 352646.

BAUER v SAGINAW COUNTY, No. 161395; reported below: 332 Mich App 174.

PEOPLE v PHAROAH JONES, No. 161550; Court of Appeals No. 346743.

PEOPLE v ANDREW JOHNSON, No. 161573; Court of Appeals No. 343497.

In re RM GRAVES, MINOR, No. 161958; Court of Appeals No. 349938.

Reconsideration Denied November 4, 2020:

GRIFFIN v SWARTZ AMBULANCE SERVICE, No. 159205; Court of Appeals No. 340480. Leave to appeal denied at 506 Mich 894.

Order Granting Motion to Disqualify Entered November 4, 2020:

PEOPLE v DEERING, No. 161505; Court of Appeals No. 344734. The motion to disqualify Chief Justice BRIDGET M. MCCORMACK because of her prior association with a party in the case, having been considered by Chief Justice MCCORMACK, is granted.

Leave to Appeal Granted November 6, 2020:

WADE v UNIVERSITY OF MICHIGAN, No. 156150; reported below: 320 Mich App 1. By order of May 22, 2019, the application for leave to appeal the June 6, 2017 judgment of the Court of Appeals was held in abeyance pending the decision in *New York State Rifle & Pistol Ass'n, Inc v City of New York*, 590 US ____ (2020) (Docket No. 18-280). On order of the Court, the case having been decided on May 29, 2020, the application is again considered, and it is granted. The parties shall address: (1) whether the two-part analysis applied by the Court of Appeals is consistent with *District of Columbia v Heller*, 554 US 570 (2008), and *McDonald v Chicago*, 561 US 742 (2010), cf. *Rogers v Grewal*, 140 S Ct 1865, 1867 (2020) (Thomas, J., dissenting); (2) if so, whether intermediate or strict judicial scrutiny applies in this case; and (3) whether the University of Michigan's firearm policy is violative of the Second Amendment, considering among other factors whether this policy reflects historical or traditional firearm restrictions within a university setting and whether it is relevant to consider this policy in light of the University's geographic breadth within the city of Ann Arbor.

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.

BERNSTEIN, J., not participating.

Oral Argument Ordered on the Application for Leave to Appeal November 6, 2020:

ROTT v ROTT, No. 161051; reported below: 331 Mich App 102. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the Court of Appeals erred in its application of the law of the case doctrine; (2) the proper interpretation of the "for the purpose of" language in the recreational land use act ("RUA"), MCL 324.73301(1); and (3) whether zip lining falls within the purview of the RUA. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). 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. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. 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.

MOORE v SHAFER, No. 161098; Court of Appeals No. 345101. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the Court of Appeals erred in its application of the law of the case doctrine; (2) the proper interpretation of the "for the purpose of" language in the recreational land use act ("RUA"), MCL 324.73301(1); and (3) whether zip lining falls within the purview of the RUA. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). 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. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. 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.

Leave to Appeal Denied November 6, 2020:

PEOPLE v HOOKER, No. 160129; Court of Appeals No. 340271.

CAVANAGH, J. (*dissenting*). I respectfully dissent from the Court's decision to deny leave in this case. The Court of Appeals essentially affirmed defendant's conviction on the basis of defendant's failure to establish facts that a defendant would normally establish at an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973). However, the Court of Appeals also denied defendant the opportunity to establish those facts by denying his motion to remand for a *Ginther* hearing. I would grant defendant's motion to remand.

A jury convicted defendant of first-degree and second-degree criminal sexual conduct for sexually assaulting his daughter. There was no physical evidence or other corroboration of the complainant's allegations, making this case a "true credibility contest." *People v Thorpe*, 504 Mich 230, 260 (2019). Along with his brief on appeal, defendant filed a motion to remand to the circuit court, arguing that trial counsel provided ineffective assistance by failing to secure an expert on the forensic interviewing protocol.

In Michigan, when interviewing a child to obtain evidence of abuse or neglect, investigators must adhere to a forensic interviewing protocol. MCL 722.628(6). The goal of a forensic interview is "to obtain a statement from a child—in a developmentally-sensitive, unbiased, and truth-seeking manner—that will support accurate and fair decision-making in the criminal justice and child welfare systems." State of Michigan, Governor's Task Force on Child Abuse and Neglect and Department of Health and Human Services, *Forensic Interviewing Protocol* (4th ed), p 1. Forensic interviewing protocols are designed in part to reduce the impact of the suggestibility of children, who can be

prone to the development of false memories. See *People v Carver*, unpublished per curiam opinion of the Court of Appeals, issued August 29, 2017 (Docket No. 328157), pp 2-3. In this case, investigators admitted that they failed to follow the protocol in several instances. Defendant argued in his motion to remand that trial counsel was ineffective for failing to obtain an expert to explain the importance of the deviations, leaving counsel himself "laboriously going over the instruction manual in an attempt to explain to the jury the importance of the protocols."

However, the Court of Appeals denied the motion to remand. Then, in affirming defendant's conviction, the Court of Appeals quoted one of the interviewers as stating that a particular departure from the protocol "did not affect the 'core idea' behind the protocol" and noted that the interviewer "did not believe that there was an adverse effect" of the numerous other violations. *People v Hooker*, unpublished per curiam opinion of the Court of Appeals, issued July 9, 2019 (Docket No. 340271), pp 3-4. The Court of Appeals observed, "Defendant has presented no evidence that an expert would have contradicted the interviewers' conclusions or that the manner in which they employed the protocol encouraged the complainant to manufacture allegations against defendant." *Id*. at 4. It is unsurprising that defendant has not presented this evidence, since the manner in which a defendant might present this evidence is a *Ginther* hearing, and the Court of Appeals denied defendant this chance. In fact, defendant specifically asked to be able to do *just this*, explaining in his brief that

> an expert could have countered the testimony of [the interviewers] as to their reasons for breaking the protocol. Instead of hearing how these reasons prejudiced [defendant's] case, the jury was left to believe that these breaks in the protocol were reasonable.

The Court of Appeals observed, "It is defendant's burden to make a testimonial record of evidence supporting his claim, but defendant has not done so." *Hooker*, unpub op at 4 (citation omitted). That is true, but the Court of Appeals denied defendant any opportunity to make that testimonial record.

The Court of Appeals also noted that at times, cross-examination of an expert may be sufficient to attack the credibility of opposing witnesses. *Id*. That may be so, but a criminal defendant cannot be required to rely on *the adverse conclusions* of the prosecution's experts in place of a defense expert who might draw a different conclusion.

Lastly, the Court of Appeals relied on the presumption that trial counsel's actions were the product of sound trial strategy and said that it would not "second-guess that strategy with the benefit of hindsight." *Id*. It is true that a defendant arguing ineffective strategy with the benefit of hindsight." *Id*. It is true that a defendant arguing ineffective assistance of counsel bears the burden to rebut this presumption. *Strickland v Washington*, 466 US 668, 689 (1984). But again, having denied defendant's motion for a *Ginther* hearing, there was no way of knowing why trial counsel failed to obtain an expert. One of the core

functions of a *Ginther* hearing is to take testimony from trial counsel on exactly this point. Without the opportunity to hold a *Ginther* hearing, it is not clear how a defendant could be expected to carry this burden.

The Court of Appeals denied defendant a *Ginther* hearing, then affirmed his conviction on the ground that he failed to make the record that he asked to make at the hearing he was denied. Rather than allowing the Court of Appeals to employ this Catch-22, I would remand for the hearing defendant requested.

In re KOPCZYK, MINORS, No. 161878; Court of Appeals No. 348999.

In re JONES/THOMPSON, MINORS, No. 161910; Court of Appeals No. 351612.

Statement Regarding Decision on Motion for Disqualification Entered November 6, 2020:

ADULT LEARNING SYSTEMS-LOWER MICHIGAN, INC v WASHTENAW COUNTY, No. 161615; Court of Appeals No. 346902.

MCCORMACK, C.J. The motion to disqualify Chief Justice BRIDGET M. MCCORMACK has been considered by Chief Justice MCCORMACK and is denied for the reason that the plaintiffs-appellants have failed to establish grounds for her disqualification under MCR 2.003(C).

Superintending Control Denied November 12, 2020:

MORROW v JUDICIAL TENURE COMMISSION, No. 162177. The motions for immediate consideration and to expedite proceedings are granted. The complaint for superintending control is considered, and relief is denied, because the Court is not persuaded that it should grant the requested relief.

Summary Disposition November 13, 2020:

PEOPLE v WINES, No. 157667; reported below: 323 Mich App 343. By order of April 5, 2019, the application for leave to appeal the March 8, 2018 judgment of the Court of Appeals and the application for leave to appeal as cross-appellant were held in abeyance pending the decision in *People v Turner* (Docket No. 158068). On order of the Court, the case having been decided on January 17, 2020, 505 Mich 954 (2020), the application for leave to appeal is again considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court.

The application for leave to appeal as cross-appellant is again 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 judgment addressing the defendant's arguments regarding his sentences for kidnapping and armed robbery and finding them beyond the scope of the appeal. At the resentencing for first-degree murder held pursuant to

MCL 769.25a and *Miller v Alabama*, 567 US 460 (2012), the trial court had authority to consider the defendant's arguments regarding his sentences for armed robbery and kidnapping. See *Turner*, *supra*. We remand this case to the Kent Circuit Court for further proceedings not inconsistent with this order. On remand, the trial court shall consider the defendant's arguments regarding the validity of his robbery and kidnapping sentences and may exercise its discretion to resentence him for those convictions, in particular "if it finds that the sentence[s] [were] based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole on the greater offense." *Turner*, *supra*. We do not retain jurisdiction.

CLEMENT, J. (*concurring*). I concur in the order denying leave as to the application for leave to appeal, as I believe that the Court of Appeals decision below stands for the unremarkable principle that traditional penological goals should guide a trial court's sentencing discretion and that the age of a particular defendant may affect the analysis of those traditional penological goals. I respectfully disagree with the prosecutor and with my dissenting-in-part colleague that this holding represents an extension of *Miller v Alabama*, 567 US 460 (2012), into term-of-years resentencing under MCL 769.25(4) and MCL 769.25a(4)(c). The Court of Appeals decision does not hold that the Eighth Amendment requires specific consideration of each attribute of youth identified in *Miller*, nor does it require that the trial court make explicit findings as to each of these attributes on the record. See *People v Wines*, 323 Mich App 343, 352 (2018) ("[T]here is no *constitutional* mandate requiring the trial court to specifically make findings as to the *Miller* factors except in the context of a decision whether to impose a sentence of life without parole."). The Court of Appeals decision requires only that when the trial court exercises its discretion in sentencing a defendant that it consider the defendant's age, a nonconstitutional holding that is consistent with the traditional penological goals expressed by this Court in *People v Snow*, 386 Mich 586, 592 (1972). Because age must be considered in this context, *Miller*'s discussion of the unique attributes of youth is applicable—but its holding remains confined to life-imprisonment-without-parole sentences.

MARKMAN, J. (*concurring in part and dissenting in part*). I concur with this Court's decision to reverse that part of the Court of Appeals judgment addressing defendant's arguments concerning his sentences for kidnapping and armed robbery and to remand to the trial court for consideration of whether to resentence defendant for those convictions. However, I dissent from the Court's decision to deny the prosecutor's application for leave to appeal. The prosecutor argues that the Court of Appeals erred by holding that the trial court must consider the "distinctive attributes of youth, such as those discussed in [*Miller v Alabama*, 567 US 460 (2012)]," even where the prosecutor has *not* sought a sentence of life imprisonment without the possibility of parole. *People v Wines*, 323 Mich App 343, 352 (2018). Because I am inclined to agree with the prosecutor, and because there are significant consequences for our juvenile justice system, I would grant leave to appeal.

In *Miller*, the United States Supreme Court held that "children are constitutionally different from adults for purposes of sentencing." *Id*. at 471.

> First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity. [*Id*. (citations, quotation marks, ellipses, and brackets omitted).]

Given these asserted differences, *Miller* held that "*mandatory* life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Id*. at 465 (emphasis added). Instead, before such a sentence can be imposed upon a juvenile, the sentencing court must first consider: "[defendant's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; whether "he might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and "the possibility of rehabilitation . . . ." *Miller*, 567 US at 477-478. These are commonly referred to as the *Miller* factors.

In response to *Miller*, our Legislature adopted MCL 769.25, which provides, in pertinent part:

> (4) If the prosecuting attorney does not file a motion [to sentence the defendant to life without parole] within the time periods provided for in that subsection, the court shall sentence the defendant to a term of years as provided in subsection (9).
>
> * * *
>
> (6) If the prosecuting attorney files a motion [to sentence the defendant to life without parole], the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in [*Miller v Alabama*, 567 US 460], and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.

* * *

> (9) If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years. [See also MCL 769.25a.]

Thus, pursuant to this statute which itself was enacted pursuant to a sharply divided 5-4 decision by the United States Supreme Court in *Miller*, "[i]f the prosecuting attorney files a motion [to sentence the defendant to life without parole,] . . . the trial court shall consider the factors listed in [*Miller v Alabama*] . . . ." MCL 769.25(6). However, if the prosecutor does *not* file such a motion—as here—there is no obligation imposed by either the United States Supreme Court or our Legislature to consider such factors. In other words, extending *Miller* into this new realm simply lacks warrant in either *Miller* or in the statute enacted in furtherance of *Miller*. Moreover, such an extension lacks any warrant in any previous decision of *this* Court.

The Court of Appeals in this case held:

> [T]here is no *constitutional* mandate requiring the trial court to specifically make findings as to the *Miller* factors except in the context of a decision whether to impose a sentence of life without parole. We further conclude that when sentencing a minor convicted of first-degree murder, when the sentence of life imprisonment without parole is not at issue, the court should be guided by a balancing of the *Snow* objectives[1] and in that context is required to take into account the attributes of youth, such as those described in *Miller*. [*Wines*, 323 Mich App at 352.]

Finally, the Court of Appeals concluded that "a failure to consider the distinctive attributes of youth, such as those discussed in *Miller*, when sentencing a minor to a term of years pursuant to MCL 769.25a so undermines a sentencing judge's exercise of his or her discretion as to constitute reversible error." *Id*.

To begin with, it is not at all clear what exactly the Court of Appeals, and now this Court, are requiring trial courts to do when sentencing a minor convicted of first-degree murder when the sentence of imprisonment without parole is not at issue. Is "tak[ing] into account the attributes of youth" distinguishable in some way from considering the *Miller* factors and, if so, what is that distinction? Before *Miller* is extended to apply to term-of-years sentences, in *whatever* manner it is now apparently being extended, this Court should clarify exactly *what*

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[1] The *Snow* objectives are " '(1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses.' " *Wines*, 323 Mich App at 351, quoting *People v Snow*, 386 Mich 586, 592 (1972).

are the new obligations being imposed upon the juvenile sentencing process and exactly *why* we are imposing such new obligations. Some justification would seem to be in order for why, without either public discussion or legislative charge, this Court would now extend the transformation of our process for sentencing the most serious juvenile offenders—a process initiated in a 5-4 decision of the United States Supreme Court—far beyond the boundaries even of that decision.

The concurring statement contends that the Court of Appeals did not extend *Miller* to apply to term-of-years sentences. However, the Court of Appeals itself stated, "We disagree with the prosecution . . . to the extent that it argues that because *Miller*'s constitutional holding is limited, the Supreme Court's opinion has *no* application to [term-of-years sentencing]." *Id*. at 350. The concurring statement further asserts that "the Court of Appeals decision below stands for the unremarkable principle that traditional penological goals should guide a trial court's sentencing discretion and that the age of a particular defendant *may* affect the analysis of those traditional penological goals." (Emphasis added). However, the Court of Appeals did more than simply say that the trial court *may* consider a defendant's age; rather, it held that the trial court "is *required* to take into account the attributes of youth, such as those described in *Miller*" and that a failure to do so "constitute[s] reversible error." *Id*. at 352 (emphasis added).

This Court just heard oral arguments in a case in which the issue posed is whether *Miller* should be extended to *nonjuvenile* offenders. See *People v Manning*, 505 Mich 881 (2019). Before we impose upon our trial courts the new sentencing obligations asserted in the instant case to consider the *Miller* factors or the so-called "attributes of youth" to term-of-years sentences, we should hear oral arguments as we did in *Manning*. Accordingly, I would grant leave to appeal in this case.

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

PEOPLE V FOSTER, No. 159433; Court of Appeals No. 341060. 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 not inconsistent with this order. The defendant was not required to file a motion for relief from judgment to challenge his sentence for armed robbery, imposed concurrently to his sentence for a first-degree murder committed when he was under the age of 18. See *People v Turner*, 505 Mich 954 (2020) (Docket No. 158068). The trial court had jurisdiction to consider his arguments regarding his armed-robbery sentence at the resentencing for first-degree murder held pursuant to MCL 769.25a and *Miller v Alabama*, 567 US 460 (2012). On remand, the trial court shall consider the defendant's arguments regarding the validity of his armed-robbery sentence and may exercise its discretion to resentence him for that conviction, in particular "if it finds that the sentence was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole on the greater offense." *Turner*, *supra*. We do not retain jurisdiction.

Leave to Appeal Denied November 13, 2020:

HOWARD v WISTINGHAUSEN, No. 161228; Court of Appeals No. 345788.

ZAHRA, J. (*dissenting*). I respectfully dissent from the Court's decision to deny leave to appeal. I would peremptorily reverse the Court of Appeals, as I disagree that a question of fact exists as to the allocation of fault for the accident giving rise to plaintiff's injuries. The burden was on plaintiff, not defendant, to produce evidence sufficient to create a genuine issue of material fact worthy of submission to a jury, and plaintiff failed to produce such evidence.

The undisputed facts establish that plaintiff was stopped at a flashing red light on a secondary road, intending to turn left onto a main road. As plaintiff was making her turn, defendant's car struck plaintiff's car on the driver's side while in the intersection. The trial court properly granted defendant's motion for summary disposition, finding no genuine issue of material fact existed as to whether plaintiff was at least 51% at fault for this accident. See MCL 500.3135(2)(b).

This case is straightforward and simple. Only the legal profession could complicate it. Anyone who has ever driven a car could easily conclude that plaintiff is primarily, if not exclusively, at fault for this accident. Plaintiff was stopped at a blinking red light, which required her to yield to traffic traveling on the main road before proceeding herself onto that road. But she failed to yield before pulling into oncoming traffic, causing the accident that resulted in her injuries. Defendant moved for summary disposition. Under MCR 2.116(C)(10), plaintiff had the obligation to present evidence sufficient to create a genuine issue of material fact worthy of submission to a jury. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 (1999). This plaintiff utterly failed to do.

The position advanced by plaintiff, and apparently adopted by the Court of Appeals, is based entirely on evidence that defendant was driving with a blood alcohol level of 0.137, well above the level permitted under Michigan law. Indeed, a violation of a statute creates a rebuttable presumption of negligence. But this is merely a rebuttable presumption of *some* negligence on the part of defendant, not a presumption that defendant was at least 51% at fault for the accident that resulted in plaintiff's injuries. Drunk drivers are not to be taken lightly, and driving under the influence of drugs or alcohol should be eradicated, as it causes thousands of accidents and hundreds of fatalities in Michigan every year. But the presumption of negligence to which plaintiff is entitled in this case, standing alone, is insufficient for plaintiff to prevail. It simply cannot be said that defendant's intoxication caused plaintiff to pull into oncoming traffic when she did not have the right-of-way. The record is completely devoid of any evidence that defendant contributed in any way to this accident by speeding, driving outside of her lane, driving erratically, driving with her headlights off, or doing anything at all to have caused the accident. Moreover, plaintiff testified that when she made her left turn, *she did not even see defendant's vehicle*. In other words, plaintiff—whose burden it was to proffer at least *some* evidence to substantiate her allegation that defendant was both negligent and at least 51% the cause of the accident—instead, by the very dearth of

evidence in support of her claim, allowed for the opposite inference to be drawn: that *her* negligence, not defendant's, was the predominant, if not exclusive, cause of this accident. In sum, there is simply no basis in the record from which a jury could reasonably infer that it is more likely than not that any intoxication on defendant's part contributed to this accident, let alone that defendant was at least 51% at fault for the accident. Because plaintiff has not satisfied her burden, the Court of Appeals erred in reversing the trial court.

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

In re COTIE/LANZA, MINORS, No. 162044; Court of Appeals No. 351815.

Leave to Appeal Denied November 20, 2020:

PEOPLE v DEXTER TAYLOR, No. 159612; Court of Appeals No. 340028. On November 10, 2020, the Court heard oral argument on the application for leave to appeal the March 26, 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.

PEOPLE v KRUKOWSKI and PEOPLE v STEVENS, Nos. 160263 and 160264; Court of Appeals Nos. 334320 and 337120.

Summary Disposition November 24, 2020:

LACASCIO v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 160598; Court of Appeals No. 344950. By order of April 29, 2020, the application for leave to appeal the October 17, 2019 judgment of the Court of Appeals was held in abeyance pending the decision in *MEEMIC Ins Co v Fortson*, (Docket No. 158302). On order of the Court, the case having been decided on July 29, 2020, 506 Mich 287 (2020), the application is again 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 the Court of Appeals for reconsideration in light of *MEEMIC Ins Co*.

WILLIAMS v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 161288; Court of Appeals No. 351544. 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 LEONARD, No. 161483; Court of Appeals No. 352230. Pursuant to MCR 7.305(H)(1) and MCR 7.316(A)(7), in lieu of granting leave to appeal, we remand this case to the Genesee Circuit Court for reconsideration of its August 12, 2019 order denying the defendant's motion to reissue judgment. Due to the unique circumstances of this case, we direct the circuit court to determine whether the defendant made a sufficient showing that he did not receive a copy of the court's December 26, 2018 order denying his motion for relief from judgment

until July 2019. If the circuit court determines that the defendant's offers of proof are sufficient to support his claim, it shall reissue the December 26, 2018 order in the interests of justice. Contrary to the circuit court's conclusion, without reissuance of the December 26, 2018 order, the defendant has lost his ability to seek appellate review of that order. We do not retain jurisdiction.

PEOPLE v PASTOOR, No. 161794; Court of Appeals No. 352404. 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 KEVIN BEVERLY, No. 159472; Court of Appeals No. 347051.

PEOPLE v KEVIN BEVERLY, No. 159736; Court of Appeals No. 346682.

PEOPLE v HARRINGTON, No. 160617; Court of Appeals No. 349716.

PEOPLE v LAWRENCE, No. 160846; Court of Appeals No. 350364.

ALLSTATE INSURANCE COMPANY v AUTO CLUB INSURANCE ASSOCIATION, No. 160881; Court of Appeals No. 347155.

PEOPLE v MICHAEL SIMMONS, No. 160885; Court of Appeals No. 350230.

PLT v JBP, No. 160919; Court of Appeals No. 346948.

STANTON v ANCHOR BAY SCHOOL DISTRICT, No. 160930; Court of Appeals No. 345110.

PEOPLE v CROFF, No. 161035; Court of Appeals No. 344197.

PEOPLE v GILLIS, No. 161049; Court of Appeals No. 350249.

PEOPLE v WESLEY WILSON, No. 161070; Court of Appeals No. 350965.

PEOPLE v GRIMES, No. 161105; Court of Appeals No. 341417.

WOODY v AUTO CLUB INSURANCE ASSOCIATION, No. 161161; Court of Appeals No. 346182.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

PEOPLE v DAVID WILSON, No. 161166; Court of Appeals No. 351712.

PEOPLE v MARTINEZ, No. 161193; Court of Appeals No. 346063.

MILLER v LM GENERAL INSURANCE COMPANY, No. 161196; Court of Appeals No. 351426.

PEOPLE v BUSSING, No. 161258; Court of Appeals No. 351193.

PEOPLE v MILLSAP, No. 161266; Court of Appeals No. 352269.

PEOPLE v CARROLL, No. 161295; Court of Appeals No. 351741.

PEOPLE v OVALLE, No. 161310; Court of Appeals No. 346175.

PEOPLE v GARDNER, No. 161314; Court of Appeals No. 345472.

PEOPLE v DEWEY, Nos. 161336, 161337, and 161338; Court of Appeals Nos. 340063, 346208, and 346215.

VANGUARD REAL ESTATE GROUP, LLC v TAYLOR and TAYLOR v PARHAM, Nos. 161355 and 161356; Court of Appeals Nos. 351228 and 351229.

PEOPLE v HIMES, Nos. 161357 and 161358; Court of Appeals Nos. 353008 and 353009.

PEOPLE v WALTERS, No. 161368; Court of Appeals No. 347627.

In re PETITION OF BERRIEN COUNTY TREASURER FOR FORECLOSURE, No. 161387; Court of Appeals No. 351723.

PEOPLE v BOWIE, No. 161397; Court of Appeals No. 347555.

PEOPLE v CHAVEZ YOUNG, No. 161424; Court of Appeals No. 351032.

PEOPLE v HUNTER, No. 161425; Court of Appeals No. 352284.

PEOPLE v FISHER, No. 161429; Court of Appeals No. 352798.

PEOPLE v PITTS, No. 161440; Court of Appeals No. 352288.

PEOPLE v SLAUGHTER-BUTLER, No. 161445; Court of Appeals No. 352855.

KORTMAN v KORTMAN, Nos. 161456 and 161457; Court of Appeals Nos. 349270 and 349632.

PEOPLE v O'CONNELL, No. 161467; Court of Appeals No. 342071.

PEOPLE v TRENT DAVIS, No. 161487; Court of Appeals No. 352760.

PEOPLE v BRADLEY, No. 161491; Court of Appeals No. 352376.

PEOPLE v HUMES, No. 161515; Court of Appeals No. 352445.

PEOPLE v KEVIN BEVERLY, No. 161530; Court of Appeals No. 344460.

ALTOBELLI v HARTMANN and ALTOBELLI v MILLER, CANFIELD, PADDOCK, AND STONE, PLC, Nos. 161533 and 161534; Court of Appeals Nos. 348953 and 348954.

PEOPLE v TERRY WILLIAMS, No. 161552; Court of Appeals No. 352629.

PEOPLE v HEAD, No. 161561; Court of Appeals No. 346431.

PEOPLE v ELZRA JOHNSON, No. 161567; Court of Appeals No. 344391.

PEOPLE v JAMES ADAMS, No. 161588; Court of Appeals No. 352063.

PEOPLE v RASHIKA COLLIER, No. 161624; Court of Appeals No. 345826.

PEOPLE v KASBEN, No. 161644; Court of Appeals No. 352363.

HEADWORTH v KEMP, No. 161669; Court of Appeals No. 345088.

EVERETT v MCLAREN OAKLAND and EVERETT v CROISSANT, Nos. 161692, 161693, 161694, 161695, and 161696; Court of Appeals Nos. 347644, 347663, 347887, 347915, and 347920.

EVERETT v MCLAREN OAKLAND and EVERETT v CROISSANT, Nos. 161697, 161698, 161699, 161700, and 161701; Court of Appeals Nos. 347644, 347663, 347887, 347915, and 347920.

KREINER v FAHMY, No. 161727; Court of Appeals No. 353350.

GRIEVANCE ADMINISTRATOR v CZUPRYNSKI, No. 161829.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

PEOPLE v BARTLETT, No. 161870; Court of Appeals No. 347261.

STANN v STANN, No. 161876; Court of Appeals No. 353153.

CROWLEY v MICHIGAN REALTY SOLUTIONS, No. 161900; Court of Appeals No. 341722.

PEOPLE v WALSH, No. 161922; Court of Appeals No. 350603.

Superintending Control Denied November 24, 2020:

BYARS v ATTORNEY GRIEVANCE COMMISSION, No. 161191.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Reconsideration Denied November 24, 2020:

PEOPLE v GRAHAM, No. 160651; Court of Appeals No. 341393. Leave to appeal denied at 506 Mich 890.

PEOPLE v KENNEDY, No. 160805; Court of Appeals No. 343961. Leave to appeal denied at 506 Mich 890.

CITY OF WAYNE RETIREES ASSOCIATION v CITY OF WAYNE, Nos. 160809 and 160810; Court of Appeals Nos. 343522 and 343916. Leave to appeal denied at 506 Mich 904.

PEOPLE v PETTWAY, No. 160845; Court of Appeals No. 343792. Leave to appeal denied at 506 Mich 890.

In re JAN H POL, DVM, No. 160872; Court of Appeals No. 344666. Leave to appeal denied at 506 Mich 890.

IANNUCCI v JONES, No. 160891; Court of Appeals No. 345886. Leave to appeal denied at 506 Mich 890.

CARPENTER v CARPENTER, No. 161111; Court of Appeals No. 344512. Leave to appeal denied at 506 Mich 891.

PEOPLE v BISHOP PERRY, No. 161343; Court of Appeals No. 352870. Leave to appeal denied at 505 Mich 1096.

Summary Disposition November 25, 2020:

PEOPLE v MARKEE SMITH, No. 161139; Court of Appeals No. 351930. 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.

VECTREN INFRASTRUCTURE SERVICES CORP v DEPARTMENT OF TREASURY, No. 161422; reported below: 331 Mich App 568. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals judgment and we remand this case to the Court of Appeals to address the plaintiff's arguments regarding the proper method for calculating the business tax due under the statutory formula. See MCL 208.1201; MCL 208.1301(2). This foundational issue must be addressed before determining that MCL 208.1309 requires application of an alternative method of apportionment. We do not retain jurisdiction.

PEOPLE v DEHART, No. 161432; Court of Appeals No. 353422. 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. See *People v Moreno*, 491 Mich 38, 46 (2012) ("While the Legislature has the authority to modify the common law, it must do so by speaking in no uncertain terms.") (quotation marks and citations omitted).

PEOPLE v EPPLETT, No. 161569; Court of Appeals No. 353093. Because defendant met the requirements in MCR 7.204(A)(2)(e), the trial court erred when it denied defendant's motion to enter claim of appeal. MCR 6.425(G)(1)(e). 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 of defendant's resentencing argument.

Leave to Appeal Granted November 25, 2020:

TOWNSHIP OF FRASER v HANEY, No. 160991; Court of Appeals No. 337842. The parties shall address whether MCL 600.5813 applies to municipalities seeking to enjoin zoning ordinance violations. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Michigan Townships Association, the Michigan Municipal League, the Government Law 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.

CAMPBELL v DEPARTMENT OF TREASURY, No. 161254; reported below: 331 Mich App 312. The parties shall address whether the Court of Appeals erred by interpreting MCL 211.7cc(4) such that the petitioner's principal residence exemption on his property continued through

December 31 of the calendar year in which he was not entitled to the exemption. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Taxation Section and the Real Property Section of the State Bar of Michigan and the Michigan Assessors Association 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.

Oral Argument Ordered on the Application for Leave to Appeal November 25, 2020:

BAUSERMAN v UNEMPLOYMENT INSURANCE AGENCY, No. 160813; reported below: 330 Mich App 545. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the appellees have alleged cognizable constitutional tort claims allowing them to recover a judicially inferred damages remedy. See *Smith v Dep't of Public Health*, 428 Mich 540, 648-652 (1987), aff'd sub nom *Will v Mich Dep't of State Police*, 491 US 58 (1989) (BOYLE, J., concurring in part and dissenting in part). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). 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. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. 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.

POHLMAN v POHLMAN, No. 161262; Court of Appeals No. 344121. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the mediator's failure to perform the domestic violence screening as required by MCL 600.1035(2) and (3) and MCR 3.216(H)(2) should be reviewed for harmless error; (2) if so, whether such an error here was harmless; and (3) whether the trial court properly denied the appellant's motion for reconsideration arguing that she signed the settlement agreement under duress because of her attorney's actions. See *Vittiglio v Vittiglio*, 297 Mich App 391 (2012); but see Restatement Contracts, 2d, § 175. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). 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. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. 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 and Alternative Dispute Resolution 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.

Leave to Appeal Denied November 25, 2020:

PEOPLE v HORTON, No. 160349; Court of Appeals No. 341933.

MCCORMACK, C.J. (*dissenting*). I would grant leave to appeal in this case, which presents important questions about the fairness of proceedings leading to the conviction of a self-represented defendant who was improperly shackled for his jury trial.

The defendant exercised his right to represent himself at his two trials, the first of which ended in a mistrial after the jury was unable to reach a verdict. The only rationale given by the trial court for shackling the defendant was offered at his first trial. There, the trial court informed the defendant that he would remain shackled during trial because he was "charged with a[n] assaultive crime and this Court needs to insure the safety and security of this courtroom." The court placed no evidence on the record to show that the defendant was likely to attempt escape or that shackles were needed to maintain security or order in the courtroom.

The defendant represented himself at the second trial, still in shackles. This time he was convicted. At his sentencing hearing, he raised concerns that his shackles and limited mobility precluded him from having a fair trial. He told the court:

> When this trial first started, I recall you saying that you was going to hold me to the same standard as the prosecutor, but yet I was unable to defend myself properly because I was shackled down, for one thing. I wasn't able to come across to the podium for opening statement with the jury. I wasn't able to walk to the blackboard up here, to the screen and point out certain things as the prosecutor was clearly freely able to do.
>
> * * *
>
> . . . I was bound down behind the detectives on the first trial and on the second trial. [The prosecutor]'s prancing around back and forth up to the bulletin board, this and that, while I'm standing like a statue not able to move with a gun at my back. Fair. So if this is fair, then, by all means don't worry about the horse, just load the wagon. I'll see you on appeal. It's not fair.

In my view, this case presents several questions worthy of this Court's review. In *Deck v Missouri*, 544 US 622, 629 (2005), the United States Supreme Court held that "the 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." A defendant may be shackled only on a finding, supported by record evidence, that it is necessary to prevent escape or injury to persons in the courtroom, or to maintain order during the trial. *People v Dunn*, 446 Mich 409, 426 (1994). This rule is critical to preserving the dignity of the proceedings and the fundamental rights of the defendant. The presumption of innocence "is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v United States*, 156 US 432, 453 (1895). Shackling undermines this presumption because it suggests to the jury that the defendant poses a danger to them or is likely to flee the courtroom if left unrestrained.[1]

Here, the trial court abused its discretion when it failed to articulate a finding that restraints were necessary. *People v Payne*, 285 Mich App 181, 186-187 (2009). And although this issue is unpreserved, I believe it may warrant relief under *People v Carines*, 460 Mich 750, 752-753, 763-764 (1999), because it is the type of error that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. The United States Supreme Court's observation in *Illinois v Allen*, 397 US 337, 344 (1970), supports this conclusion:

> [N]o person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.

Moreover, I question whether the shackles in this case *were* noticeable to the jury, even if a protective shroud was used. The core rule of *Deck* is that a trial court may not use physical restraints that are visible to the jury without an adequate justification. *Deck*, 544 US at 629. Because the defendant elected to represent himself, he was confined to the counsel's table while the prosecution moved freely about the courtroom. The jury could have reasonably inferred that the defendant was shackled, making his restraints constructively visible. Two parties so differentially situated in the eyes of the jury, particularly without an individualized finding of necessity, may contravene the presumption of innocence even if no juror directly saw the shackles. Given that the defendant was shackled without adequate justification, this may have risen to a due-process violation and affected the defendant's substantial rights under *Carines*.

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[1] As one clinical law professor put it, "Our client has a difficult time believing that the presumption of innocence still cloaks him when all he can feel are chains." Berkheiser, *Unchain the Children*, Nev Lawyer 30, 30 (June 2012), available at <http://nvbar.org/wp-content/uploads/NevLawyer_June_2012_Dean-1.pdf> (accessed November 19, 2020) [https://perma.cc/6QKL-9EHK].

Finally, whether the defendant was denied his right to self-representation is another question that warrants our review. This right is enshrined in both the United States and Michigan Constitutions. *Faretta v California*, 422 US 806, 818-832 (1975), citing US Const, Am VI; Const 1963, art 1, § 13. A violation of it constitutes structural error. *McKaskle v Wiggins*, 465 US 168, 177 n 8 (1984). Because the defendant was shackled without adequate justification and unfairly placed on an unequal playing field before the jury, I question whether he was effectively denied his right to self-representation. The defendant cites several examples of efforts that can be made to minimize the risk of prejudice when shackled defendants represent themselves at trial. See, e.g., *United States v Fields*, 483 F3d 313, 357 (CA 5, 2007) (trial court ordered both sides to remain seated before the jury); *Frantz v Hazey*, 533 F3d 724, 728 (CA 9, 2008) (same); *Overton v Mathes*, 425 F3d 518, 520 (CA 8, 2005) (both sides were confined to counsel tables and jury was excused when a sidebar conference was needed). Though the defendant did not make a timely request for the trial court to order the prosecution to remain seated as well, I nevertheless think it is an issue that warrants close scrutiny and possible clarification from this Court.

I would grant leave to explore the contours of the right to self-representation in this unique context. Is it enough that the defendant was able to question witnesses and make his case to the jury, even seated behind a shroud at the defense table? Or does the right encompass more than that, when there was no adequate justification for the shackling? This case is distinguishable from *People v Arthur*, 495 Mich 861 (2013), because the defendant here *did* insist on exercising his right to represent himself. See *id*. at 862 ("That the defendant elected to relinquish his right of self-representation rather than exercise that right while seated behind the defense table does not amount to a denial of the defendant's right of self-representation"). Whether his improper shackling violated that right is an issue that has not been addressed in our Court, and it is one that implicates important values of fairness and due process.

I respectfully dissent from the Court's order denying leave.

BERNSTEIN and CAVANAGH, JJ., join the statement of MCCORMACK, J.

SAKOFSKE V GERING, No. 160619; Court of Appeals No. 342714.

STANOW V BEAUMONT CENTER FOR PAIN MEDICINE, No. 160871; Court of Appeals No. 347275.

ZAHRA, J. (*dissenting*). I would grant leave to appeal to consider whether the factors from *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 507 (1995), were appropriately applied in the dismissal analysis under MCR 2.504 in light of *Maldonado v Ford Motor Co*, 476 Mich 372, 395 n 24 (2006).

KALAMAZOO TRANSPORTATION ASSOCIATION V KALAMAZOO PUBLIC SCHOOLS, No. 160876; Court of Appeals No. 349031.

ZAHRA, J. (*dissenting*). I would grant leave to appeal to consider whether the Court of Appeals correctly interpreted "education records," 20 USC 1232g(a)(4)(A)(i) and (ii).

KI PROPERTIES HOLDINGS, LLC v ANN ARBOR CHARTER TOWNSHIP, No. 161390; Court of Appeals No. 348167.

ZAHRA, J., would grant leave to appeal.

PEOPLE v DRUMB, No. 161527; Court of Appeals No. 344616.

PEOPLE v OUERT, No. 161559; Court of Appeals No. 349080.

STANOW v BEAUMONT CENTER FOR PAIN MEDICINE, Nos. 161601 and 161602; Court of Appeals Nos. 346641 and 347275.

ZAHRA, J. (*dissenting*). I would grant leave to appeal to consider whether the factors from *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 507 (1995), were appropriately applied in the dismissal analysis under MCR 2.504 in light of *Maldonado v Ford Motor Co*, 476 Mich 372, 395 n 24 (2006).

HANOVER INSURANCE COMPANY, INC v LUBIENSKI, No. 161676; Court of Appeals No. 346942.

PEOPLE v REGINALD DAVIS, No. 162203; Court of Appeals No. 354927.

PEOPLE v WINBURN, No. 162222; Court of Appeals No. 354482.

Superintending Control Denied November 25, 2020:

DAVIS v JUDICIAL TENURE COMMISSION, No. 161818. On order of the Court, the complaint for superintending control is considered, and it is dismissed to the extent that the information sought does not relate to the allegations of Formal Complaint No. 101 for the reason that there is no "proceeding" before the Judicial Tenure Commission within the meaning of MCR 9.211(C). In all other respects, the complaint for superintending control is denied, because the Court is not persuaded that it should grant the requested relief.

Reconsideration Denied November 25, 2020:

SCOLA v JPMORGAN CHASE BANK, No. 158903; Court of Appeals No. 338966. Summary disposition order entered at 506 Mich 924.

PEOPLE v WINBURN, No. 161963; Court of Appeals No. 354482. Leave to appeal before a decision by the Court of Appeals entered at 506 Mich 969.

Leave to Appeal Denied December 4, 2020:

PEOPLE v AARON JOHNSON, No. 159924; Court of Appeals No. 341318.

CAVANAGH, J. (*concurring*). I concur in the order denying leave to appeal because ultimately the identification in question in this case is reliable. However, the choice of the police to conduct this unnecessarily suggestive showup, and the Court of Appeals' commentary on that choice, warrants discussion.

Defendant robbed a pizza delivery driver at gunpoint in an apartment complex parking lot. The driver returned to the restaurant where he worked and called the police. The police informed the driver that they thought they had the robber and asked the driver to come identify him. When the driver arrived, defendant was in the backseat of a police car, and the driver identified defendant as the robber. Defendant was convicted by a jury of armed robbery, assault with a dangerous weapon, and carrying a firearm during the commission of a felony.

When a defendant challenges an identification procedure arranged by the state as suggestive, as this defendant has, courts apply a three-part test, asking whether "(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, 238-239 (2012). Writing for the Court in *Perry*, Justice Ginsburg explained that a "primary aim" of excluding identification evidence that fails this test is to "deter law enforcement use of improper lineups, showups, and photo arrays in the first place." *Perry*, 565 US at 241. The test incorporates an exception for suggestive procedures when they are necessary, such in *Stovall v Denno*, 388 US 293 (1976), where the sole witness was in the hospital awaiting surgery and "[n]o one knew how long [the witness] might live." *Id*. at 302. Courts stretch further and allow admission of even unnecessarily suggestive identification procedures that are nonetheless reliable. *Manson v Brathwaite*, 432 US 98, 112 (1977). This aspect of the test was not meant to bless unnecessarily suggestive identification procedures, but was an observation that excluding reliable evidence might "frustrate rather than promote justice . . . ." *Id*. at 113. That is not a decision for police to make. Police should not conduct a showup unless it is necessary.

Turning back to this case, the identification procedure here was clearly suggestive. As we said in *Sammons*, showups are inherently suggestive. *Sammons*, 505 Mich at 41-47. Taking a witness to view a suspect in the back of a police car " 'conveys a clear message that the police suspect *this* man.' " *Id*. at 43, quoting *Ex parte Frazier*, 729 So 2d 253, 255 (Ala, 1998). There is no indication I have found in the record or that the parties have identified as to why it might have been necessary to conduct the showup rather than conducting a fair procedure. The police ought not to have done this. Still, in affirming the conviction, the Court of Appeals appeared to sanction the practice. The Court of Appeals wrote that "[p]rompt on-the-scene confrontations 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." *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued May 28, 2019 (Docket No. 341318), p 2 (quotation marks and citation omitted). The Court of Appeals further said that "[o]n-the-scene identification also allows witnesses to make identifications when their memories are fresh" and "that it is proper . . . for the police to promptly conduct an on-the-scene identification." *Id*. (quotation marks and citation omitted; alteration in original). To the

extent such practices could be accomplished with an unsuggestive procedure, I agree. But the police must avoid employing suggestive identification procedures whenever possible.

That said, the Court of Appeals correctly applied the reliability portion of the test, as it stands.[1] I agree that under the nonexclusive list of factors from *Neil v Biggers*, 409 US 188 (1972), this identification was reliable. What is troubling, however, is that here, like in *Sammons*, the police appear to have administered the showup as a matter of course. In *Sammons*, the detective who administered the showup testified that there was nothing out of the ordinary about it. Here, 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 choice of the United States Supreme Court to incorporate the reliability analysis in *Brathwaite* rather than apply a per se rule of excluding unnecessarily suggestive identifications relied on a prediction: "The 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." *Brathwaite*, 432 US at 112. The police appear not to have been correctly incentivized either in *Sammons* or here. Further, the records in both cases included indications that those choices were not isolated events, but examples of routine practices. Deterring this conduct by the police is the "primary aim" of this line of jurisprudence. *Perry*, 565 US at 241. But we continue to see indications that in Michigan it may be missing the mark. As we noted in *Sammons*, other states have interpreted their state protections differently than the federal protection in this regard. *Sammons*, 505 Mich at 50 n 13. However, as in *Sammons*, we have not been asked to reach that question in this case.

PEOPLE v JERMAL CLARK, No. 160529; Court of Appeals No. 344701.

MCCORMACK, C.J. (*concurring*). I concur with the Court's order denying leave to appeal.

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[1] The Court of Appeals reasoned:

> The delivery driver's testimony indicated that he had a good opportunity to view the person who robbed him. The robber was within a couple feet of him during the robbery and wore nothing to hide his face. The delivery driver also indicated that the parking lot was lit by streetlights and that he was very focused on the robber and the gun during the encounter. He provided a description of the robber and his actions. Based on his description, police were quickly able to connect the robbery to the later firing of shots from defendant's vehicle. The delivery driver was then quickly able to identify defendant as the robber with a high degree of certainty. Additionally, the delivery driver identified defendant about an hour after the robbery occurred. Accordingly, the robber's appearance was still fresh in his mind. [*Id.*]

I write separately, however, for two reasons. First, when the defendant initially raised the affirmative defense of legal insanity, the trial court determined that he failed to satisfy the first prong of the legal standard to establish insanity: a showing that he lacked the substantial capacity to appreciate the wrongfulness of his conduct. The court therefore mistakenly concluded that the defendant was unable to establish legal insanity. The Court of Appeals correctly remanded, noting that under MCL 768.21a, a defendant need only establish one of the two prongs to establish legal insanity, the second of which is the lack of a substantial capacity to conform one's conduct to the requirements of the law. *People v Clark*, unpublished per curiam opinion of the Court of Appeals, issued August 10, 2017 (Docket No. 332297), pp 2-3. From that point forward, however, the Court of Appeals did not review the trial court's conclusion that the defendant had failed to satisfy the first prong. While I see potential merit in an argument that the trial court erred in concluding that the defendant failed to satisfy the first prong of the legal-insanity defense, the defendant has not raised this question on appeal.

Second, and relatedly, while I am not sure I disagree with the Court of Appeals' conclusion that the defendant's conviction was not against the great weight of the evidence, I am troubled by the panel's treatment of this question.

In evaluating the merits of a "great weight" claim, a reviewing court must consider whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 642 (1998). Perhaps the defendant did not meet that burden. But no such analysis appears in the panel's opinion. Instead, there is a single conclusory paragraph:

> In light of the evidence presented, we affirm the trial court's order denying defendant's motion for a new trial on the basis that the verdict was against the great weight of the evidence. The trial court did not err in concluding that defendant failed to prove by a preponderance of the evidence that he lacked the substantial capacity to conform his conduct to the requirements of the law, and therefore could not establish that "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). [*People v Clark*, unpublished per curiam opinion of the Court of Appeals, issued September 17, 2019 (Docket No. 344701), p 4.]

The panel seems to have decided that its conclusion that the defendant had the ability to conform his conduct to the requirements of the law was sufficient to resolve his great-weight claim. I worry that this approach conflates the standards governing a challenge to the sufficiency of the evidence with those governing a challenge based on the great weight of the evidence. Resolution of the former does not necessarily resolve the latter; they are distinct, if related, inquiries. The panel should have analyzed whether the verdict constituted a miscarriage of justice or whether the interests of justice require a new trial to be

ordered in light of the "whole body of proofs," *Lemmon*, 456 Mich at 634-635, 638, notwithstanding its sufficiency finding on the "conforming conduct to the requirements of the law" prong of legal insanity.[1] As part of that inquiry, the panel should have taken a broader view and analyzed *both* prongs of the defendant's legal-insanity defense.

Because the defendant has not appealed the trial court's determination on the "wrongfulness" prong and because I am not convinced the panel erred in concluding that the defendant's conviction was not against the great weight of the evidence, I concur in the Court's denial of leave to appeal.

DANIEL v ANN ARBOR TRANSIT AUTHORITY, Nos. 160917 and 160918; Court of Appeals Nos. 343860 and 343866.

CAVANAGH, J. (*dissenting*). This case presents the significant issue of whether claimants whose health would be harmed by their current job, either permanently or for the foreseeable future, can qualify for unemployment benefits under the Michigan Employment Security Act (MESA), MCL 421.1 *et seq*. I would have granted oral argument on the application to consider whether claimant satisfied the requirements of the voluntary-leaving provision in MCL 421.29(1)(a).

MESA provides that an individual claiming to have left work involuntarily for medical reasons must satisfy three requirements to avoid disqualification for employment benefits, the third of which is that the claimant "unsuccessfully attempted to be placed on a leave of absence with the employer to last until the individual's mental or physical health would no longer be harmed by the current job." MCL 421.29(1)(a). Claimant in this case suffered a heart attack that rendered her unable to do her job as a bus driver. She testified that although she inquired about transferring to a desk job, her employer did not have any available. Apparently feeling she had no other choice, given that her doctors told her she could not return to work and her employer told her there was no other work available, claimant took a medical retirement. At the time of her resignation, claimant had used approximately 6 months out of an available 12 months of unpaid medical leave and did not request to extend her leave.

The Unemployment Insurance Agency (UIA) determined that claimant was disqualified from receiving unemployment benefits pursuant to the third requirement of MCL 421.29(1)(a). The administrative law judge and the Michigan Compensation Appellate Commission affirmed.

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[1] The panel's cursory treatment of the great-weight argument is easier to understand given the defendant's treatment of this issue in his briefing, which refers back to his argument regarding the "conforming conduct to the requirements of the law" prong. But the defendant is arguing that upholding his conviction, and specifically the finding that he was not legally insane, would constitute a miscarriage of justice. Determining whether that is true warrants a deeper dive beyond just the "substantial capacity" prong; it demands an inspection of "the entire body of proofs."

But the trial court reversed, ruling that claimant was not required to exhaust all available medical leave in order to satisfy Section 29(1)(a), instead finding the third requirement satisfied because claimant had a permanent medical condition necessitating indefinite medical leave. The trial court reasoned that if the condition is permanent, the amount of leave is irrelevant because no amount of leave would be sufficient to allow a claimant to resume their prior employment. However, the Court of Appeals reversed, noting the undisputed facts that claimant did not unsuccessfully attempt to be placed on a leave of absence until her health improved and that she left six months of unpaid leave on the table.

If no amount of leave would allow a claimant's health to improve enough to resume their job duties, can they satisfy the requirements of MCL 421.29(1)(a)? In circumstances such as these, where a claimant does not have a short-term disability, I question whether the requirement at issue is reasonably related to the cause or fact of unemployment such that it comports with federal law. See *In re Hearing to the South Dakota Dep't of Employment Security*, decision of the United States Secretary of Labor, issued September 25, 1964. I also question whether this interpretation is consistent with the purposes of the MESA—to prevent the spread and lighten the burden of involuntary unemployment, to compensate workers who become unemployed through no fault of their own, and to encourage employers to provide stable employment. MCL 421.2.

Under the UIA's interpretation, claimants whose health conditions are of an indefinite nature are left with an untenable set of choices—take long-term unpaid leave, or become unemployed with no unemployment benefits. For a claimant forced to forgo necessary income, neither choice is materially different. Such an interpretation hardly serves to prevent unemployment's "spread and to lighten its burden which so often falls with crushing force" upon employees and their families. MCL 421.2. I also take seriously claimant's concern that "leave of absence" is being interpreted to encompass absences without pay or benefits. Thus, an employer could simply place an employee on indefinite leave without pay such that the employee could not qualify for unemployment benefits. This, too, is inconsistent with MESA's purpose to encourage employers to provide stable employment. MCL 421.2.

I question whether the Legislature intended such an absurd outcome for claimants with indeterminate or permanent medical issues that may never substantially improve to the point that they can return to their former jobs. I urge the Legislature to consider amending the language of the third requirement of MCL 421.29(1)(a) to address the application of the medical-leave-of-absence requirement to claimants with longer-term medical conditions.

Reconsideration Denied December 4, 2020:

CITY OF DEARBORN v BANK OF AMERICA, No. 159691; Court of Appeals No. 339704. Leave to appeal denied at 506 Mich 936.

In re SHERIDAN, MINORS, No. 161540; Court of Appeals No. 351263. Leave to appeal denied at 506 Mich 888.

Petition for Declaratory Relief Denied December 9, 2020:

JOHNSON v SECRETARY OF STATE, No. 162286. On order of the Court, the motions for immediate consideration are granted. The petition for extraordinary writs and declaratory relief is considered, and it is denied, because the Court is not persuaded that it can or should grant the requested relief. The motions to intervene are denied as moot.

CLEMENT, J. (*concurring*). I concur in the Court's order denying the relief sought in this complaint. Indeed, I do so in large part due to the legal authority cited by Justice VIVIANO in dissent. It is undeniable that the legal authority in this area has not been the subject of much litigation, and therefore there is little caselaw on point. However, there are many *seemingly* apparent answers—many of which are discussed at some length by Justice VIVIANO—and when these answers are combined with the defects in petitioners' presentation of their case, I do not think it is an appropriate exercise of this Court's discretion to prolong the uncertainty over the legal status of this election's outcome. This Court routinely chooses not to hear cases which raise interesting and unsettled legal questions in the abstract when we conclude the case would be a poor practical vehicle for addressing those questions—which is my view of this case and these questions. Moreover, I believe it would be irresponsible to continue holding out the possibility of a judicial solution to a dispute that it appears must be resolved politically.

I think it is important at the outset to have a basic understanding of how elections in Michigan work. On Election Day, votes are cast. Once Election Day is over, the votes in each race are then counted at the precinct level. See MCL 168.801 ("Immediately on closing the polls, the board of inspectors of election in each precinct shall proceed to canvass the vote."). Those results are then forwarded to the county. See MCL 168.809. The results are then canvassed by the board of county canvassers, see MCL 168.822(1), which declares the winners of county and local races, MCL 168.826(1), while tabulating the results of elections for various statewide and other races within that county and forwarding those results to the Board of State Canvassers, MCL 168.824(1) and 168.828. The Board of State Canvassers then canvasses the figures from around the state, MCL 168.842(1), tabulating the figures and declaring the winners of the various races that the Board of State Canvassers must manage, MCL 168.844 and 168.845. Once the canvassing is finished, the county clerk (for county and local offices) or the Secretary of State (for higher offices) issues a certificate of election to the named winners. MCL 168.826(2) and 168.845.

At no point in this process is it even proper for these individuals to investigate fraud, illegally cast votes, or the like. "[I]t is the settled law of this State that canvassing boards are bound by the return, and cannot go behind it, especially for the purpose of determining frauds in the election. Their duties are purely ministerial and clerical." *McQuade v Furgason*, 91 Mich 438, 440 (1892). *After* a certificate of election is issued, it is possible to challenge whether it was issued to the right individual. Usually this is done via a court action seeking what is called a writ of "quo warranto." See MCL 600.4501 *et seq*. There are debates at

the margins about exactly how this process might work—as noted by Justice VIVIANO, there is some dispute about who has standing to maintain an action for quo warranto and whether it can commence before an allegedly wrongful officeholder takes office—but this is the basic outline: the votes are counted, a certificate of election is issued, and *then* we debate whether said certificate was issued to the wrong individual. This is because of the limited authority of the canvassing board to simply tally votes cast.

> The duties of these [canvassing] boards are simply ministerial: their whole duty consists in ascertaining who are elected, and in authenticating and preserving the evidence of such election. It surely cannot be maintained that their omissions or mistakes are to have a controlling influence upon the election itself. It is true that their certificate is the authority upon which the person who receives it enters upon the office, and it is to him *prima facie* evidence of his title thereto; but it is only *prima facie* evidence. [*People ex rel Attorney General v Van Cleve*, 1 Mich 362, 366 (1850).]

It is in this context that I believe we must read petitioners' complaint. At no point does their complaint ask that we declare that a particular slate of presidential electors was duly elected. Nor does their prayer for relief ask that we order the Secretary of State to perform an audit of this election under Const 1963, art 2, § 4(1)(h). Indeed, it is not entirely clear exactly what the nature of petitioners' complaint even is; while MCR 2.111(B)(1) requires that a complaint lay out each "cause of action," the complaint recites several vague counts ("Due Process," "Equal Protection," and "Article II, section 1, clause 2") that are not recognized causes of action themselves. The only recognized cause of action is Count Four, which asks for "Mandamus and *Quo Warranto*." These certainly are recognized causes of action at common law, although they are distinct causes of action that are addressed to different problems. "[T]o obtain a writ of mandamus, the plaintiff must have a clear legal right to the performance of the specific duty sought to be compelled and the defendants must have a clear legal duty to perform the same." *State Bd of Ed v Houghton Lake Community Sch*, 430 Mich 658, 666 (1988). Quo warranto, by contrast, is "the only way to try titles to office finally and conclusively . . . ." *Lindquist v Lindholm*, 258 Mich 152, 154 (1932). Combining them makes it unclear what petitioners are asking this Court to *do*—command a public officer to perform a legal duty (and if so, which officer, and what duty?), or test title to office?[1] I believe this confusion is reflected in the fact that Justices VIVIANO and ZAHRA focus on the constitutional right to an audit that the petitioners do not actually ask for in their prayer for relief. Rather, the prayer for relief asks for a variety of essentially interim steps—taking control of ballots,

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[1] Notably, none of the named defendants are alleged to be usurpers to any office, which indicates that plaintiffs have not satisfied the pleading requirements for a quo warranto action under MCL 600.4505(1).

segregating ballots the petitioners believe were unlawful, enjoining officials from taking action predicated on the vote counts—but does not ask for any actual electoral outcome to be changed. This only begins the problems with this proceeding.

Next, there is a problem of jurisdiction. There has, admittedly, never been litigation like this before in Michigan, so we have no precedents we can draw upon as a definitive resolution. However, the face of petitioners' complaint strongly suggests there is a jurisdictional problem. The gist of petitioners' complaint is that they are unsatisfied with the recent decision of the Board of State Canvassers to declare a winner in the election for presidential electors in Michigan. But this Court has no apparent jurisdiction to review this decision. As noted, the canvassing process is not the time to allege that an election was marred with fraud. Petitioners allege that sections of the Michigan Election Law, like MCL 168.479 and MCL 168.878, allow for decisions of the Board of State Canvassers to be challenged by a mandamus action in the Michigan Supreme Court. But these sections appear to be inapplicable—MCL 168.479 is in the chapter on initiative and referendum, where the responsibilities of the Board of State Canvassers are far more involved than merely tabulating votes, and MCL 168.878 is in the chapter on recounts, which is also not implicated here. Even if either statute were applicable here, there is no theory that the petitioners have put forward suggesting that the Board of State Canvassers failed to perform a legal duty it was obliged to perform. Instead, as noted by Justice VIVIANO, in this context the role of the canvassing board is ministerial, with no function other than to tabulate the votes cast and determine which candidate (or candidates) received the most votes. To the extent that petitioners are trying to revisit the determination of the Board of State Canvassers, it appears they cannot, at least absent the unlikely scenario of the board simply having performed its computations incorrectly, which is not alleged here.

Petitioners also ask that we enjoin respondents "from finally certifying the election results and declaring winners of the 2020 general election . . . ." As an initial matter, this would seem to be moot—it has been widely reported that this already has occurred. A "past event cannot be prevented by injunction." *Rood v Detroit*, 256 Mich 547, 548 (1932). Even had that not happened, however, it does not appear that the law contemplates any role for the courts in this process. As noted by Justice VIVIANO, the ordinary process by which a Michigan election result can be challenged is via quo warranto proceedings. We have said

> that you may go to the ballots, if not beyond them, in search of proof of the due election of either the person holding, or the person claiming the office. And this is as it should be. In a republican government, where the exercise of official power is but a derivative from the people, through the medium of the ballot box, it would be a monstrous doctrine that would subject the public will and the public voice, thus expressed, to be defeated by either the ignorance or the corruption of any board of canvassers. [*Van Cleve*, 1 Mich at 365-366.]

However, when the Board of State Canvassers must declare the winner of an election—as it must with presidential electors, MCL 168.46—the Legislature has, in MCL 168.846, apparently suppressed quo warranto proceedings and reserved to itself the prerogative of determining who the winner is. Such an arrangement is consistent with how disputes over elections to the United States Congress and the Michigan Legislature are resolved, see US Const, art I, § 5, cl 1; Const 1963, art 4, § 16, as well as the plenary authority that state legislatures have over the selection of presidential electors under federal law, see US Const, art II, § 1, cl 2; 3 USC 2.[2] As Justice VIVIANO observes, the language of MCL 168.846 was formerly in the Michigan Constitution of 1850. When it was, we observed that it

> does not permit the regularity of elections to the more important public offices to be tried by the courts. It has provided that in all cases, where . . . the result of elections is to be determined by the Board of State Canvassers, there shall be no judicial inquiry beyond their decision. . . .
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> This provision was doubtless suggested by the serious difficulties which would attend inquiries into contested elections, where the ballots of a great number of election precincts would require to be counted and inspected; and probably, also, to discourage the needless litigation of the right to the higher public offices at the instance of disappointed candidates where the public interest does not appear to require it. A legislative body can exercise a discretion in such cases, and could not be compelled to enter upon such an inquiry except upon a preliminary showing which the courts are not at liberty to require. [*People ex rel Royce v Goodwin*, 22 Mich 496, 501-502 (1871).]

These jurisdictional problems seemingly put to rest petitioners' allegations about how absentee ballots were handled in this election. They ask that we "segregate any ballots counted or certified inconsistent with Michigan Election Law" and, in particular, "any ballots attributable to the Secretary of State's absentee ballot scheme"—a reference to the Secretary of State's decision to send out unsolicited absentee ballot applications to voters. Whatever the legality of this decision on the Secretary of State's part, it does not appear that the courts are the proper forum for challenging the validity of *any* votes cast in the race for presidential electors (as well as some other offices). For those offices

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[2] One could fairly question whether it is constitutional for MCL 168.846 to reserve to the Legislature the prerogative to settle disputes over elections to offices required by the Michigan Constitution—a Legislature inclined to abuse this power could conceivably nullify an election that the Michigan Constitution requires to be held. But the Michigan Constitution does not require that presidential electors be themselves popularly elected, and reserving final decision-making authority in the Legislature as to that specific office is consistent with federal constitutional and statutory law.

where it might be challengeable, the proper means would be a quo warranto action. That said, I would note that laches may apply here—the time to challenge this scheme may have been before the applications were mailed out (or at least before the absentee ballots were cast), rather than waiting to see the election outcome and then challenging it if unpalatable.

These jurisdictional concerns are not the only problem with this petition. Petitioners' prayer for relief does not ask that we direct the Secretary of State to conduct an audit of this election, although their briefing does invoke the right to an audit under Const 1963, art 2, § 4(1)(h)—added to our Constitution two years ago as part of Proposal 18-3. To the extent that the petitioners are trying to get a writ of mandamus against the Secretary of State to perform an immediate audit under the constitutional language,[3] I would note at the outset that they have apparently made a procedural misstep. Although the Michigan Constitution gives this Court jurisdiction over mandamus actions, see Const 1963, art 6, § 4 (stating that "the supreme court shall have . . . power to issue, hear and determine prerogative and remedial writs"), we have provided by rule that such actions must begin in either the Court of Appeals or the Court of Claims, MCR 3.305(A)(1). "Reasons 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). This is why the court rule for original actions in our Court refers

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[3] Justice VIVIANO says I am "mistaken in suggesting that petitioners here have not asked for an audit," because petitioners' complaint declares several times that the respondents "owe citizens an audit of election results that is meaningful and fair and to safeguard against election abuses." In my view, asserting what citizens are owed is a far cry from demanding actual relief—particularly in light of the conceptual confusion that pervades this petition. The fact that Justice VIVIANO must patch together what the petitioners are apparently after by combining the petition's allegations with its prayer for relief and the accompanying brief goes to show how weakly it is presented. Moreover, as noted by Justice VIVIANO, petitioners' brief asks us to "enter an order requiring that the Michigan Legislature convene a joint convention to analyze and audit the election returns" or that this Court "should oversee an independent audit." Given the nature of the writ of quo warranto, it is simply not a proper vehicle for receiving any audit-related relief. As noted, mandamus might be, at least to the extent that petitioners seek to compel the Secretary of State to perform a clear legal duty. But that would not extend to this Court's performing said audit; nowhere in the law is it *this Court's* legal duty to perform any audit. The same can also be said of the Legislature, which is in addition not even a named defendant in this action, so it is hard to imagine how we would order the Legislature to do anything even if that were *not* an assault on the separation of powers.

only to proceedings for superintending control, which extends to either the lower courts or certain other judicial entities, MCR 7.306(A)(1) and (2), not the executive branch. We have indicated a willingness to disregard such errors in the past, see, e.g., *McNally v Wayne Co Bd of Canvassers*, 316 Mich 551, 555-556 (1947), but petitioners' audit-related arguments begin in a bad position.

More importantly, there is no apparent purpose to which the audit sought by the petitioners can be put in light of the above-mentioned jurisdictional limits on the judiciary's ability to revisit the outcome of this election. Given the apparent inability of canvassing boards to investigate fraud, there is a fundamental disconnect between petitioners' allegations of fraud and their request for an audit. Justice ZAHRA "would have ordered an immediate evidentiary hearing before a special master for the purpose of ferreting out whether there is any substance to the very serious-but-as-yet-unchallenged allegations of irregularities and outright violations of Michigan Election Law that petitioners assert took place before the vote was certified . . . ." But such an evidentiary hearing is unnecessary—in any event, those boards of canvassers had no authority to perform (or at least act on) such a factual investigation. Moreover, the boards have certified the results and certificates of election have been issued; it is difficult to see how any judicial proceeding could undo that process. I fail to see how those certification choices can be taken back any more than the Governor can take back a pardon once issued. Cf. *Makowski v Governor*, 495 Mich 465 (2014). This is not to say that certificates of election cannot be challenged; rather, it is to say that an election contest needs to take the form of a challenge to the certificate of election, rather than a challenge to the ministerial certification process.

There is also reason to believe that the right to an audit does not extend to changing the outcome of an election. The statute that implements the right to an audit makes clear that it "is not a recount and does not change any certified election results." MCL 168.31a(2). While one might argue that the statute does not completely vindicate the petitioners' constitutional "right to have the results of statewide elections audited," Const 1963, art 2, § 4(1)(h), it seems important to note that the Constitution provides that the audit shall be performed "in such a manner as prescribed by law," *id*. There is a somewhat confusing internal contradiction in the constitutional text, as the audit right is the only one said to be "as prescribed by law," but all of the rights in § 4(1) are said to be "self-executing." However, I see nothing to be gained in judicial exploration of this tension and examination of the scope of the audit right conveyed in § 4(1)(h) if there is no purpose to which the results could be applied. Moreover, deferring to the audit right as it is expressed in MCL 168.31a(2) would be consistent with the outcome of the remainder of the cases that have come to us which implicate Proposal 18-3. While this Court has denied leave in each of these cases and thus has taken no institutional position, see MCR 7.301(E), the consistent result has been to unsettle the least amount of the Michigan Election Law as possible when provisions of it are challenged under

Proposal 18-3. We have thus left in place the statutory deadline of 8 p.m. on Election Day for absentee ballots to be received and counted as well as certain statutory voter registration requirements, and denied a prior challenge seeking an audit outside the boundaries of MCL 168.31a. See *League of Women Voters v Secretary of State*, 506 Mich 886 (2020), denying lv from 333 Mich App 1 (2020), recon den 506 Mich 905 (2020); *Promote the Vote v Secretary of State*, 506 Mich 888 (2020), denying lv from 333 Mich App 93 (2020); *Priorities USA v Secretary of State*, 506 Mich 888 (2020), denying lv from 333 Mich App 93 (2020); *Costantino v Detroit*, 506 Mich 1041 (2020). As I have been the only member of the Court in the majority on all of these cases and the instant case, I cannot speak for my colleagues, but for my own part I can say that a desire to unsettle as little of the Michigan Election Law as possible has animated my approach to these cases.

Petitioners' remaining requests in their prayer for relief put them in the curious position of volunteers in defense of the Legislature's needs. Thus, they ask that we "take immediate custody and control of all ballots, ballot boxes, poll books, and other indicia of the Election . . . to prevent further irregularities, and to ensure that the Michigan Legislature and this Court have a chance to perform a constitutionally sound audit of lawful votes." But if the Legislature needs to seize records, it has some authority to do so, see MCL 4.541, and if it needs judicial assistance in this regard, it is free to ask us. They similarly ask that we "appoint a special master or committee from both chambers of the Michigan Legislature to investigate all claims of mistake, irregularity, and fraud at the TCF Center . . . ." But the separation of powers makes it unthinkable that we would direct the Legislature to convene a committee to investigate anything—that branch's choice to investigate is its own.[4] For our part, there is no need for a special master to investigate anything if it is not in service of a cause of action that the petitioners enjoy. As noted, during the vote-counting process, the question of fraud is not one that the canvassing boards can investigate; after the vote-counting is complete, the issue is one that must be raised in either a quo warranto proceeding or, as apparently is the case here, before the Legislature itself.

If the scope of the constitutional right to an audit that animates Justices ZAHRA's and VIVIANO's dissenting statements were squarely presented and likely to be dispositive, I would be open to hearing this case. But the scope of that right is not very well presented (as noted, it

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[4] Justice VIVIANO suggests the possibility that the "results of an audit could be used by petitioners to convince the Legislature to take up the matter and to prevail in that venue," but their success or failure before the Legislature is a political rather than a legal question. *Nobody* asserts that the right created by Const 1963, art 2, § 4(1)(h) entitles the petitioners to information on the schedule they prefer to try and persuade the Legislature to take action.

does not appear in petitioners' prayer for relief), it does not appear to be dispositive, and petitioners' complaint is marred by further problems besides these. Although we have no absolutely definitive answers for these questions, it appears very much that petitioners are erroneously seeking to make the investigation of fraud a part of the canvassing process, and doing so by invoking statutes (MCL 168.479, MCL 168.878) that do not purport to give the judiciary the jurisdiction they ask us to exercise, which is all the more a problem given that MCL 168.846 appears to make the Legislature the exclusive arbiter of who is the proper winner of a presidential election. Petitioners also gesture toward an audit right which MCL 168.31a indicates is too circumscribed to give them the outcome they seek, and even if MCL 168.31a is narrower than the constitutional audit right of Const 1963, art 2, § 4(1)(h), it remains the case that MCL 168.846 apparently makes the Legislature the arbiter of this dispute to the exclusion of the judiciary. Petitioners further ask that we enjoin actions that have already occurred (the certification of the winners of this election), that we retroactively invalidate absentee ballots whose issuance they did not challenge in advance of the election, and that we preserve evidence for the Legislature to review that it either can gather for itself or that it has not asked us to assist in preserving. I simply do not believe this is a compelling case to hear.

In short, even if this petition can be construed as requesting an audit, what it requests is beyond the bounds of MCL 168.31a; and even if petitioners received said audit, it appears that it could not be used to revisit the canvassing process, because MCL 168.846 apparently reserves to the Legislature rather than the judiciary the final say on who Michigan's presidential electors are. For us to scrutinize these admittedly unresolved questions further, we must do so on the strength of a petition we may not have jurisdiction to entertain and within the four corners of which it is not clear what actual cause of action it is pleading, what relief it is seeking, or on what theory it believes it is owed relief from the named defendants. In light of these myriad difficulties—only some of which implicate the apparent merits of the legal issues the petitioners attempt to present to us—I consider it imprudent to hear this matter, a conclusion only amplified by my view that it is irresponsible to continue holding out the possibility of a judicial solution to a political dispute that needs to be resolved with finality. Petitioners' complaint casts more heat than light on the legal questions it gestures toward, and would not help us in providing a definitive interpretation of the law in this area. I therefore concur with our order denying petitioners relief.

ZAHRA, J. (*dissenting*). Just two years ago, through the exercise of direct democracy and the constitutional initiative process, the people of Michigan amended our Constitution to expand greatly how Michigan residents may exercise their right to vote. Among the additions to the Michigan Constitution effected by what was then known as Ballot Proposal 2018-3 (Proposal 3) were provisions that: (i) require the Secretary of State automatically to register to vote all Michigan residents conducting certain business with the Secretary of State, unless

the resident specifically declines registration; (ii) allow same-day registration with proof of Michigan residency; and (iii) permit no-reason absentee voting. Critics of Proposal 3 argued that these changes would increase opportunities for voter fraud and weaken the integrity of the electoral process, thereby placing in doubt the accuracy and integrity of Michigan's election returns.[1] Proponents responded that Proposal C would promote and ensure the accuracy and integrity of elections by constitutionally guaranteeing the right to audit the results.[2]

In the wake of the very next election cycle to follow the adoption of these sweeping election reforms of 2018, petitioners filed an original action in this Court under Const 1963, art 6, § 4 and MCL 600.217(3) "seeking extraordinary writs of mandamus, prohibition, and declaratory and injunctive relief." In support of their claims, petitioners invoke MCL 168.479, which specifies that "any person 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."[3] Petitioners request, among other things, appointment of a special master to investigate their claims of election irregularities and fraud and to "independently review the election procedures employed at the TCF Center and throughout the State,"[4] presumably pursuant to Const 1963, art 2, § 4(1)(h)—which was among the provi-

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[1] See Mack, *Michigan Approves Proposal 3's Election Reforms*, MLive (updated January 29, 2019) <https://www.mlive.com/news/2018/11/hold_michigan_proposal_3s_elec.html> (accessed December 8, 2020) [https://perma.cc/A8Z9-B46G].

[2] *Id*.

[3] Justice CLEMENT's statement concurring in the Court's order argues that MCL 168.479(1) does not confer jurisdiction in this Court to hear petitioners' challenge because it is located in the chapter on initiatives and referenda. But the plain language of MCL 168.479(1) is broad: "[A]ny person 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" (emphasis added). Moreover, it would be strange to suggest that MCL 168.479(1) applies only to initiatives and referenda, as precisely that sort of limiting language is found not in MCL 168.479(1) but, rather, MCL 168.479(2), which provides in relevant part that any person who "feels aggrieved by any determination made by the board of state canvassers *regarding the sufficiency or insufficiency of an initiative petition* . . . ." (emphasis added). Therefore, on the basis of the statutory text, I am not nearly as confident as Justice CLEMENT that MCL 168.479(1) does not confer jurisdiction in this Court to hear petitioners' challenge. But to the extent we have questions about the Court's jurisdiction, I would explore them at oral argument.

[4] Petition for Extraordinary Writs & Declaratory Relief, p 53.

sions added to the Michigan Constitution by Proposal 3 and which guarantees to "[e]very citizen of the United States who is an elector qualified to vote in Michigan . . . [t]he right to have the results of statewide elections audited, in such manner as prescribed by law, to ensure the accuracy and integrity of elections."

Based on the pleadings alone, a majority of the Court today denies petitioners' requested relief through a short form order of denial that concludes the majority "is not persuaded that it can or should grant the requested relief." I dissent from the summary dismissal of petitioners' action, without ordering immediate oral argument and additional briefing. As pointed out in the statements of my colleagues, there are threshold questions that must be answered before addressing the substantive merits of petitioners' claims. But rather than summarily dismissing this action because procedural questions exist, I would have ordered immediate oral argument and briefing to address these threshold questions, as well as the meaning and scope of implementation of Const 1963, art 2, § 4(1)(h).

The matter before us is an original action asking the Court to invoke the power of mandamus, superintending control, and other extraordinary writs to provide declaratory relief. As such, this matter should be distinguished from a typical application seeking leave to appeal from the Court of Appeals. Original actions are limited to a small class of cases particularly described in Const 1963, art 6, § 4. Original actions should, therefore, be afforded very close review, particularly when they raise matters under Michigan election law.

Here, petitioners have presented a significant constitutional question pertaining to the process and scope of the constitutional right to an election audit—a right explicitly placed in our Constitution by the people themselves, in whom "[a]ll political power is inherent . . . ." Const 1963, art 1, § 1. Not only that, but Const 1963, art 2, § 4(1)(h) has remarkable resonance for the precise controversy now before this Court because, even when viewed in hindsight, it seems unlikely that the people of Michigan could have crafted language that would more directly address this circumstance than they have already done in ratifying this very provision. Accordingly, I believe we owe it to the people of Michigan to fully and completely review the claims asserted by petitioners. For this reason, I would have immediately ordered oral arguments and briefing to assess, as expeditiously as was practicable, whether petitioners are properly before this Court and, if so, both provide guidance as to the meaning and scope of the right to an audit under Const 1963, art 2, § 4(1)(h), and determine whether petitioners are entitled to any of the other relief they seek.

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

VIVIANO, J. (*dissenting*). For the second time in recent weeks, individuals involved in last month's election have asked this Court to order an audit of the election results under Const 1963, art 2, § 4. See *Costantino v Detroit*, 506 Mich 1041 (2020). As in that case, petitioners here allege that election officials engaged in fraudulent and improper conduct in administering the election. In support of these claims, petitioners have submitted hundreds of pages of affidavits and expert

reports detailing the alleged improprieties. Here, as in *Costantino*, I would grant leave to appeal so we can determine the nature and scope of the constitutional right to an election audit.[1] After all, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803). But I write separately to highlight the lack of clarity in our law regarding the procedure to adjudicate claims of fraud in the election of presidential electors.[2]

The case before the Court is no small matter. Election disputes pose a unique test of a representative democracy's ability to reflect the will of the people when it matters most. See Foley, *Ballot Battles: The History of Disputed Elections in the United States* (New York: Oxford University Press, 2016), pp 17-18. But it is a test our country has survived, one way or another, since its inception. The Founding Fathers faced their share of contested elections, as have subsequent generations. See generally *id*.

But in the context of presidential elections, all these episodes pale in comparison to the contest of 1876, which resulted in challenges and changes that helped set the stage for the present dispute.[3] As with the current case, many of the ballot-counting contests in 1876 focused on the work of canvassing boards and the function of courts; they also involved the role of Congress itself, which created an electoral commission to adjudicate the dispute and help Congress select a victor. See Nagle, *How Not to Count Votes*, 104 Colum L Rev 1732 (2004) (reviewing books on the 1876 election); see also Ewing, *History and Law of the Hayes-Tilden Contest Before the Electoral Commission: The Florida Case, 1876-77* (Washington, DC: Cobden Publishing Co, 1910), pp 148-153 (discussing the litigation in Florida courts over the role of canvassing boards).

Among the modes for challenging the election in 1876 (and in the earlier election of 1872, among others) were lawsuits brought to obtain a writ of quo warranto. See Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 Fla L Rev 541, 573 (2004).

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[1] Because of the time constraints imposed by federal law on the appointment of and balloting by federal electors, I would hear and decide this case on an expedited basis so that, if we accept petitioners' interpretation of the constitutional right to an election audit, they will be able to exercise that right in a timely and meaningful manner.

[2] I do not address whether a claim of fraud could be adjudicated or investigated in the context of a recount.

[3] As Justice COOLEY wrote of the 1876 election, "the country is thoroughly warned, that in any close election the falsification of the result is not so difficult that unscrupulous men are not likely to contemplate it," and the practice of relying on state determinations of the vote "makes the remedy exceedingly uncertain, if dishonest men, who have control of the State machinery of elections, shall venture to employ it to defeat the will of the people." Cooley, *The Method of Electing the President*, 5 Int'l Rev 198, 201 (1878).

With no common-law action available to directly contest an election, Bickerstaff, *Counts, Recounts, and Election Contests: Lessons from the Florida Presidential Election*, 29 Fla St U L Rev 425, 431 (2002), the archaic writ of quo warranto became the tool in England and in this country to dispute an ostensibly successful candidate's right to office. *Conscientious Congressman's Guide*, 56 Fla L Rev at 570-571.[4] A quo warranto proceeding was instituted to "try titles to office" based on claims that the officeholder had wrongfully intruded into or usurped the office. See *Gildemeister v Lindsay*, 212 Mich 299, 303 (1920) (citation and quotation marks omitted); see also Cooley, *Constitutional Limitations* (5th ed), p 788 ("[T]he proper proceeding in which to try [challenges to election results] in the courts is by *quo warranto*, when no special statutory tribunal is created for the purpose.").

The problem, as the elections in the 1870s revealed, was that quo warranto actions were ill-suited to keep pace with the Electoral College: in the two presidential elections of that decade, none of the proceedings "even had their trial phase completed before the electors balloted." *Conscientious Congressman's Guide*, 56 Fla L Rev at 573. In response, Congress passed the Electoral Count Act in 1887. *Id*. at 542, 583. The statute encourages states to adopt procedures to try election contests involving presidential electors. *Id*. at 585. As it currently stands, the results of any determination made under these procedures will be binding on Congress if the determination comes at least six days before the electors meet to vote. 3 USC 5.

Why is the history relevant now? Surely, one might think, after the passage of nearly 150 years our state has adopted efficient procedures to address election disputes, especially when the presidency is at stake. In many states, this is true. In almost all, postelection contests for legislative seats are ultimately decided by the legislatures themselves, although some states have provided for preliminary determinations by the courts or independent commissions. See Douglas, *Procedural Fairness in Election Contests*, 88 Ind L J 1, 5-8, 24-29 (2013); see also *Berdy v Buffa*, 504 Mich 876, 877-879 (2019) (noting that such provisions are commonplace and holding that they only apply to postelection contests of a challenged election result).[5] For disputed gubernatorial elections, a plurality of states have enacted legislation allowing the losing candidate to contest the election in court, either at the trial or appellate court level; others place the decision in the hands of the legislature or a nonjudicial tribunal. *Procedural Fairness*, 88 Ind L J at 9-20. Although only about 20 states have specific provisions for presidential-election disputes,

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[4] Quo warranto challenges date back to the middle ages. See Sutherland, *Quo Warranto Proceedings in the Reign of Edward I, 1278–1294* (Oxford: Clarendon Press, 1963), pp 1-6 (noting the king's extensive use of quo warranto in the thirteenth century).

[5] The same is true of contests in congressional elections. See US Const, art 1, § 5.

parties often can bring these challenges under the state's general election-contest statutes. *Id*. at 29-34.[6]

Unfortunately, while the vast majority of states have adopted legislation creating a mechanism for the summary or expedited resolution of election contests, Michigan has not. Cf. Wyo Stat Ann 22-17-103 (requiring election contests to be expedited); NJ Stat Ann 19:29-5 (requiring summary proceedings); Neb Rev Stat 32-1110 (requiring summary proceedings with a hearing not later than 15 days after the "matter is at issue"). Indeed, as the controversies arising out of the 2020 general election have shown, there is rampant confusion in our state concerning the proper mechanism for contesting elections in general, and presidential elections in particular, on the basis of fraud. Much of the litigation so far this year has focused on the decisions of the canvassing boards. But "[w]e have long indicated that canvassing boards' role is ministerial and does not involve investigating fraud." *Costantino*, 506 Mich at 1046 (VIVIANO, J., dissenting) (collecting sources). There is simply no statutory framework for the boards to adjudicate fraud. And, strikingly, the Legislature has not, in any other statute, expressly provided a mechanism for determining disputes specific to presidential electors as envisioned in the Electoral Count Act.

And thus, we remain one of the only states without any clear framework to enable and regulate election contests. See *Procedural Fairness*, 88 Ind L J at 10; Douglas, *Discouraging Election Contests*, 47 U Rich L Rev 1015, 1028 (2013).[7] Instead, our state has various elements that do not quite add up to a coherent system. As noted, our Legislature has codified the ancient writ of quo warranto. See MCL 600.4501 *et seq*. and MCR 3.306; see also MCL 168.861 ("For fraudulent or illegal voting, or tampering with the ballots or ballot boxes before a recount by the board of county canvassers, the remedy by quo warranto shall remain in full force, together with any other remedies now

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[6] The American Law Institute has recently issued model frameworks for states to consider adopting in order to comprehensively regulate both election disputes in general and presidential-election disputes in particular. American Law Institute, Principles of the Law, Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes (2019), Parts II and III.

[7] See also Developments in the Law, *Postelection Remedies*, 88 Harv L Rev 1298, 1303 n 22 (1975) (noting that, at the time, Michigan was one of "[f]our states [that] do not generally provide for election contests, but do make available the writ of quo warranto"); Nat'l Conference of State Legislatures, *After the Voting Ends: The Steps to Complete an Election* (October 28, 2020) ("Forty-four states have statutes pertaining to election contests. The states lacking such statutes are . . . Michigan . . . .") <https://www.ncsl.org/research/elections-and-campaigns/after-the-voting-ends-the-steps-to-complete-an-election.aspx> (last accessed Dec 8, 2020) [https://perma.cc/5RQ7-UGR9].

existing."). Under these proceedings, the court can determine the "right of the defendant to hold the office." MCL 600.4505. But these actions usually must be brought by the attorney general—only if she refuses can a private citizen seek leave of court to make the claim. MCL 600.4501. And our caselaw has suggested that to prevail in the action, the plaintiff must present evidence that he or she is entitled to the office. See *Marian v Beard*, 259 Mich 183, 187 (1932) ("The [quo warranto] suit by a citizen, on leave of court, is a private action, and, therefore, the plaintiff must allege in the information the facts which give him the right to sue. Such allegations necessarily include the . . . showing of title in plaintiff.") (citations and comma omitted); *Barrow v Detroit Mayor*, 290 Mich App 530, 543 (2010) (noting caselaw). Our statutes and court rule do not specify when these actions can be brought, but traditionally they required the defendant to have assumed office; thus one commentator has concluded that our framework "effectively preclude[s] election contests . . . ." *Discouraging Election Contests*, 47 U Rich L Rev at 1028; see also *Procedural Fairness*, 88 Ind L J at 11.[8] With respect to presidential electors, whose office exists for only a short period, it is not at all clear how a quo warranto action could timely form the basis for an effective challenge. Nonetheless, we have stated that " '[t]he only way to try titles to office finally and conclusively is by quo warranto.' " *Sempliner v FitzGerald*, 300 Mich 537, 544-545 (1942), quoting *Frey v Michie*, 68 Mich 323, 327 (1888).

Despite the apparent exclusiveness of the quo warranto proceeding, MCL 168.846 provides that "[w]hen the determination of the board of state canvassers is contested, the legislature in joint convention shall decide which person is elected." This statute contains language that previously appeared in our 1850 Constitution as Article 8, § 5.[9] Under

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[8] The lead opinion in *In re Servaas*, 484 Mich 634, 643 n 15 (2009) (opinion of WEAVER, J.), suggested that quo warranto actions could be launched without regard to whether the defendant was currently in office. But as the dissenters cogently observed, quo warranto historically applied only "to claims that a public official is *currently* exercising invalid title to office." *Id*. at 664 (MARKMAN, J., dissenting).

[9] The statute and constitutional provision have interesting histories. As described by one law professor from the period, Const 1850, art 8, § 5 ended the prevailing practice of having "all contests concerning elections to office . . . decided by the courts." Wells, *Reilly-Jennison: An Address to the People on the Recent Judicial Contest*, Detroit Free Press (March 27, 1883), p 4; see also University of Michigan, Michigan Law, *William P. Wells*, Faculty, 1874–1891 <https://www.law.umich.edu/historyandtraditions/faculty/Faculty_Lists/Alpha_Faculty/Pages/WilliamPWells. aspx> (accessed Dec 7, 2020) [https://perma.cc/V2PS-Z8ET]. But with the passage of this new constitutional section in 1850, "the power to decide election contests was taken away from the courts, in respect to the State officers named, and such other officers as the Legislature, by

that constitutional provision, we held that the Legislature had "discretion" and that we could not require our coordinate branch to act. *People ex rel Royce v Goodwin*, 22 Mich 496, 502 (1871); see also *Dingeman v Bd of State Canvassers*, 198 Mich 135, 137 (1917) ("The legislature, bound by no hard and fast rule, may or may not, in its discretion, entertain contests."). We further explained that the rationale for taking these disputes out of the courts was the "serious difficulties which would attend inquiries into contested elections, where the ballots of a great number of election precincts would require to be counted and inspected . . . ." *Goodwin*, 22 Mich at 501; see also *Dingeman*, 198 Mich at 137 ("The determination of the legislature is a finality, and private parties, ambitious to fill these offices, or litigious in character, cannot compel action by the legislature or go elsewhere and secure delay in carrying out the recorded will of the electorate."). As a result, in *Goodwin*, which involved a petition for a writ of quo warranto, we stated that this constitutional language "does not permit the regularity of elections to the more important public offices to be tried by the courts." *Goodwin*, 22 Mich at 501. This rule has been followed in numerous cases, including in elections for the judiciary—but it has not been cited or discussed by this Court or the Court of Appeals in many decades.[10]

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subsequent statutes, might add to the list." Wells, *Reilly-Jennison*, p 4. This constitutional provision was carried over in the 1908 Constitution, see Const 1908, art 16, § 4. For some unknown reason, in 1917 the Legislature enacted the same substantive rule in statutory form. 1917 PA 201, chap XIX, § 12. It has remained there since and is now codified at MCL 168.846. See 1925 PA 351, part 4, chap XVI, § 11; 1954 PA 116, § 846. In the meantime, the voters amended the constitutional provision in 1935 so that the Legislature could prescribe rules by which the Board of State Canvassers would oversee election contests. See Ballot Proposal No. 1, 1935, amending Const 1908, art 16, § 4 ("In all cases of tie vote or contested election for any state office, except a member of the legislature, any recount or other determination thereof may be conducted by the board of state canvassers under such laws as the legislature may prescribe."). At the convention that produced our current Constitution, the constitutional provision was considered to be "legislative in character" and thus was excluded altogether from the constitutional text. 1 Official Record, Constitutional Convention 1961, p 846 (Exclusion Report 2016). The convention committee that recommended the exclusion noted that statutes already governed this issue and the Legislature had authority over this area. *Id*.

[10] See *Vance v St Clair Co Bd of Canvassers*, 95 Mich 462, 466 (1893) ("Contests respecting the title to that office [i.e., the circuit judgeship] must be made before the Legislature. That body finally determines the very matters which the board of canvassers in the present case propose to pass upon."); *Dingeman*, 198 Mich at 136, 139 ("It is, and must be, conceded that the Constitution has vested in the legislature sitting in

But the Senate's rules currently provide for these contests. Senate Rule 1.202(d) (February 12, 2019).[11]

The plain language of MCL 168.846, and the caselaw interpreting that language from our earlier constitutions, would appear to apply to contested presidential elections. And, since it is arguable whether quo warranto applies before a defendant assumes office, MCL 168.846 may offer the only route for contesting a presidential election before it becomes final.[12] But the statute does not provide for any definite or detailed procedures to determine election contests, as the Electoral Count Act appears to contemplate. 3 USC 5. Compare, e.g., Cal Election Code 16400 and 16401 (providing for contests of "any election" and requiring it to be brought within 10 days "[i]n cases involving presidential electors"); Del Code Ann, tit 15, § 5921 (requiring "[a]ny person intending to contest the election of any one declared by the Governor to have been chosen an elector of President and Vice President" to file a declaration within 10 days of the Governor's proclamation). And it is discretionary with the Legislature—they can take up the matter or not. *Dingeman*, 198 Mich at 137; compare Ark Code Ann 7-5-806(c) (requiring the Legislature to vote on whether "the prayers shall be granted" in various contested elections concerning executive offices). As things appear to stand, then, unless the Legislature can be convinced to review the matter, individuals alleging fraud in an election can obtain review,

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joint convention the power of finally determining the question who was elected to the office of circuit judge. . . . Running through all these cases is the rule, to my mind clear and distinct, that wherever by the organic law, whether Federal, State, or municipal, a tribunal is created to finally determine the right to an office, that tribunal is exclusive, and there, and there only, may the right to the office be tested. By the organic law of this State the legislature, sitting in joint convention, is made such tribunal as to the office here involved."); see also *McLeod v Kelly*, 304 Mich 120, 126-127 (1942) (applying *Dingeman*); *Behrendt v Bd of State Canvassers*, 269 Mich 247, 248 (1934) (same); *Wilson v Atwood*, 270 Mich 317 (1935) (rejecting petition for leave to file quo warranto action regarding the office of Secretary of State when, under the constitutional provision in effect at the time, the Legislature did not properly meet in joint convention to hear the election contest).

[11] Although I did not locate any reference to this procedure in the Standing Rules of the House of Representatives or the Joint Rules of the House and Senate.

[12] The petitioners here have, in fact, recently filed a petition with the Legislature to obtain an election audit and other relief. See Feather, CW7 News, *Voters Petition Michigan Legislature to Audit Election Results, Call SOS Under Oath*, <http://cw7michigan.com/news/local/voters-petition-michigan-legislature-to-audit-election-results-call-sos-under-oath> (accessed December 7, 2020) [https://perma.cc/PL2G-M3RV].

if at all, in a quo warranto action only when executive officials decline to initiate the action, only by leave of the court, and, mostly likely, only after it is too late to matter.

This backdrop makes the current case all the more important, as it involves a new tool for detecting fraud in elections. The voters in 2018 enacted sweeping changes to our election system. One of the new concepts introduced was an election audit. Article 2, § 4(1)(h) provides to "[e]very citizen of the United States who is an elector qualified to vote in Michigan . . . [t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections." *Id*. "The provision is self-executing, meaning that the people can enforce this right even without legislation enabling them to do so . . . ." *Costantino*, 506 Mich at 1044 (VIVIANO, J., dissenting), citing *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466 (1971). The Legislature has provided for these audits in MCL 168.31a, "which prescribes the minimum requirements for statewide audits and requires the Secretary of State to issue procedures for election audits under Article 2, § 4." *Costantino*, 506 Mich at 1044 (VIVIANO, J., dissenting).

Petitioners here, like the plaintiffs in *Costantino*, seek to use this new right to obtain an audit of the election results.[13] With that audit in hand, they apparently hope to find further support for their challenge to the election. As my dissent in *Costantino* explained, the nature of the right granted in Article 4, § 4(1)(h) is an important issue this Court should resolve. A full resolution involves answering many questions, such as whether MCL 168.31a "accommodates the full sweep of the Article 2, § 4 right to an audit or whether it imposes improper limitations on that right" and whether the party seeking an audit must make some showing of entitlement, such as by presenting evidence of fraud. *Costantino*, 506 Mich at 1044.

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[13] Justice CLEMENT is mistaken in suggesting that petitioners here have not asked for an audit under Const 1963, art 2, § 4. In each of their claims for relief, petitioners state that "Respondents owe citizens an audit of election results that is meaningful and fair and to safeguard against election abuses." They claim to be aggrieved because the Board of State Canvassers certified the election "without conducting an audit . . . ." Their prayer for relief asks us to collect the ballots and election materials so that "the Michigan Legislature and this Court [will] have a chance to perform a constitutionally sound audit of lawful votes[.]" If there was any lingering doubt, the petitioners' brief here makes it clear, presenting as a numbered issue of "whether the nature and scope of article 2, § 4 requires a meaningful audit before Michigan's electors may be seated." For good measure, the brief asks the Court to "enter an order requiring that the Michigan Legislature convene a joint convention to analyze and audit the election returns . . . ." See also *id*. ("This Court should oversee an independent audit—or require the Michigan Legislature to take back this constitutional function . . . ."). Short of a magical incantation, it seems to me that petitioners have done all they can to put the issue directly before the Court.

But the core question this case and *Costantino* have presented is whether the petitioners are entitled to an audit in time for it to make any difference in their election challenges. In other words, is this right a means "to facilitate challenges to election results, or does it simply allow for a postmortem perspective on how the election was handled?" *Id*. at 1045. This gets to the heart of the struggle with these election disputes. The path for citizens of our state to raise serious claims of election wrongdoing, implicating the heart of our democratic institutions, is unclear and underdeveloped. This void in our law might suggest that the audit right in Article 2, § 4 was not intended to support election challenges. On the other hand, the very fact that the mechanisms for election challenges are so opaque might be a reason why the right to an audit is so critical. Moreover, to the extent the current system puts decisions in the hands of the Legislature, MCL 168.846, a timely audit might be essential for parties to convince the Legislature to entertain an election contest. And as I pointed out in *Costantino*, Article 2, § 4 was passed at a time when audits were increasingly viewed as a tool to measure the accuracy of election results so that recounts and other procedures could be employed if the audit uncovered problems. *Costantino*, 506 Mich at 1046.

Whatever the answer may be, the importance of the issue cannot be denied. Indeed, few topics so closely affect the maintenance of our democratic principles. As noted above, our laws governing election contests are underdeveloped in the context of the election of presidential electors. This uncertainty—particularly the lack of any laws that *clearly* govern the determination of presidential-election contests, although MCL 168.846 arguably applies—jeopardizes our ability to take advantage of the safe harbor in 3 USC 5, i.e., Congress's guarantee to respect the state's determination of election disputes over electors. For this reason, and perhaps even more importantly to provide our citizens with a coherent, fair, and efficient mechanism for adjudicating claims of fraud in the election of presidential electors, I respectfully urge the Legislature to consider enacting legislation creating such a mechanism.

By closing the courthouse door on these petitioners, the Court today denies them any ability to have their claims fully considered by the judiciary.[14] That is because petitioners, rightly thinking that time is short, have filed this case as an original action in this Court. As a result,

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[14] Justice CLEMENT declares it "irresponsible" for us even to consider the issues presented by this case. *Ante* at 975, 982. I would beg to differ. Considering jurisprudentially significant constitutional claims is our core responsibility. The fact that the claims arise in a high-profile case or one that may have national implications is no reason for us to shy away from our duty to decide them. As I have discussed at some length here (and in *Costantino*), our election-contest laws are underdeveloped and unclear. That murkiness may explain why the petitioners here (and parties in related cases like *Costantino*) have had such difficulty navigating them. Justice CLEMENT appears to agree that the law is unsettled: her concurrence repeatedly hedges on every significant ques-

they have received no decision below and now will go without any answer. I believe it is incumbent upon the Court, in these circumstances, to provide guidance so that, no matter the outcome, the people are able to understand and exercise their constitutional rights in an effective and meaningful manner.[15] Accordingly, I dissent.

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

Summary Disposition December 11, 2020:

In re CHRISTOPHER ROSS, JR, MINOR, No. 158764; Court of Appeals No. 331096. On October 8, 2020, the Court heard oral argument on the application for leave to appeal the August 21, 2018 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

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tion in the case, and she ultimately concludes that she has "no absolutely definitive answers for" them. *Ante* at 982. So we have real work to do in this case to clarify the law in this area—work that only this Court can do.

In addition, despite claiming she has not reached any "definitive answers," Justice CLEMENT's reasons for voting to deny are premised on certain conclusions regarding the nature of the right to an audit and other issues in the case. For example, she says "there is no apparent purpose to which the audit sought by the petitioners can be put in light of the above-mentioned jurisdictional limits on the judiciary's ability to revisit the outcome of this election." *Ante* at 980. This suggests that the audit right has no role to play in election contests because such contests cannot come before the courts. And because she believes the matter is for the Legislature, she sees no need to resolve the "tension" she perceives in the text of Article 2, § 4. *Ante* at 980. Of course, this conclusion overlooks the possibility that the results of an audit could be used by petitioners to convince the Legislature to take up the matter and to prevail in that venue. Baked into the concurrence's rationales, then, are determinations about the scope and nature of the audit right, this Court's jurisdiction, and the respective roles of the courts and Legislature—all of which are questions at the heart of the case and any of which is significant enough, in my opinion, to merit a full opinion from this Court. Thus, in professing not to answer any question in this case, Justice CLEMENT assumes the answer to a number of them. I would instead take direct aim at resolving these issues, but only after hearing the case.

[15] In hearing the case, I would consider all matters necessary to reach a resolution, including whether this Court has jurisdiction to hear this original action or provide any or all of the relief requested. Because the Court has declined to hear this case, I, of course, reach no final conclusions on any of the issues addressed above.

the Oakland Circuit Court. The Court of Appeals erred by reversing the trial court's decision to grant the respondent a new trial. As the trial court correctly decided, the respondent received ineffective assistance of counsel under *Strickland v Washington*, 466 US 668, 687 (1984). Because "reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options," counsel has a duty to conduct a reasonable investigation into a defendant's case. *Id*. at 680. This duty to investigate includes the pursuit of all leads regarding inconsistencies with a complainant's allegations, as the instant trial counsel recognized at the evidentiary hearing held pursuant to *People v Ginther*, 390 Mich 436 (1973). See *People v Grant*, 470 Mich 477, 487 (2004). Here, trial counsel failed to further investigate and substantiate the respondent's claim that the complainant allowed the respondent to use her cellular phone to call his mother after the alleged sexual assault occurred. Although counsel testified at the evidentiary hearing that the phone records initially provided to him by the respondent's mother did not identically match the details of the respondent's narrative, counsel was put on notice to investigate the matter further through the respondent's assertions regarding the phone calls, the respondent's mother's assertions regarding the phone calls, and the phone records that were received before trial that demonstrated that the respondent's mother called the complainant three times on the afternoon in question. Further investigation would have revealed, as it did during the evidentiary hearing, that a call was made from the complainant's phone to the respondent's mother's phone, prompting the three calls in return.

Given that the trial was essentially a credibility contest, counsel's failure to investigate an issue that would have bolstered the respondent's credibility and revealed an inconsistency in the complainant's narrative was not—as the Court of Appeals erroneously determined—a strategic decision, but instead a fundamental abdication of his duty to conduct a complete investigation. Had counsel investigated further and the phone call evidence been admitted at trial, it is probable that the result of the proceeding would have been different. We remand this case to the Oakland Circuit Court for further proceedings consistent with this order. 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.

ZAHRA, J. (*concurring in part and dissenting in part*). I disagree with this Court's peremptory order that in part concludes that "the Court of Appeals erred by reversing the trial court's decision to grant the respondent a new trial."[1] I agree with the Court that the Court of Appeals'

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[1] The Court ordered oral argument on the application on the following four issues:

> (1) whether appeals from juvenile adjudications for criminal offenses are governed by the time limits for civil cases or by the time limits for criminal cases, see MCR 7.305(C)(2); (2) whether the standard for granting a new trial in a juvenile delinquency case is

judgment should be reversed; but only because, in my judgment, the lower-court record does not provide a basis for any appellate review. Appellate proceedings in this matter should be reserved until the trial court makes the constitutionally required findings to conclude that defense counsel provided ineffective counsel. Absent these required findings, a peremptory order from this Court begets the same error made by the Court of Appeals' opinions and judgment, a component of this case that prompted our interest in and consideration of this case.

The trial court ruled:

> [J]ust as the failure to file a witness list falls below an objective reasonable standard,[2] so too is the issue of failing to properly have evidence admitted at trial. More crucial is the fact that such evidence, i.e., Mrs. Ross's cell phone records, could have been obtained prior to trial through discovery . . . .

In regard to the trial court's court ruling that "the failure to file a witness list falls below an objective reasonable standard, as no witness was otherwise prevented from testifying at trial based on [defense counsel's] failure to file a witness list," this ruling is ultimately correct

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> the same as the standard for granting a new trial in a criminal case, compare MCR 3.992(A) with MCR 6.431(B); (3) whether juveniles who claim a deprivation of their due process right to counsel must satisfy the two-part test set forth in *Strickland v Washington*, 466 US 668, 687 (1984); and (4) whether the Court of Appeals erred in reversing the trial court's decision to grant the respondent a new trial based on evidence that trial counsel did not obtain or present. [*In re Ross, Minor*, 505 Mich 964, 964-965 (2020).]

The Court's dispositional order only addresses the fourth issue.

[2] In this respect, the trial court held:

> Regarding Respondent's allegation that his trial counsel, Mr. Daniel Randazzo, was ineffective for failure to file a witness list, the Court finds that Respondent is not entitled to a new trial on that issue.
>
> The evidence from trial and the evidentiary remand hearing is clear that there's no dispute that Mr. Randazzo failed to timely file a witness list. The Court agrees with Respondent that that fact alone satisfies the first prong, that Mr. Randazzo's performance fell below an objectively reasonable standard of performance, and nor can that failure to file a witness list be considered trial strategy. However, though the Respondent disagrees, the Court record is also clear that the error was harmless, as no witness was otherwise prevented from testifying at trial based on Mr. Randazzo's failure to file a witness list.

but significantly flawed. If, as the court concluded, "no witness was otherwise prevented from testifying at trial based on [defense counsel's] failure to file a witness list," defense counsel's performance cannot in this instance be deemed to have fallen short of an objectively reasonable standard of performance. The trial court expressly incorporated this flawed holding in concluding that, "as previously discussed, just as the failure to file a witness list falls below an objective reasonable standard, so too is the issue of failing to properly have evidence admitted at trial. More crucial is the fact that such evidence, i.e., Mrs. Ross's cell phone records, could have been obtained prior to trial through discovery . . . ."

Here, defense counsel and his associate attorney undertook a difficult case. In my review, the complainant was entirely credible throughout investigations by the police and the panoply of family court proceedings. Respondent presents an entirely concocted and incredible narrative based on phone records he obviously had in his possession before the family court adjudication, and he admittedly "reviewed" these records before his adjudication. Respondent testified at the adjudication that he reviewed phone records of three calls between two cellular phones all placed within one minute, 4:31 p.m. Maybe this could be coincidence, but there is no evidence to suggest that either of these cellular phones had previously placed a call to the other. Clearly, respondent had in his possession and reviewed the very phone records he now claims his defense counsel should have discovered through further investigation. Thus, while I agree with the Court that appellate courts tread on thin ice when making findings to remedy the lack of a trial court's findings required by law, I nonetheless maintain that the only appropriate remedy is to remand and require the trial court to make requisite constitutional findings to support its decision that defense counsel's performance fell below an objectively reasonable standard.

DETROIT ALLIANCE AGAINST THE RAIN TAX v CITY OF DETROIT, No. 158852; Court of Appeals No. 339176. On October 7, 2020, the Court heard oral argument on the application for leave to appeal the November 6, 2018 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 judgment of the Court of Appeals and remand this case to that court, which shall hold this case in abeyance pending its decision in *Binns v City of Detroit* (Court of Appeals Docket No. 337609). After *Binns* is decided, the Court of Appeals shall reconsider this case in light of *Binns*. We do not retain jurisdiction.

BINNS v CITY OF DETROIT, No. 158856; Court of Appeals No. 337609. By order of January 24, 2020, the application for leave to appeal the judgment of the Court of Appeals was held in abeyance pending the decision in *DAART v City of Detroit* (Docket No. 158852). On the Court's own motion, the application for leave to appeal the November 6, 2018 judgment of the Court of Appeals 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 that court, which, while retaining jurisdiction, shall refer the case to a judicial circuit for proceedings under MCR 7.206(E)(3)(d). We do not retain jurisdiction.

ZAHRA, J. (*concurring*). I concurred in the Court's order vacating and remanding *Detroit Alliance Against the Rain Tax v Detroit* (Docket No. 158852) (*DAART*) to the Court of Appeals for reconsideration in light of our decision in this case, *Binns v Detroit* (Docket No. 158856). I write separately, however, to observe that the fact-finding process under MCR 7.206(E)(3)(d) that will take place in this case and which will subsequently be applied in *DAART* is critical to reaching a sound result under *Bolt v City of Lansing*, 459 Mich 152 (1998). *Bolt* set out a three-factor test for distinguishing a fee from a tax under Const 1963, art 9, § 31. See *Bolt*, 459 Mich at 161-162. Of particular importance to this case is the second factor, the proportionality analysis, especially in light of the following statement of fact from amicus Kickham Hanley PLLC's late-filed brief in *DAART*:

> The City [of Detroit (the City)] inexplicably does not collect Drainage Charges from the City's largest landowner, the Detroit Land Bank Authority ("DLBA"), a component unit of the City that owns and controls approximately 25% of the parcel-based acres in the City, a land area the size of the City of Royal Oak. As a result, the lost revenues attributable to the City's failure to collect from the DLBA must be made up through higher Drainage Charge rates imposed on other landowners[.][1]

Given the foregoing, it is at best unclear to me how the City's drainage charge is best classified as a user fee rather than as a tax where: (1) "user fees must be proportionate to the necessary costs of the service," *Bolt*, 459 Mich at 161-162; (2) a subunit of the City is exempted from paying the drainage charge that other impervious-acreage landowners must pay, see Kickham Hanley amicus brief at 3; and (3) that results in the imposition of "higher Drainage Charge rates" on other, non-DLBA landowners, see *id*.—all of which applies to plaintiffs in these cases.

In re PETITION OF ATTORNEY GENERAL FOR SUBPOENAS, No. 159690; reported below: 327 Mich App 481. On November 12, 2020, the Court heard oral argument on the application for leave to appeal the February 26, 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 affirm the holding of the Court of Appeals in part, reverse the holding of the Court of Appeals in part, and deny the application in all other respects.

The Court of Appeals erred in concluding that the circuit court was required to hold a hearing before issuing a subpoena pursuant to 42 CFR 2.66. As an initial matter, the Court of Appeals erred in holding it was bound by the analysis of lower federal courts. See *Abela v General Motors Corp*, 469 Mich 603, 606 (2004) ("Although state courts are bound by the decisions of the United States Supreme Court construing federal law . . . there is no similar obligation with respect to decisions of the lower federal courts."). The Court of Appeals was free to rely on

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[1] Kickham Hanley amicus brief at 3 (emphasis omitted).

federal appellate cases insofar as it found them "persuasive." *Id*. at 607. But neither case is persuasive because neither stands for the proposition that 42 CFR 2.66 requires a hearing before a subpoena can be issued. The Eleventh Circuit, in *Hicks v Talbot Recovery Sys, Inc*, noted that 42 CFR 2.64 requires, among other things, "a closed judicial hearing." 196 F3d 1226, 1242 n 32 (CA 11, 1999). Indeed, 42 CFR 2.64(b) requires that notice to a patient and the person holding a patient's records must include "[a]n opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence . . . ." Further, 42 CFR 2.64(c) specifically describes how hearings are to be held. While 42 CFR 2.66 incorporates 42 CFR 2.64(d) and 42 CFR 2.64(e), it does not incorporate 42 CFR 2.64(b) or 42 CFR 2.64(c). The First Circuit, in *United States v Shinderman*, applied 42 CFR 2.66, but that case was not about whether there should have been a hearing prior to issuance of a subpoena. 515 F3d 5 (CA 1, 2008). No party argued that. *Shinderman* was about notice required after issuance of a subpoena. *Shinderman*, 515 F3d at 10. There is no argument here that notice was defective. *Hicks* and *Shinderman* having nothing to say about whether 42 CFR 2.66 requires a hearing before issuance of a subpoena, we look to the text of the regulation itself, and find no mention of such a hearing. The Court of Appeals erred in holding to the contrary.

The Court of Appeals correctly held that the circuit court erred in its application of 42 CFR 2.64(d). Again, 42 CFR 2.66(c) incorporates the requirements of 42 CFR 2.64(d) and 42 CFR 2.64(e).[2] Under 42 CFR 2.64(d), before issuing an order a court must find that "good cause exists," which in turn requires two findings: "(1) Other ways of obtaining the information are not available or would not be effective; and (2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services." The circuit court made no finding as to whether other ways of obtaining the information in question were available or effective. Petitioner asserted the subpoena was the *most* effective method, but that is not the inquiry 42 CFR 2.64(d)(1) requires. Neither did the circuit

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[2] Although the Court of Appeals correctly noted that 42 CFR 2.64(e) describes procedural safeguards that must take place to protect patient identity, the panel erroneously concluded that all such administrative proceedings be closed and sealed from public scrutiny. The regulatory language states that an order authorizing disclosure must "[i]nclude such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered." 42 CFR 2.64(e)(3). So courtroom closure and sealing of records are examples of procedural safeguards a court may order, but the regulation does not require these steps be fulfilled in every case so long as all necessary measures are taken to protect a patient, the patient-physician relationship, and treatment services.

court weigh the "public interest and need for the disclosure" against potential injuries to "the patient, the physician-patient relationship and the treatment services" as required by 42 CFR 2.64(d)(2). Petitioner asserts that the circuit court's order incorporated the contents of the petition for the subpoenas, but the order does not explicitly purport to do so. Even assuming such an incorporation would have satisfied 42 CFR 2.64(d), the best practice would clearly be for a circuit court to memorialize this type of analysis in a written order or at least on the record to facilitate appellate review.

We remand this case to the Ingham Circuit Court for proceedings not inconsistent with this order. 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 MILTON, No. 160398; Court of Appeals No. 349777. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the February 14, 2019 order of the Wayne Circuit Court, and we remand this case to that court for reconsideration of the defendant's motion for relief from judgment in light of *Brady v Maryland*, 373 US 83 (1963), and *People v Johnson*, 502 Mich 541 (2018). The trial court erred by failing to address the defendant's claim that the prosecution violated *Brady* by failing to disclose an exculpatory statement made to the police. The trial court also erred by making credibility determinations and failing to conduct the proper credibility analysis under *Johnson*. As this Court stated in *Johnson*, "a trial court's credibility determination is concerned with whether a *reasonable juror* could find the testimony credible on retrial." *Id*. at 567 (emphasis in original). On remand, the trial court shall address the defendant's *Brady* claim and undertake the appropriate analysis of the proffered new evidence under *People v Cress*, 468 Mich 678 (2003), and *People v Johnson*. The motion to remand for evidentiary hearing is denied. We do not retain jurisdiction.

MCCORMACK, C.J. (*concurring*). I agree that reconsideration is warranted in this case. I do not believe that the Court is second-guessing a reasonable decision to deny a motion for relief from judgment. And rather than departing from its decision in *People v Johnson*, 502 Mich 541 (2018), the Court is merely applying it.[1]

The defendant was convicted in 1985 of a murder committed during a robbery that he claimed was actually committed by "Taxi Tony" and Jerry Littlejohn. After exhausting his direct appeals and unsuccessfully filing his first motion for relief from judgment, the defendant obtained affidavits from two witnesses who claimed that Taxi Tony and Littlejohn committed the robbery and murder and that the prosecution's key witness was bribed to frame the defendant.

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[1] Whether the *Johnson* two-part credibility test applies when analyzing a defendant's motion without the benefit of holding an evidentiary hearing remains an open question. See *People v Hammock*, 506 Mich 870, 874 (2020) (CAVANAGH, J., concurring). For our purposes, however, I will assume that it does.

One witness, Steven Jackson, averred that he was riding in a car with Taxi Tony, Littlejohn, and Joe Johnson when they committed the murder. He further swore that he went to the police station the next day to make a statement about what he had witnessed. The other witness, Althon Vann, swore that he was present when Taxi Tony and Littlejohn planned a robbery. Later, when Vann found himself sharing a holding cell with Littlejohn in the county jail, Littlejohn told him that he had shot the doorman during the robbery. Vann further averred that Littlejohn told him that Taxi Tony was going to pay off the only witness who could identify him and that he was going to pin the shooting on the defendant to eliminate him as a drug competitor.

Based on these affidavits and his own affidavit, the defendant brought this successive motion for relief from judgment.[2] He claimed that the prosecution violated *Brady v Maryland*, 373 US 83 (1963), by failing to disclose Jackson's exculpatory police statement. He also raised a new-evidence claim under *People v Cress*, 468 Mich 678 (2003). The trial court denied the motion without holding an evidentiary hearing. In doing so, the trial court made three clear errors that warrant reconsideration of its decision.

First, the trial court erred when it neglected to analyze the defendant's *Brady* claim. Though *Brady* claims and *Cress* claims are often intertwined,[3] trial courts must address each claim separately. See MCR 6.504(B)(2) (an order denying a motion for relief from judgment without holding further proceedings "must include a concise statement of the reasons for the denial"). Here, the trial court's opinion focused entirely on the defendant's *Cress* claim.

Second, I believe the trial court erred when it dismissed Jackson's and Vann's affidavits because they contained hearsay statements. In my view, the most pivotal parts of the affidavits—the identifications of Jerry Littlejohn as the shooter—would be admissible as hearsay exceptions. Littlejohn's alleged admission to Vann that he shot the victim would be a statement against penal interest admissible under MRE 804(b)(3). And Johnson's alleged statement to Jackson immediately after the shooting—that "Jerry shot Roger"—would be admissible either as a statement against penal interest (because Johnson would be liable for

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[2] Because his motion is based on newly discovered eyewitnesses, the defendant has satisfied the requirements of MCR 6.502(G)(2) (a defendant may file a successive motion for relief from judgment if it is based on a claim of new evidence that was not discovered before the first motion was filed).

[3] A defendant may claim, for example, that an eyewitness' account is *Brady* evidence because it was allegedly known to the police and was not disclosed to the defense. But if the record does not support a finding that this evidence was in the government's possession before trial, that same evidence may support an alternatively pled *Cress* claim because it was newly discovered.

felony-murder as an aider and abettor in the home invasion) or as an excited utterance under MRE 803(2).

Finally, I agree that the trial court's *Cress* analysis failed to apply the proper credibility test. In *Johnson*, this Court laid out a two-step process for analyzing the credibility of new eyewitnesses. First, the court must decide if the witness is "patently incredible," such that *no* reasonable juror would "entertain a reasonable belief in the witness's veracity." *Johnson*, 502 Mich at 568. If that is the case, the court should deny the motion. *Id*. But if a witness is not patently incredible, the court must decide whether the newly discovered evidence makes a different result probable on retrial, "bear[ing] in mind what a reasonable juror might make of the testimony, and not what the trial court itself might decide, were it the ultimate fact-finder." *Id*. Here, the trial court did not apply *Johnson* and instead appeared to make its own credibility determinations about the proffered witnesses. As we made clear in *Johnson*, "a trial court's credibility determination is concerned with whether a *reasonable juror* could find the testimony credible on retrial."[4] *Id*. at 567. In failing to correctly apply *Johnson*, the trial court abused its discretion. See *People v Duncan*, 494 Mich 713, 723 (2013) ("A trial court necessarily abuses its discretion when it makes an error of law.").

In conducting its analysis of the proffered witnesses on reconsideration, the trial court must "consider all relevant factors tending to either bolster or diminish the veracity of the witness's testimony." *Johnson*, 502 Mich at 567. Here, there are reasons to be skeptical of the witnesses' accounts, as detailed by my dissenting colleagues. But there are also reasons to think that the affiants might be telling the truth. According to the Offender Tracking Information System (OTIS) maintained by the Michigan Department of Corrections, Jackson was 12 years old at the time of the shooting, which would explain his account of being taken to the police station by his mother the next day to report what he allegedly saw. OTIS also shows that Vann committed a larceny on February 11, 1985—about two weeks before the murder in this case took place. This tends to support Vann's account of being placed in the same holding cell (presumably having been picked up on the larceny charge) with Littlejohn, who we know was arrested at some point in relation to this

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[4] Justice ZAHRA questions whether *Johnson* held that if a single hypothetical rational juror would vote to acquit on retrial, a new trial must be granted. It did not. Though I believe the question of what a "different result" means is worthy of our consideration, it was not at issue in *Johnson*. Nor is it presented in this case. Rather, *Johnson* instructed that the trial court's role is as a gatekeeper, rather than the ultimate fact-finder, when evaluating motions for relief from judgment. See *Johnson*, 502 Mich at 568. Instead of deciding for itself whether the new witnesses are credible, a trial court is to ask whether a reasonable juror could believe their testimony. If so, the court must weigh the proffered witnesses' accounts in determining whether the newly discovered evidence makes a different result probable on retrial.

murder. Nor does it appear that either Jackson or Vann has nothing to lose by signing a false affidavit; Jackson's earliest release date is in 2023 and Vann's is in 2026. Moreover, the prosecution's sole eyewitness to the murder, Edith Gibson, admitted at trial that she told a police officer that Taxi Tony had set up the robbery and that he had a friend named Jerry. Gibson also identified Joe Johnson as having been one of the perpetrators of the crime. Two other witnesses, who could not be located to testify, also told the police that Taxi Tony's brother "Jerry" was the shooter. Finally, the defendant denied any involvement in the crime and presented an alibi defense at trial.

These facts are, in my view, worthy of further exploration at an evidentiary hearing. The decision whether to hold an evidentiary hearing is for the trial court to make. See MCR 6.504(B)(2) (a trial court may deny a motion for relief from judgment without holding an evidentiary hearing if it "plainly appears from the face of the materials described in subrule (B)(1) that the defendant is not entitled to relief"). But it is a decision that must be made on the particular facts of the case and with careful consideration of the strengths and weaknesses of the prosecution's original case compared to the strengths and weaknesses of the defendant's proffered evidence. At an evidentiary hearing, the trial court would have the opportunity to judge Vann's and Jackson's demeanor and to see how they withstand cross-examination. There are credibility issues at stake here to be sure; but I believe that these issues deserve to be fleshed out through the truth-revealing process of an evidentiary hearing.

ZAHRA, J. (*dissenting*). I respectfully dissent from the order remanding this case to the trial court for reconsideration of the defendant's motion for relief from judgment in light of *Brady v Maryland*[1] and *People v Johnson*.[2] This is yet another case in which this Court has second-guessed a trial court's patently reasonable decision to deny a pro se defendant's successive motion for relief from judgment that is supported only by affidavits of highly questionable veracity submitted by fellow prisoners.[3] Like Justice MARKMAN, I do not "quarrel with the idea that this Court should view 'actual innocence' claims in a receptive manner where a substantial question as to a defendant's innocence has been raised . . . ."[4] This Court, however, is departing from the very standard espoused in *Johnson*: " 'The trial court has the right to determine the credibility of newly discovered evidence for which a new trial is asked, and if the court is satisfied that, on a new trial, such testimony would not be worthy of belief by the jury, the motion should be denied.' "[5] Further, "[i]t is well settled that the matter of granting a new

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[1] *Brady v Maryland*, 373 US 83 (1963).

[2] *People v Johnson*, 502 Mich 541 (2018).

[3] See *People v Hammock*, 506 Mich 870, 878-879 (2020) (MARKMAN, J., dissenting), and cases cited therein.

[4] *Id*. at 879.

[5] *Johnson*, 502 Mich at 567, quoting *Connelly v United States*, 271 F2d 333, 335 (CA 8, 1959) (emphasis omitted).

trial on after-discovered evidence *rests in the sound judicial discretion of the trial court, and an order refusing a new trial on that ground will not be disturbed on appeal, in the absence of a plain abuse of discretion*. And it is equally well settled that an application for new trial based upon that ground *is not regarded with favor and will be granted with great caution*."[6] The recent decisions of this Court cited above, and particularly the decision in the instant case, demonstrate the very absence of caution or meaningful deference to the trial court's decision. In doing so, the Court continues to signal

> that trial courts must hold evidentiary hearings on almost every occasion on which a defendant submits new evidence in the form of an affidavit signed by a fellow prisoner. And if that is the message we intend, I fear that such lowering of the bar in support of new evidentiary hearings—perhaps many years after the commission of the offense and the presentation at trial of the evidence—is not only incompatible with the Court's new rules and incompatible with our traditional standards of appellate review of the trial courts, but, most grievously, risks burying potentially meritorious claims of innocence among claims based on far-fetched, incredible, and uncorroborated prisoner affidavits.[7]

I would deny defendant any relief in this matter and respect the threshold determination made by the trial court that the affidavits offered in this case fail to present a material and credible question of defendant's actual innocence that is worthy of further review.

Some 35 years ago, defendant and Joseph Johnson were tried for the robbery and fatal shooting of a drug dealer named Roger Cottingham. The primary prosecution witness, Edith Marie Gibson, testified that she observed defendant and Joseph Johnson commit the crime and that defendant was the shooter. Gibson admitted on cross-examination that she told police that "Taxi Tony," whose real name is William Anthony Garrett, set up the robbery. Sergeant Elmer Harris, the officer in charge of the investigation, testified that Garrett admitted to driving defendant and Johnson to the scene to collect one of his drug debts. A separate record was made outside the jury's presence, during which Garrett testified. He refused to provide his nickname or testify as to whether he was at the shooting scene on the day of the shooting on the grounds that it might incriminate him. There was also reference to a pretrial hearing in defendant's case in which a person named "Littlejohn" was identified as having been arrested in conjunction with this crime. This is significant because defendant's instant motion for relief from judgment asserts that a "Jerry Littleton" was actually the shooter, and defendant supports his claim in part with an affidavit from a fellow prisoner, Althon Vann, who avers that he and Jerry Littleton were incarcerated together shortly after the shooting. But there is no evidence that Littleton was

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[6] *Connelly*, 271 F2d at 334 (quotation marks and citations omitted; emphasis added).

[7] *Hammock*, 506 Mich at 879 (MARKMAN, J., dissenting).

actually charged or incarcerated in relation to these crimes or, if he was incarcerated, whether he was incarcerated during the same period as Vann.

After deliberating for a mere 90 minutes, the jury convicted defendant of first-degree felony-murder and possessing a firearm during the commission of a felony (felony-firearm). Defendant was sentenced to nonparolable life imprisonment for the murder conviction and a consecutive two-year sentence for the felony-firearm conviction. Johnson was convicted of second-degree murder in a bench trial and was sentenced to life imprisonment. Johnson testified at his trial that he was sent to the address to collect a debt from Gibson's then boyfriend, Leroy Gigger (now deceased), who owed Taxi Tony money. Johnson claimed that he was unaware that defendant was armed with a gun.

Defendant filed a direct appeal arguing that the trial court erred by not responding to a jury question about what would happen if jurors were unable to reach a verdict and that the prosecutor violated his discovery obligation by failing to disclose leniency offered to Gibson (on a pending drug conviction) in exchange for her testimony. The Court of Appeals granted defendant's motion to remand, limited to the prosecutor's alleged discovery violation.[8] On remand, the trial court denied a new trial after conducting two evidentiary hearings. The Court of Appeals affirmed,[9] and this Court denied leave to appeal.[10]

In 2004, defendant filed his first motion for relief from judgment. He claimed that the jury instructions failed to convey the requisite intent for felony-murder, the prosecutor failed to produce res gestae witnesses, and defense counsel failed to communicate a plea offer. The trial court denied the motion. The Court of Appeals denied leave to appeal under MCR 6.508(D),[11] as did this Court.[12]

Defendant, acting pro se, filed the current motion for relief from judgment in 2018 on the basis of newly discovered evidence. In support of his motion, he submitted affidavits from two witnesses who claim that the actual killer is a person named Jerry Littlejohn, presumably the same "Littlejohn" earlier mentioned.

The first affiant, Steven Lamont Jackson, avers that he was in a car with Garrett, Littleton, and Johnson on the night of the shooting. Garrett apparently pulled the car into the parking lot next to a house. Littleton and Johnson got out of the car, drew guns, and went onto the porch of a home. According to Jackson, several minutes later, they came

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[8] *People v Milton*, unpublished order of the Court of Appeals, issued August 13, 1986 (Docket No. 89639).

[9] *People v Milton*, unpublished per curiam opinion of the Court of Appeals, issued August 26, 1988 (Docket No. 89639).

[10] *People v Milton*, 434 Mich 894 (1990).

[11] *People v Milton*, unpublished order of the Court of Appeals, issued March 16, 2006 (Docket No. 263771).

[12] *People v Milton*, 477 Mich 907 (2006).

out of the house with their guns in their hands and Johnson purportedly said, "Jerry shot Roger." As Garrett drove away, Garrett asked Littlejohn and Johnson if Roger was dead and they responded that they did not know. Littleton asked what was going to happen now, but Garrett told him not to worry about it because he had something planned. Jackson averred that he told his mother what he saw and she drove him to the police station to make a statement.

The second affiant, Althon Vann, avers that sometime prior to the murder (he does not provide a date) he was at Garrett's house with Littleton talking about committing a robbery at a home on Philadelphia, the street on which the robbery and murder occurred. Garrett and Littlejohn allegedly asked Vann to join them as there would be plenty of money to go around. According to Vann, the intent was to scare off rival drug dealers in the area. Vann averred that he declined to join Garrett and Littlejohn in their scheme to confront rival dealers and did not in any way participate in the robbery. Vann then later encountered Littleton in the county jail. According the Michigan Offender Tracking Information System website, Vann had committed a larceny on February 11, 1985, for which he was convicted and then sentenced on April 15, 1985.[13] The exact date Vann was arrested for this larceny is unknown. And, as previously mentioned, other than the mention of "Littlejohn" during a pretrial hearing in defendant's case, there is no evidence to support the conclusion that someone named Littlejohn was being held in the county jail in this time frame.

Vann avers that while in jail, Littleton told Vann that he was lucky he did not come with them to the robbery because things got bad and a guy got killed. Specifically, Vann claims that Littleton admitted to shooting a doorman in the head. Vann purportedly asked if Littleton had a chance of beating the charge. Littleton told him that Garrett was going to pay off the only witness who could identify him and "Joe" as the shooters. Vann specifically averred that Littleton stated he was going to give the witness 10 bundles of heroin and $2,500 dollars in cash and that defendant would be framed for the murder.

In addressing the instant motion for relief from judgment, the trial court specifically mentioned that defendant had presented two claims. "First, defendant requests an evidentiary hearing alleging new evidence, which defendant alleges was suppressed by the police," i.e., a *Brady* claim. "Second, defendant claims this new evidence which was not uncovered during his trial was in-direct [sic] violation of his state and federal rights." The Court's order remanding this case states that "[t]he trial court erred by failing to address the defendant's claim that the prosecution violated *Brady* by failing to disclose an exculpatory statement made to the police." This simply is not true. The trial court specifically addressed Jackson's claim that his mother took him to the

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[13] Michigan Department of Corrections, *Michigan Offender Tracking Information System*, <https://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=145300> (accessed November 2, 2020).

police department where he gave a statement regarding the robbery and murder. In rejecting this claim, the trial court observed that "defendant has not presented a copy of this statement in support of his allegation of its existence." The trial court did not end its analysis at that point, but noted further that Jackson's "affidavit is riddled with hearsay statements," as Jackson did not personally witness the robbery and murder, and that "the affidavit contains no dates as to when he was dropped off near the location of the robbery and shooting, dates for any conversation that took place, or [dates for] when he came into contact with [Garrett] or [Littleton]." In sum, the trial court rejected Jackson's affidavit, which was the basis of defendant's *Brady* claim. Obviously, the trial court could have been more thorough. Nonetheless, a cursory viewing of the affidavit reveals its incredibility. On these facts, I am unconvinced that the trial court abused its discretion by finding no reason to conduct an evidentiary hearing to explore defendant's putative *Brady* violation.

Jackson is currently 47 years old and serving 7- to 22-year sentences for third-degree criminal sexual conduct involving a victim between 13 and 15 years of age. He also served nearly 10 years for an armed-robbery conviction. Given Jackson's age, he would have been 12 years old at the time of the murder. It is dubious that a drug dealer would associate with a 12-year-old, let alone gratuitously take that 12-year-old to a location where he intended to commit an armed robbery. But even conceding such events could happen, there is a serious factual flaw in Jackson's affidavit. Jackson contends Garrett drove him home after the murder, where he got in trouble with his mother for getting home late, stating, "I didn't get home until around *7:05-7:15*, and my Mother was pissed at me for being more than an hour late[.]"[14] The murder, however, did not occur before 10:24 p.m., well beyond three hours after Jackson attests Garrett dropped him off at home. Thus, under Jackson's own version of events, he could not have been in Garrett's car when Cottingham was killed. Further, no evidence has been previously presented during any of these proceedings that mentions Jackson, and I would surmise the same is true for Johnson's case.

Althon Vann's affidavit also suffers from factual contradictions. Vann is 61 years old and serving 27 to 42 years in prison for assault with intent to commit murder and felony-firearm. He also has previous theft convictions. He provides a version of events inconsistent with critical aspects of defendant's version of events at trial. Whereas defendant contended that Garrett killed Cottingham in the course of collecting a debt for drug purchases, Vann's affidavit discusses Garrett killing a "doorman" while intimidating rival drug dealers. Thus, it is not apparent how Vann's version of events conforms at all to the facts of the case.

Finally, while I have mentioned that defendant, Jackson, and Vann are all currently incarcerated, they were in fact all incarcerated *in the very same facility* at the time these affidavits were created. In fact, the only person who does not appear to have a criminal conviction is the very person that defendant claims was the shooter, Littleton. What are the chances that defendant, some 33 years after the murder, would

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[14] Emphasis added; comma omitted.

encounter not one, but two individuals in prison who happened to have contact with Garrett—the prime alternative suspect—on or before the day of the murder and that each of these individuals had conversations with Garrett in which he not only implicated Littleton as the shooter, but further suggested Garrett informed them of his plan to frame someone for the shooting? Indeed, Vann averred that he remembered, again after some 33 years, that Garrett "was going to put the shooting on Kenneth Milton," despite no evidence that Vann even previously knew of defendant. The trial court recognized as much, stating, "[T]his [c]ourt finds a lack of veracity as . . . these affiants provided defendant with their 'helpful' information after they themselves were incarcerated many years after the murder of the complainant took place." I submit the trial court was well within its sound discretion to reject these affidavits under *People v Cress*[15] and *People v Johnson*. The concurrence claims this Court "made clear in *Johnson* [that] 'a trial court's credibility determination is concerned with whether a *reasonable juror* could find the testimony credible on retrial.' "[16] This was stated in *Johnson*, I agree, but I seriously question whether the *Johnson* Court believed it necessary to hold that a single rational juror's doubt was now sufficient to conclude that a new trial was required. If this conclusion was integral to the Court's decision, then the Court necessarily holds that a "different result probable on retrial" under MCR 6.508(D) includes a hung jury or mistrial instead of an acquittal.[17]

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[15] *People v Cress*, 468 Mich 678 (2003).

[16] *Ante* at 1001, quoting *Johnson*, 502 Mich at 567 (emphasis in *Johnson*).

[17] If this is the case, the *Johnson* Court has drastically altered our time-honored standard of review, sua sponte, without the issue having ever been raised and without any briefing on this issue. Further, the holding would align our state's jurisprudence with that of a single jurisdiction which holds that "when a defendant makes a motion for a new trial based on newly discovered evidence, he has met his burden of showing that a different result is probable on retrial of the case if he has established that it is probable that *at least one* juror would have voted to find him not guilty had the new evidence been presented . . . ." 6 LaFave et al, Criminal Procedure (4th ed), § 24.11(d), pp 740-741 n 21, citing *People v Soojian*, 190 Cal App 4th 491 (2010).

Moreover, this holding is not supported by the sources relied on in *Johnson*. The only case cited by *Johnson* in relation to this lone-juror standard is *Connelly v United States*, 271 F2d 333, 335 (CA 8, 1959), which in turn relied on *Johnson v United States*, 327 US 106 (1946), for the formula to be used when testing the sufficiency of evidence warranting the granting of a new trial on the ground of newly discovered evidence. *Connelly* summarized the relevant factor as requiring that the newly discovered evidence "must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." *Connelly*, 271 F2d at 335.

In sum, I conclude the trial court was well within its discretion to reject the proffered affidavits as wholly lacking in credibility. Accordingly, no evidentiary hearings are justified with regard to the claim of newly discovered evidence or the newly asserted claim of a *Brady* violation. I would deny leave and offer defendant no further relief with regard to the successive motion for relief from judgment currently before the Court.

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

PEOPLE V CRYSTAL, No. 161800; Court of Appeals No. 346248. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse Part III of the judgment of the Court of Appeals remanding for resentencing before a different trial court judge. As noted by dissenting Judge MARKEY, the Court of Appeals majority took the trial court judge's remarks at sentencing out of context. The judge did not suggest that the defendant intended to cause the collision or the injuries suffered by the victims, but instead noted that the letters in support of the defendant referred to the offense as an "accident" without recognizing that the defendant made the decision to drink alcohol and drive at speeds in excess of 90 miles per hour. The record does not indicate that the trial court judge would have substantial difficulty putting out of his mind previously expressed views or findings, and reassignment is not necessary to preserve the appearance of justice. *People v Walker*, 504 Mich 267, 285-286 (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.

MCCORMACK, C.J. (*concurring in part and dissenting in part*). I concur in the Court's denying leave with respect to whether the defendant's

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Simply put, *Connelly* does not support a lone-juror standard and in fact stated that newly discovered evidence must likely produce an *acquittal* to warrant a new trial. A lone juror cannot produce an acquittal. At most, a lone juror can produce a hung jury, which is not a different legal result. Moreover, *Connelly* has good company. See *United States v Burfoot*, 899 F3d 326, 341 (CA 4, 2018); *United States v Bell*, 761 F3d 900, 911 (CA 8, 2014). See also *United States v Owen*, 500 F3d 83, 88 (CA 2, 2007); *United States v Berry,* 624 F3d 1031, 1042 (CA 9, 2010); *United States v Brown*, 595 F3d 498, 511 (CA 3, 2010); *United States v Morrison*, 218 F Appx 933, 946 (CA 11, 2007); *United States v Pearson*, 203 F3d 1243, 1274 (CA 10, 2000); *United States v Wall*, 389 F3d 457, 467 (CA 5, 2004); *United States v Glover*, 21 F3d 133, 138 (CA 6, 1994). And while circuits may differ on the order of the factors and some circuits combine the four and fifth factors, see *United States v Sheffield*, 425 US App DC 158, 171 (2016); *United States v Ryan*, 213 F3d 347, 351 (CA 7, 2000); *United States v Wright*, 625 F2d 1017, 1019 (CA 1, 1980), all federal circuits uniformly require a showing that newly discovered evidence is likely to result in an acquittal at a retrial to provide the convicted defendant any relief from the judgment.

sentence was reasonable. But I respectfully dissent from the Court's decision to reverse the Court of Appeals' remand for resentencing before a different judge. In my view, the panel majority did not clearly err when it concluded that the factors articulated in *People v Walker*, 504 Mich 267, 285-286 (2019), weighed in favor of reassignment to a new judge. " 'To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.' " *People v Cheatham*, 453 Mich 1, 30 n 23 (1996), quoting *Parts & Electric Motors, Inc v Sterling Electric, Inc*, 866 F2d 228, 233 (CA 7, 1988) (quotation corrected). In light of its analysis of the trial court's departure sentence, which this Court leaves undisturbed, the Court of Appeals' decision to remand for resentencing before a different judge does not definitively appear to be a mistake. Nor do I believe the Court of Appeals clearly erred when it alternatively held that even if the trial judge could clear his mind of his previously expressed views, reassignment would still be required to preserve the appearance of justice and impartiality. That rationale is, in my view, an adequate alternative basis to support the Court of Appeals' decision. See *Sparks v Sparks*, 440 Mich 141, 163 (1992) (reassigning the case to a different judge on remand because the appearance of justice would be better served with a new judge presiding).

MARKMAN, J. (*concurring in part and dissenting in part*). I concur with the majority to the extent it concludes that the Court of Appeals erred by holding that the resentencing it ordered should take place before a different judge. But I respectfully disagree that leave to appeal should be denied as to whether resentencing is required in the first place. For I believe the Court of Appeals also erred by holding that the trial court failed to justify its decision to depart from the guidelines minimum sentence range. In my judgment, and in agreement with the Court of Appeals dissent, the circumstances here that are mitigating pall before those that are aggravating and uncontemplated by the guidelines. Therefore, I would fully reverse the Court of Appeals, but having not prevailed as to resentencing, I join with the majority only as to which judge should undertake that resentencing.

Leave to Appeal Denied December 11, 2020:

PUNTURO v KERN, Nos. 158749, 158755, and 158756; Court of Appeals Nos. 338727, 338728, and 338732. On November 12, 2020, the Court heard oral argument on the applications for leave to appeal the October 16, 2018 judgment of the Court of Appeals. On order of the Court, the applications are again considered, and they are denied, because we are not persuaded that the questions presented should be reviewed by this Court.

CLEMENT, J. (*concurring*). I concur with the Court's order denying leave to appeal. While the text of the fair-reporting-privilege statute at issue, currently codified at MCL 600.2911(3), is not all that clear, there is reason to believe that the statutory privilege only applies to media defendants, and is thus inapplicable to the instant defendants. When, as here, the Court of Appeals allows a suit to move forward, I am content

to deny leave and not have this Court articulate any binding precedent. I write separately to discuss why I believe the statute can be read as inapplicable to defendants *themselves*, in lieu of the Court of Appeals' conclusion that defendants' *remarks* did not factually satisfy the statute's protection, and to ask the Legislature to clarify the intended scope and application of the statute.

The fair-reporting privilege we are concerned with generally protects certain libel defendants from liability so long as what they publish is "fair and true." It was originally enacted in 1931 PA 279, and at that time provided:

> No damages shall be awarded in any libel action brought against a reporter, editor, publisher or proprietor of a newspaper for the publication therein of a fair and true report of any public and official proceeding, or for any heading of the report which is a fair and true headnote of the article published: *Provided, however*, That this privilege shall not apply to a libel contained in any matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of the public and official proceeding which was not a part thereof.

Under this version of the statute, it only applied to newspapers—specifically, "a reporter, editor, publisher or proprietor of a newspaper." They were protected for their reporting on "any public and official proceeding," so long as they provided "a fair and true report" of the proceeding. See *McCracken v Evening News Ass'n*, 3 Mich App 32, 38 (1966) ("The statute protects newspaper publishers if the article is a fair and true report of the public and official proceeding.") This protection included a proviso, however, that it did not extend to "a libel contained in any matter added by any person concerned in the publication." Thus, media defendants who made "a fair and true report of . . . public and official proceeding[s]" could not add libelous matter to the report—such as defamatory editorial remarks mixed in with the fair and true reporting of what happened—and be insulated from liability.

Were the 1931 language still in effect, we would not be hearing this case—there would be no dispute that it did not protect these defendants, who are not "reporter[s], editor[s], publisher[s] or proprietor[s] of a newspaper." But the statutory language *was* amended, by 1988 PA 396. It now provides:

> Damages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report. This privilege shall not apply to a libel which is contained in a matter added by a person concerned in the publication or contained in the report of anything said or done at the time and place of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally

> available to the public, or act or action of a public body, which was not a part of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body. [MCL 600.2911(3)].

The immunity from damages is no longer specific to newspapers and their employees, but rather applies to any "publication or broadcast" of certain "fair and true report[s]." The amendment also broadened the subject matter of those "fair and true report[s]" beyond "any public and official proceeding," and now includes "matters of public record" or "a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body." The denial of protection to "a libel contained in any matter added by any person concerned in the publication" was recast as no longer in the form of a proviso, consistent with the modern preference against provisos. See 1A Singer & Singer, Sutherland Statutory Construction (7th ed), § 21:11, p 173 (characterizing provisos as "lazy drafting practice" that "make a statute hard to understand" and "may also produce unanticipated consequences").

Obviously, the deletion of the newspaper-specific language in 1988 PA 396 can be read as broadening the fair-reporting privilege of MCL 600.2911(3) to any "publication or broadcast" of an account of the proceedings listed. Defendants argue accordingly that their remarks to the media—made with the expectation that those remarks would be repeated—qualifies as a sort of publication or broadcast of those remarks. However, I believe there are clues in and around 1988 PA 396 suggesting that the fair-reporting privilege is only enjoyed by media defendants, and I am consequently content to deny leave in this case and let this suit move forward.

First, the apparent thrust of 1988 PA 396 was the expansion of the fair-reporting privilege's scope beyond an account of "any public and official proceeding" to include "matters of public record" or "a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body." This expansion was adopted in response to this Court's decision in *Rouch v Enquirer & News of Battle Creek*, 427 Mich 157 (1986). See *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 323 n 4 (1995), quoting House Legislative Analysis, HB 4932 (June 15, 1988) (identifying *Rouch* as the Legislature's motivation for 1988 PA 396 and noting that the legislative analysis called our *Rouch* decision "unduly restrictive"). The *Rouch* plaintiff was arrested for the rape of his children's babysitter, although in the end, charges were not filed against him and in fact charges were ultimately filed against someone else. That said, the day after his arrest, the newspaper reported that he had been " 'arrested and charged with the sexual assault of a 17-year-old women [sic] who was baby-sitting with his children . . . .' " *Rouch*, 427 Mich at 160. The reporter had received this information from the police department, which the reporter would habitually call in the morning to find out what had happened in the last 24 hours. *Id*. at 161. Rouch sued for libel. The newspaper cited the

statute as a defense, saying that it had given "a fair and true report" of a "public and official proceeding"—Rouch's arrest and the police understanding of the situation. This Court rejected that argument, concluding "that an arrest that amounts to no more than an apprehension is not a 'proceeding' under the statute," meaning that "the information orally furnished to the defendant in support of it does not, as such, enjoy the privilege afforded by the 'public and official proceedings' statute." *Rouch*, 427 Mich at 172-173. The Legislature then expanded the statute's scope beyond "proceedings" to, among other things, matters of public record—such as the fact of the arrest and the government's understanding of what motivated it. It strikes me as unlikely that the Legislature, in responding to *Rouch*, also intended to overhaul the immunity being conferred by expanding it beyond the journalism context.

Second, 1988 PA 396 applies only to a "publication or broadcast." On the one hand, this is certainly a change from 1931 PA 279, which applied only to newspapers. But it appears to me to be an effort at *modernizing* the fair-reporting privilege rather than changing its fundamental character. The reference to a "publication or broadcast" seems likely to me to be the Legislature's effort at accommodating the substantial changes in major forms of media between 1931 and 1988, in particular the dramatic expansion of radio and television journalism. I can say from firsthand experience in the legislative-drafting process that the Legislature, when it decides to make some substantive change to a law, will often also take up other forms of clean-up, to modernize the law—whether to render the language gender-neutral, move away from disfavored phrasings (such as the use of *shall*), or update a law's text to conform to how it is actually applied. For this statute to apply to these defendants, it would be more natural for it not to refer to "publication or broadcast" at all, and simply read "[d]amages shall not be awarded in a libel action for a fair and true report of matters of public record" and so on. The fact that, instead, it says that "[d]amages shall not be awarded in a libel action for the *publication or broadcast* of a fair and true report of matters of public record" suggests to me that the Legislature was aiming to protect media defendants which control the means of publishing or broadcasting information.

Third, the statute still requires that the protected communication be a "fair and true report." Because the original statute applied only to newspapers, the "report" mentioned then could have only been a report in the sense of *journalism*. See, e.g., *The American Heritage Dictionary of the English Language* (5th ed) (defining the verb "report" as "[t]o write or provide an account or summation of for publication or broadcast"). In this context, requiring that it be "fair and true" appears to be an allusion to a journalist's professional responsibilities and an effort to avoid protecting "yellow journalism." It seems unlikely to me that the Legislature, in making changes responsive to our *Rouch* decision, also aimed to transform the character of the sort of "report" that the statute shields to include nonjournalistic "reports." This is all the more so since the report still must be "fair and true"—this seems to me to continue alluding to a journalist's professional duties, rather than requiring an

inquiry about whether an individual has "fairly" characterized his or her *own actions* to decide whether the statutory protection applies.

Fourth, the Legislature's adjustment of the former proviso also suggests to me that not every change to the text of this statute can be taken at face value, because the change to the proviso has rendered it nearly unintelligible. Under 1931 PA 279, the fair-reporting privilege did not "apply to a libel contained in any matter added by any person concerned in the publication." This was using "matter" in the sense of "[s]omething printed or otherwise set down in writing: *reading matter*." *American Heritage Dictionary*. In this sense, "matter" is roughly synonymous with "content"—thus, it could be rewritten to say that the privilege did not "apply to a libel contained in any *content* added [to the published report] by any person concerned in the publication." In this sense of the word "matter," it is an uncountable noun, and we cannot grammatically speak of "one matter" or "one content" any more than we can speak of "one beef" or "one concrete." Our case reports have many references to "libelous matter" in this sense of libelous published content.[1] After 1988 PA 396, this language now reads, "This privilege shall not apply to a libel which is contained in a matter added by a person concerned in the publication." Postamendment, the statute has apparently changed the sense of the word "matter," because it now takes the indefinite article *a* ("contained in *a matter added*") and thus must be a countable noun. The apparent sense of "matter" here may be something like "[a] subject of concern, feeling, or action[.]" *American Heritage Dictionary*. This creates an interpretive problem—how does "a person concerned in the publication" go about adding "a subject of concern" to an account of "a public and official proceeding" or the other activities to which the fair-reporting privilege applies? Should the availability of the privilege turn on whether the report discusses multiple "subjects of concern" as opposed to confining itself to whatever "subject of concern"

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[1] See, e.g., *Taylor v Kneeland*, 1 Doug 67, 75 (Mich, 1843), quoting *Thomas v Croswell*, 7 Johns 264, 270-271 (NY, 1810); *Lewis v Soule*, 3 Mich 514, 517, 520-522 (1855); *Leonard v Pope*, 27 Mich 145, 150 (1873); *Scripps v Reilly*, 35 Mich 371, 394 (1877); *Scripps v Reilly*, 38 Mich 10, 25, 29 (1878); *Maclean v Scripps*, 52 Mich 214, 247 (1883); *Peoples v Detroit Post & Tribune Co*, 54 Mich 457, 458 (1884); *Bacon v Mich Central R Co*, 66 Mich 166, 173 (1887); *Park v Detroit Free Press Co*, 72 Mich 560, 569 (1888); *Smith v Smith*, 73 Mich 445, 446 (1889); *Wheaton v Beecher*, 79 Mich 443, 446 (1890); *Long v Tribune Printing Co*, 107 Mich 207, 215 (1895); *Long v Evening News Ass'n*, 113 Mich 261, 263 (1897); *Burr's Damascus Tool Works v Peninsular Tool Mfg Co*, 142 Mich 417, 421 (1905); *Flynn v Boglarsky*, 164 Mich 513, 516, 518 (1911); *Bennett v Stockwell*, 197 Mich 50, 55 (1917); *Bowerman v Detroit Free Press*, 287 Mich 443, 450-452 (1939); *Powers v Vaughan*, 312 Mich 297, 304-306 (1945); *Sanders v Evening News Ass'n*, 313 Mich 334, 340, 342 (1946); *Davis v Kuiper*, 364 Mich 134, 137-139, 145 (1961); *Bufalino v Maxon Bros, Inc*, 368 Mich 140, 150 (1962).

was the primary motivation of the "public and official proceeding" the report is about? It seems unlikely to me that the Legislature intended to alter the sense of the word "matter"—and thus the scope of this provision—via the insertion of the indefinite article "a" before the word "matter," and create such interpretive challenges. Rather, I suspect that this was a poorly executed effort at eliminating the proviso without intending to change its substantive meaning. And the poor execution of *this* change is a signal to me that many of the *other* changes introduced by 1988 PA 396 should be read as narrowly as the text permits.

I readily acknowledge that each of these observations about 1988 PA 396 is rebuttable. First, while the context of the Legislature's action suggests it was responding to *Rouch* and unlikely to have intended the sort of broadening of this statute that would benefit the instant defendants, *unlikely* is not *impossible*. We have held in the past that the Legislature has made what were likely inadvertent changes with substantive consequences to our laws. See, e.g., *People v Pinkney*, 501 Mich 259 (2018) (suggesting that the Legislature probably inadvertently failed to maintain forgery as a crime under the Michigan Election Law). Second, if you squint, the "publication or broadcast" language could be construed as applying against a speaker or writer as well as a publisher or broadcaster, because a defendant in a defamation suit *can* be held liable for someone else's publication of defamatory remarks if the defendant made the defamatory remarks intending that they be published. Thus, in *Wheaton v Beecher*, 66 Mich 307, 311 (1887), the defendant gave an interview to the *Detroit Evening News* making remarks about the plaintiff, and we held that the defendant could be sued because "[t]here was testimony in the case offered by the plaintiff tending to show that the defendant authorized the publication of the libel . . . ." Third, it is not impossible for one to make a "report" about one's own doings. The word can be defined as "[a] spoken or written account of an event, usually presented in detail," *American Heritage Dictionary*, and there is no strictly logical reason one cannot offer such an account of one's own activities. And fourth, the Legislature *could* have meant to change the sense of the word "matter" in MCL 600.2911(3) by inserting the word "a" in front of it, obliging us to (perhaps) determine whether a "report" dared to touch on multiple "subjects of concern" and forfeit the privilege.

Yet while each observation is rebuttable, the combination of them is, in my view, compelling. Beginning from the meaning that 1931 PA 279 had—protecting only media defendants—the fact that 1988 PA 396 only applies to a "publication or broadcast," and still requires a "report," reads to me more like an effort at preserving the statute's application to media defendants rather than eliminating it. This is even more apparent when considering that 1988 PA 396 was prompted by and responsive to our *Rouch* decision, which had nothing to do with the contested aspects of the statute's scope regarding whom the privilege protects (indeed, the defendant in *Rouch* was a media defendant). And the grammatically challenged rewritten proviso both suggests that the statute's text does not reflect the Legislature's intent and counsels against this Court definitively interpreting what may be an effectively

"broken" statute, making denying leave here a prudent exercise of our discretionary control of our docket. Moreover, should the Legislature revisit this statute, it would have a chance to review the proper scope of its application in a media environment that has changed dramatically since 1988; the rise of the Internet and the nontraditional journalism it facilitates invites a reassessment of this privilege.

MARKMAN, J. (*dissenting*). This case involves claims of defamation by plaintiff Bryan Punturo against defendants, Brace Kern, Saburi Boyer, and Danielle Kort. The Court of Appeals affirmed the trial court's holding that defendants' statements to the news media concerning their antitrust lawsuit against Punturo were not protected under the fair-reporting privilege, MCL 600.2911(3). Because I would conclude that the statements fall within the protections of the fair-reporting privilege, I respectfully dissent from this Court's order of denial. Instead, I would reverse the Court of Appeals and remand to the trial court for entry of an order granting summary disposition in favor of defendants.

Punturo owns ParkShore Resort on Grand Traverse Bay, and Boyer owns a parasailing business on a beach near the resort. In 2014, Boyer signed a "Parasailing Exclusivity Agreement," wherein he agreed to pay $19,000 per year to Punturo for three years. In exchange, Boyer would buy parasailing equipment from Punturo's son and Punturo would not compete with Boyer's business. When Boyer stopped making payments in accordance with the agreement, Punturo allegedly threatened Boyer and his then wife, Kort, demanding that they continue payments. After one allegedly threatening e-mail from Punturo, Boyer contacted Kern, a local attorney. Kern believed that Punturo had violated the Michigan Antitrust Reform Act, MCL 445.771 *et seq*., and reported the findings to the Michigan Attorney General. Soon thereafter, the Attorney General investigated Punturo and filed a criminal extortion charge. Boyer and Kort then retained Kern to file a lawsuit against Punturo, alleging antitrust violations, extortion, and intentional infliction of emotional distress.

While this lawsuit was pending, Kern and his clients spoke to certain news outlets about it. According to the complaint, some of Kern's statements to the media were reported as follows:

> "Kern said the correspondence proved Punturo flagrantly violated state antitrust laws." "The contract itself is an agreement to limit competition," Kern said. "So that violates the (Michigan) Antitrust Reform Act in [and] of itself."
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> Kern called the charge against Punturo "a long time coming" for Boyer and Boyer's wife. "It's a vindicating day for my clients," he said. "There was extortion for the past two years."
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> The Boyers' civil attorney, Brace Kern, says, "Extortion is one aspect of our case, but ours seeks to prove that the unlawful

> contract that Mr. Punturo extorted my clients into the signing anti-trust laws [sic] and there's also a claim for intentional affliction [sic] of emotional distress."
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> * * *
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> Brace Kern represents Traverse Bay Parasailing, saying Punturo violated anti-trust laws and caused emotional distress. "Today is a vindicating day for my clients, and it's been a long time coming. They are glad that the attorney general takes anti-trust violations and extortion seriously. This is something that I don't think Traverse City needs or wants, so it's nice to see them put an end to this conduct," says [Kern].
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> Attorney Brace Kern represents the alleged victim—Saburi Boyer—in an ongoing civil case. "Essentially what he did was tell my client, 'Give me $19,000 a year or I'm going to run you out of business with unfair competition . . . below cost prices,' ["] says Kern. Kern says Punturo threatened in telephone messages to "make your life a living hell."
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> . . . "As soon as I saw the contract, I'm like, 'This is an antitrust violation, this is a covenant not to compete, this is extortion,' ["] Kern said.

In addition to Kern's statements, Boyer also provided a number of statements to the media concerning the lawsuit:

> Boyer maintains he wasn't trying to corner the market and that he only paid Punturo out of fear. "I felt like I was being extorted through this entire timeline," Boyer said. "When I was going through it, I felt like it was going on every day."
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> "He basically ran over me verbally, and I froze," says Boyer. "My wife told me I turned white as a ghost. I froze up, didn't have much at all to say, [h]e told me he was going to make my life a living hell, that he was going to crush me and everything that mattered to me, and that he was going to bury me by the end of this. I just froze up and took it. I realized that he was very motivated to hurt me. Whether that was business or personal, I was in fear.' "

Further, there was one statement that was attributed to both Boyer and his wife:

> The Boyers say they were tired of living in fear and went to a lawyer who discovered anti-trust law violations and went to the attorney general.

Eventually, the criminal charges and the civil suit against Punturo were dismissed. Thereafter, Punturo filed the present defamation action, arguing that the various statements to the news media that he had committed antitrust violations and extortion were defamatory and that he is entitled to damages. Kern, Boyer, and Kort all claimed that the fair-reporting privilege protected such statements. Relying on *Bedford v Witte*, 318 Mich App 60 (2016), the trial court concluded that the privilege was not applicable. However, it denied both parties' motions for summary disposition, ruling that there were questions of fact concerning other aspects of the defamation claim, and the Court of Appeals affirmed. *Punturo v Kern*, unpublished per curiam opinion of the Court of Appeals, issued October 16, 2018 (Docket Nos. 338727, 338728, and 338732).

A defamatory communication is "one which tends so to harm the reputation of persons . . . as to lower them in the estimation of the community or to deter others from associating or dealing with them." *Locricchio v Evening News Ass'n*, 438 Mich 84, 115 (1991) (cleaned up). Such a claim requires proof of four elements:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. [*Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113 (2010) (quotation marks and citation omitted).]

The issue before this Court is the second element of the defamation claim: whether defendant's communications are "privileged," specifically with regard to the fair-reporting privilege under MCL 600.2911(3), which provides in part:

> [D]amages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report.

MCL 600.2911(3) further provides:

> This privilege shall not apply to a libel which is contained in a matter added by a person concerned in the publication or contained in the report of anything said or done at the time and place

> of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, which was not a part of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body.

Thus, to be afforded the protections of the fair-reporting privilege, the statements must constitute: (1) a "fair and true report" (2) that pertains to "matters of public record," "a public and official proceeding," or a "record generally available to the public." MCL 600.2911(3). There is no dispute that Boyer and Kort's lawsuit, and in particular their complaint, against Punturo alleging antitrust violations and extortion satisfied the second prong of this privilege. The question then turns on whether the statements by Kern, Boyer, and Kort constituted "fair and true reports" of the lawsuit, in particular, of its complaint alleging antitrust violations and extortion.[1]

The Court of Appeals has previously explained what entails a "fair and true report":

> The information obtained and published must substantially represent the matter contained in the court records. This Court has held that such a standard is met, and a defendant is not liable, where the "gist" or the "sting" of the article is substantially true, that is, where the inaccuracy does not alter the complexion of the charge and would have no different effect on the reader than that which the literal truth would produce, absent proof that such variance caused the plaintiff damage.
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> Under this test, minor differences are deemed immaterial if the literal truth produces the same effect. To determine whether the plaintiff carried the burden of showing material falsity under the substantial truth doctrine, this Court must independently review the entire record. [*Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 325-326 (1995) (quotation marks, citations, and emphasis omitted).]

Thus, to determine whether the reports here are both "fair and true," one must consider the context in which the statements were made and compare those statements to the underlying complaint. See *Smith*, 487 Mich at 129 (2010) ("[A]llegedly defamatory statements must be analyzed in their proper context.").[2] If the statements substantially repre-

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[1] The parties do not dispute that this case involves a "libel action," as required under the statute. MCL 600.2911(3).

[2] Punturo argues that the statements from Kern and his clients were not "reports" at all. "Report" is defined as a "detailed account or statement." *Merriam-Webster's Collegiate Dictionary* (11th ed). Kern's and his clients' statements to the news media were "detailed accounts or statements" on the lawsuit against Punturo. Even if a "report" must be

sent what is set forth in the complaint, then defendants have provided a "fair and true report" of the official proceeding. That is, such statements were "true" to the complaint. Upon review of the underlying complaint, it is clear, in my judgment, that the statements to the news media were nearly word-for-word recitations of the allegations in the complaint. The complaint details the underlying facts and circumstances of the case, including the assertedly inappropriate comments that Punturo made to Boyer and Kort throughout their dealings. Most significantly, the complaint asserts in no uncertain terms that Punturo sought to extort them. For instance, the complaint stated, "Through threats of physical, financial and reputational harm to Plaintiffs, [Punturo] coerced and extorted Plaintiffs . . . ." Further, the complaint stated that Punturo "received, as proceeds of extortion . . . , over $35,500 in cash from Plaintiffs." And it claimed that Punturo engaged in "threats, coercion, extortion, [and] antitrust violations . . . ." Indeed, the complaint sets forth statements that can only be viewed as more harmful than what was allegedly reported to the media. For example, according to the complaint, Punturo said, "You instilled this hatred within me, you defaulted on your agreement to abate me, and now you will realize my resolve to witness your demise." And it further claimed that Punturo exploited Boyer's need for chemotherapy treatments as "a point of leverage to compel the payment of extortion money . . . ." Overall, defendants' statements to the media substantially align with the allegations in the complaint. There are numerous declaratory sentences in the complaint that are nearly identical to the statements subsequently provided to the media. These statements had substantially the same effect as if the complaint itself had been published in the news media or as if each statement to the media had effectively been preceded by, or couched within the semantic context, "We allege in our complaint . . . ." For that reason I would conclude that the fair-reporting privilege does protect defendants' statements to the news media as "fair and true" reports of the official proceeding to which they pertain.

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officially reported—for instance, in a news outlet—certainly the statements here meet this standard because they *were* reported in the news media. What the statute does not do, as it has in previous versions, is to protect news reporters *exclusively*. Compare MCL 600.2911(3), as enacted ("No damages shall be awarded in any libel action *brought against a reporter, editor, publisher, or proprietor of a newspaper* for the publication in it of a fair and true report of any public and official proceeding . . . .") (emphasis added), with the current version of MCL 600.2911(3) ("Damages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, [or] a public and official proceeding . . . ."); see also *Amway Corp v Proctor and Gamble Co*, 346 F3d 180, 189 (CA 6, 2003) (Schwarzer, J., concurring) ("[A]s amended, . . . [MCL 600.2911's] protection extended to anyone against whom damages might be awarded in a libel action for a publication or broadcast, not simply members of the newspaper trade."). For these reasons, I find Punturo's argument unavailing.

Also for this reason, I do not believe defendant's statements constitute "matter added by a person concerned in the publication . . . which was not a part of the public and official proceeding . . . or record generally available to the public . . . ." MCL 600.2911(3). The statements align with the underlying allegations in the complaint, and thus nothing was "added." By the proposition of not "adding" new matter, I do not believe that the statute is intended to refer to the force or dynamism or degree of emphasis brought to bear by the person making the statement, but rather to the terms and provisions of the substantive public record. The Court of Appeals here relied on *Bedford* to hold that the privilege did not apply because the statements were made "with certainty" (a specific point of emphasis the Court repeated throughout its opinion) and thus went beyond the public record. While I cannot fault that court for following its own published precedent, I respectfully disagree with a significant element of that precedent, in particular, *Bedford*'s assertion that a statement goes *beyond* the public record when it is merely uttered with "certainty."

In *Bedford*, the defendants were attorneys who had filed a complaint in federal court on behalf of their clients alleging, *inter alia*, a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 USC 1961 *et seq*., and malicious prosecution. *Bedford*, 318 Mich App at 63. One of the attorneys who filed the lawsuit spoke to a reporter for a CBS affiliate in an interview and proclaimed that "we can say with certainty" that the defendants (the plaintiffs in the subsequent defamation action) had broken the law by obstructing justice, committing bribery, and perpetrating mail and wire fraud. *Id*. In the subsequent defamation action, the plaintiffs argued that the attorneys had knowingly and maliciously made false statements against them to the media in the television interview. *Id*. The attorneys' defense was that the statements had been protected under the fair-reporting privilege. *Id*. at 65-66. *Bedford* held:

> As noted in *Amway* [*Corp v Proctor & Gamble Co*], 346 F3d [180, 187 (CA 6, 2003)], "[t]he statute excepts from the privilege libels that are not a part of the public and official proceeding or governmental notice, written record or record generally available to the public." In this case, viewing the defamation complaint in the light most favorable to plaintiffs, [the attorney's] comments did not merely summarize what was alleged—but not yet adjudicated—in the federal complaint. He stated that "we can say with certainty" that plaintiffs broke the law in various ways. Given the level of certainty expressed, we conclude that his words did alter the effect the literal truth would have on the recipient of the information, and thus the "fair and true" standard in MCL 600.2911(3) was not satisfied. *Northland Wheels*, 213 Mich App at 325. These statements went beyond the public record. See *Amway*, 346 F3d at 187. Accordingly, defendants were not entitled to claim the fair-reporting privilege with regard to the television interview . . . . [*Bedford*, 318 Mich App at 71.]

In my view, the "certainty" principle established in *Bedford* is nowhere grounded within the statute.[3] Rather, the statute only requires the allegedly libelous statements to constitute "fair and true" reports of the proceedings. MCL 600.2911(3). There is no requirement that an attorney or litigant qualify his or her own statements by explicitly prefacing them as only "allegations," for they quite obviously are only allegations. Rather, the statements viewed in the required statutory context need only align with what has been set forth in the complaint. The Court of Appeals in both *Bedford* and in this case failed to take into account the self-evident context in which defendant's statements were made. They were made during interviews regarding an ongoing lawsuit, and the reasonable reader or listener of such statements is fully equipped to comprehend that these statements were mere allegations, just as all lawsuits until adjudicated are composed of mere allegations. Having to assess the "level of certainty," or the quantum of certainty or tentativeness, expressed in every such statement would give rise to an increasingly vague and arbitrary rule that would leave many litigants and their attorneys open to confusion and uncertain liability whenever they speak to the media about an ongoing lawsuit. Moreover, such a standard would have the effect of potentially "chilling" speech on the part of any person who reports on an official or public proceeding. "The special protected nature of accurate reports of judicial proceedings has repeatedly been recognized," and "the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." *Cox Broadcasting Corp v Cohn*, 420 US 469, 492, 495 (1975). Simply put, I believe the statements here were "true," in the sense that they accurately reflected the nature of the allegations made by defendants, and they were "fair," in the sense that any reader or listener would clearly understand that these were merely allegations made in the course of a lawsuit. Thus, I believe these statements fall readily within the ambit of protections of the fair-reporting privilege. I would therefore reverse the judgment of the Court of Appeals and remand to the trial court for entry of an order granting summary disposition to defendants.

ZAHRA and BERNSTEIN, JJ., join the statement of MARKMAN, J.

In re GATES/GOMEZ/RODRIGUEZ/FERGUSON, MINORS, No. 162064; Court of Appeals No. 352446.

In re PETITION OF WAYNE COUNTY TREASURER FOR FORECLOSURE, No. 162111; Court of Appeals No. 353846.

In re KIMBALL/HARDEN, MINORS, No. 162114; Court of Appeals No. 350934.

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[3] Which is not to say that the exercise of good lawyerly judgment and professionalism would not generally counsel reasonably measured and tempered characterizations of a client's claims.

DONALD J TRUMP FOR PRESIDENT, INC v SECRETARY OF STATE, No. 162320; Court of Appeals No. 355378.

Application for Leave to Appeal Dismissed on Stipulation December 11, 2020:

DOES 11-18 v DEPARTMENT OF CORRECTIONS, No. 160514; Court of Appeals No. 349073.

CLEMENT, J., did not participate.

DOES 11-18 v DEPARTMENT OF CORRECTIONS, No. 160778; Court of Appeals No. 350679.

CLEMENT, J., did not participate.

DAVIS v SECRETARY OF STATE and LAMBERT v SECRETARY OF STATE, Nos. 162184 and 162185; Court of Appeals Nos. 355265 and 355266.

Leave to Appeal Denied December 16, 2020:

KAPUR v SHUMAKE, No. 162164; Court of Appeals No. 353956.

Leave to Appeal Denied December 18, 2020:

PIONEER STATE MUTUAL INSURANCE COMPANY v WRIGHT, No. 161159; reported below: 331 Mich App 396.

CLEMENT, J. (*concurring*). I concur with the Court's order denying leave. I write separately simply to note that it seems to me that the equities of whether rescission will deny a plaintiff access to alternative sources of recovery may play out differently in the future than it did in this case. When this litigation began, it was at least an open question whether the "innocent-third-party rule" was still in effect, and that informed the litigation choices of both the plaintiff and defendant. This Court has since resolved that this rule is no longer in effect, see *Bazzi v Sentinel Ins Co*, 502 Mich 390 (2018), which I tend to think may change the equitable calculus moving forward. I would note, for example, that the Court of Appeals here acknowledged that the claimants could have brought more insurers into the litigation to avoid the operation of the "one-year-back rule" of MCL 500.3145(1), and that doing so may even have been prudent, but not doing so was nevertheless excusable in equity given the state of the law when this litigation began. What was prudent but excusable here may be less excusable in the future now that the status of the innocent-third-party rule has been resolved—although this will presumably need to be balanced against avoiding duplicative "kitchen sink" pleading. As for insurers, now that they know that rescission is a potential remedy, in fairness and equity they should be encouraged to seek out such a remedy as soon as possible, to avoid prejudicing claimants. I would note that among the factors listed in *Farm Bureau Gen Ins Co v Ace American Ins Co*, 503 Mich 903, 906 (2018) (MARKMAN, C.J., concurring), and adopted by the Court of Appeals

in this case, is the question of "the extent to which the insurer could have uncovered the subject matter of the fraud before the innocent third party was injured[.]" *Pioneer State Mut Ins Co v Wright*, 331 Mich App 396, 411 (2020). It would, I think, be consistent with the spirit of this inquiry to add to it the question of the extent to which the insurer could have uncovered the subject matter of the fraud in a more timely manner after the litigation began, to see if it may equitably bear a degree of responsibility for the plaintiff's inability to recover against some other insurer.

MARKMAN, J., joins the statement of CLEMENT, J.

Reconsideration Denied December 18, 2020:

MICHIGAN ALLIANCE FOR RETIRED AMERICANS v SECRETARY OF STATE, No. 161837; Court of Appeals No. 354429. Leave to appeal denied at 506 Mich 889.

Summary Disposition December 22, 2020:

PEOPLE v MURRAY, No. 161518; Court of Appeals No. 352788. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *People v Lewis* (Court of Appeals Docket No. 350287). After *Lewis* is decided, the Court of Appeals shall reconsider the defendant's application in light of *Lewis* as it relates only to the defendant's challenge to the constitutionality of MCL 769.1k(1)(b)(*iii*). 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 LAKESHIA BROWN, No. 161531; Court of Appeals No. 346573. 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 trial court's assessment of court costs pursuant to MCL 769.1k(1)(b)(*iii*), and we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *People v Lewis* (Court of Appeals Docket No. 350287). After *Lewis* is decided, the Court of Appeals shall reconsider this case in light of *Lewis*. 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.

JOYCE v GOGEBIC COUNTY ROAD COMMISSION, No. 161849; Court of Appeals No. 353297. 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.

COOPER v COOPER, No. 161959; Court of Appeals No. 353409. 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 PETITION OF BERRIEN COUNTY TREASURER FOR FORECLOSURE, No. 161966; Court of Appeals No. 352954. 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 SCHLOTTMAN, No. 162144; Court of Appeals No. 354198. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Calhoun Circuit Court's order dismissing the defendant's motion to correct invalid sentence and we remand this case to that court for reconsideration of the motion. The Calhoun Circuit Court shall treat the defendant's January 16, 2020 motion and May 27, 2020 supplemental motion as timely filed and evaluate the defendant's issues on the merits. The defendant's current appellate attorneys concede that they allowed the time limits for appellate review to expire without seeking direct review of the defendant's plea-based convictions or, alternatively, 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 do not retain jurisdiction.

Leave to Appeal Denied December 22, 2020:

PEOPLE v WASHINGTON, No. 160268; Court of Appeals No. 343987.

PEOPLE v LAWHEAD, No. 160354; Court of Appeals No. 348687.

PEOPLE v BYRD, No. 160696; Court of Appeals No. 350504.

PEOPLE v RHODES, No. 160831; Court of Appeals No. 350560.

PEOPLE v NAPPER, No. 160832; Court of Appeals No. 350398.

PEOPLE v CHRISTOPHER JONES, No. 160989; Court of Appeals No. 342112.

PEOPLE v ROSE, No. 161085; Court of Appeals No. 351041.

PEOPLE v RAPOZA, No. 161104; Court of Appeals No. 351897.

In re GUARDIANSHIP OF VIRGINIA WAHAB and *In re* CONSERVATORSHIP OF VIRGINA WAHAB, Nos. 161108, 161109, and 161110; Court of Appeals Nos. 343838, 345132, and 347501.

PEOPLE v SHAQUILLE WOODS, No. 161149; Court of Appeals No. 351851.

PEOPLE v SHAQUILLE WOODS, No. 161151; Court of Appeals No. 351850.

PEOPLE v BOWMAN, No. 161154; Court of Appeals No. 351730.

PEOPLE v SIMPSON, No. 161155; Court of Appeals No. 351720.

PEOPLE v TACKETT, No. 161164; Court of Appeals No. 350497.

PEOPLE v SPEED, No. 161177; Court of Appeals No. 343184.

PEOPLE v BRADBURY, No. 161194; Court of Appeals No. 347732.

PEOPLE v BRIGHAM, No. 161210; Court of Appeals No. 342621.

PEOPLE v WHETSTONE, No. 161217; Court of Appeals No. 352195.

PEOPLE v RENARD FRANKLIN, No. 161270; Court of Appeals No. 352316.

PEOPLE v NICHOLS, No. 161278; Court of Appeals No. 352101.

PEOPLE v FINLAYSON, No. 161300; Court of Appeals No. 351717.

PEOPLE v HORRISON, No. 161317; Court of Appeals No. 345528.

PEOPLE v WALLACE, No. 161323; Court of Appeals No. 343795.

NIXON v WEBSTER TOWNSHIP, No. 161328; Court of Appeals No. 343505.

PEOPLE v TIMS, No. 161367; Court of Appeals No. 344222.

KINCAID v CITY OF FLINT, Nos. 161388 and 161389; Court of Appeals Nos. 337972 and 337976.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for former Governor Rick Snyder.

PEOPLE v TIMOTHY WRIGHT, No. 161436; Court of Appeals No. 351907.

PEOPLE v DARON EVANS, No. 161449; Court of Appeals No. 352472.

SUMMIT STREET DEVELOPMENT COMPANY, LLC v STATE OF MICHIGAN, No. 161479; Court of Appeals No. 346133.

PEOPLE v LYTE, No. 161480; Court of Appeals No. 346574.

PEOPLE v DEERING, No. 161505; Court of Appeals No. 344734.

MCCORMACK, C.J., did not participate because of her prior association with a party in this case.

PEOPLE v MARTIN, No. 161507; Court of Appeals No. 344884.

PEOPLE v CUMMINGS, No. 161519; Court of Appeals No. 352252.

PEOPLE v BROOME, No. 161520; Court of Appeals No. 352556.

BYKAYLO v CHARTER TOWNSHIP OF WEST BLOOMFIELD, No. 161532; Court of Appeals No. 346711.

PEOPLE v ROBERT BOLES, No. 161542; Court of Appeals No. 351899.

PEOPLE v FILES, No. 161543; Court of Appeals No. 352420.

PEOPLE v LYNCH, No. 161545; Court of Appeals No. 353463.

PEOPLE v ANDREWS, No. 161553; Court of Appeals No. 345895.

PEOPLE v HOPKINS, No. 161556; Court of Appeals No. 344646.

LUSTIG v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 161563; Court of Appeals No. 346447.

PEOPLE v VARY, No. 161582; Court of Appeals No. 344223.

PEOPLE v ALVIN DAVIS, No. 161594; Court of Appeals No. 353571.

DETROIT v NEAL, No. 161595; Court of Appeals No. 352098.

GRIEVANCE ADMINISTRATOR v CANNER, No. 161599.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

ADULT LEARNING SYSTEMS-LOWER MICHIGAN, INC v WASHTENAW COUNTY, No. 161615; Court of Appeals No. 346902.

CAREY v FOLEY & LARDNER, LLP, No. 161618; Court of Appeals No. 344940.

ZLATKIN v ROGGOW, No. 161619; Court of Appeals No. 346247.

PEOPLE v COBB, No. 161633; Court of Appeals No. 353334.

WHITE v KNAPP, No. 161638; Court of Appeals No. 346921.

NOWICKI-HOCKEY v BANK OF AMERICA, No. 161714; Court of Appeals No. 347587.

PEOPLE v LAJUAN SMITH, No. 161721; Court of Appeals No. 347258.

PEOPLE v PAYNE, No. 161724; Court of Appeals No. 345734.

PEOPLE v FEEK, No. 161732; Court of Appeals No. 352410.

PEOPLE v COLVIN, No. 161734; Court of Appeals No. 353471.

PEOPLE v DERRELL EVANS, No. 161736; Court of Appeals No. 352599.

PEOPLE v BARDWELL, No. 161737; Court of Appeals No. 347246.

PEOPLE v DEXTER JOHNSON, No. 161739; Court of Appeals No. 353536.

PEOPLE v LUMPKINS, No. 161758; Court of Appeals No. 346040.

PEOPLE v ROSEMOND, No. 161790; Court of Appeals No. 346035.

PEOPLE v HUFFMAN, No. 161802; Court of Appeals No. 352502.

PEOPLE v HANEY, No. 161808; Court of Appeals No. 353335.

PEOPLE v GOHAGEN, No. 161810; Court of Appeals No. 353060.

BELL v DEPARTMENT OF CORRECTIONS, No. 161832; Court of Appeals No. 349194.

PEOPLE v DOAN, No. 161834; Court of Appeals No. 352668.

PEOPLE v DAVID WALKER, No. 161840; Court of Appeals No. 353848.

PEOPLE v SMUTZ, No. 161841; Court of Appeals No. 346561.

PEOPLE v JENNINGS, No. 161844; Court of Appeals No. 349222.

PEOPLE v MCCLELLAND, No. 161846; Court of Appeals No. 347829.

In re GUARDIANSHIP OF MARY ALICE MCGILLIS, No. 161847; Court of Appeals No. 349412.

PEOPLE v QUINN, No. 161851; Court of Appeals No. 346813.

In re GUARDIANSHIP OF MARTA JO HIESHETTER, No. 161856; Court of Appeals No. 352931.

PEOPLE v BOSHELL, No. 161857; Court of Appeals No. 347412.

PEOPLE v WIERTALLA, No. 161859; Court of Appeals No. 347094.

RUDD v MAREK, No. 161871; Court of Appeals No. 348144.

PEOPLE v CANDELARIO, No. 161875; Court of Appeals No. 350607.

MERKUR STEEL SUPPLY, INC v CITY OF DETROIT, No. 161891; Court of Appeals No. 352915.

PEOPLE v NIX, No. 161895; Court of Appeals No. 353577.

PEOPLE v DENHERDER, No. 161896; Court of Appeals No. 353590.

PEOPLE v SCALES, No. 161898; Court of Appeals No. 353345.

PEOPLE v WAGENSCHUTZ, No. 161901; Court of Appeals No. 353662.

SWEAT v DETROIT HOUSING COMMISSION, No. 161905; Court of Appeals No. 347642.

PEOPLE v HOFFMAN, No. 161916; Court of Appeals No. 354011.

CLARIZIO v FORBES, No. 161918; Court of Appeals No. 347846.

PEOPLE v BAKER, No. 161938; Court of Appeals No. 344590.

PEOPLE v VISNER, Nos. 161969, 161970, and 161971; Court of Appeals Nos. 347028, 347083, and 347084.

PEOPLE v BRENT BROWN, No. 161982; Court of Appeals No. 353430.

ZINK v KONG, No. 161985; Court of Appeals No. 353408.

PEOPLE v KAUFMANN, No. 161988; Court of Appeals No. 353711.

PEOPLE v ORT, No. 161996; Court of Appeals No. 347284.

PEOPLE v JEKOBIAN DAVIS, No. 162012; Court of Appeals No. 354519.

PEOPLE v JOELY JACKSON, No. 162168; Court of Appeals No. 354456.

Reconsideration Denied December 22, 2020:

PEOPLE v FULLER, No. 161132; Court of Appeals No. 351596. Leave to appeal denied at 506 Mich 918.

PEOPLE v KARACSON, No. 161236; Court of Appeals No. 346236. Leave to appeal denied at 506 Mich 919.

PEOPLE v TAMEKIA YOUNG, No. 161346; Court of Appeals No. 346511. Leave to appeal denied at 506 Mich 892.

AARON v STAFFELD, No. 161374; Court of Appeals No. 349252. Leave to appeal denied at 506 Mich 892.

PEOPLE v LAPINE, No. 161404; Court of Appeals No. 353275. Leave to appeal denied at 506 Mich 854.

PEOPLE v CURTIS, No. 161410; Court of Appeals No. 351657. Leave to appeal denied at 506 Mich 855.

PEOPLE v MCDADE, No. 161496; Court of Appeals No. 323614. Motion to docket the application denied at 506 Mich 921.

PEOPLE v CASNAVE, No. 161591; Court of Appeals No. 351727. Leave to appeal denied at 506 Mich 920.

KROLL v DEMORROW, No. 161610; Court of Appeals No. 341895. Leave to appeal denied at 506 Mich 920.

PEOPLE v TIGGART, No. 161863; Court of Appeals No. 354242. Leave to appeal denied at 506 Mich 905.

Summary Disposition December 23, 2020:

PEOPLE v STEAD, No. 160284; Court of Appeals No. 346488. By order of February 4, 2020, appellate counsel was directed to file a supplemental brief addressing the reasons for his failure to secure the filing of the necessary transcripts as required by MCR 7.205(B)(4) and MCR 7.210(B)(1)(a). The supplemental brief having been received, the application for leave to appeal the May 20, 2019 order of the Court of Appeals is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Roscommon Circuit Court for further proceedings consistent with this order. Appellate counsel concedes that his failure to order transcripts was the product of his unfamiliarity with the relevant court rules. The defendant, through no fault of his own, was denied meaningful appellate review of his convictions and sentences. See *Halbert v Michigan*, 545 US 605 (2005). On remand, the trial court shall permit the defendant to "order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court or tribunal," MCR 7.210(B)(1)(a), or if appropriate, "some portion less than the full transcript," MCR 7.210(B)(1)(c). The trial court shall also permit the defendant to file a motion for a declaration of indigency for purposes of obtaining tran-

scripts at public expense under MCR 6.433(B). If the defendant chooses to file such a motion, the trial court shall determine whether he is indigent using the criteria set forth in MCR 6.005(B). Once transcripts have been ordered and arrangements for payment have been made, the court reporter shall prepare the requested transcripts in accord with the procedures outlined in MCR 7.210(B)(3). Thereafter, the defendant may file an application for leave to appeal in the Court of Appeals for consideration under the standard for direct appeals, and/or any appropriate post-conviction motions in the trial court, within 42 days of the filing of the requested transcripts. 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 MILES, No. 160494; Court of Appeals No. 343800. 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 scoring of Offense Variable (OV) 3, MCL 777.33, OV 12, MCL 777.42, and the trial court's assessment of court costs pursuant to MCL 769.1k(1)(b)(*iii*), and we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *People v Lewis* (Court of Appeals Docket No. 350287). After *Lewis* is decided, the Court of Appeals shall reconsider this case in light of *Lewis* and *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.

PEOPLE v HAJRIC, No. 161117; Court of Appeals No. 351892. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Macomb Circuit Court to allow the defendant the opportunity to either withdraw or reaffirm his no contest plea. As the prosecution concedes, the trial court failed to give advice about "any mandatory minimum sentence required by law[.]" MCR 6.302(B)(2). "[A] failure to impart the information required by MCR 6.302(B)(2) continues to require reversal." *People v Brown*, 492 Mich 684, 697 (2012), citing *In re Guilty Plea Cases*, 395 Mich 96, 118 (1975). We do not retain jurisdiction.

PEOPLE v BOWLING, No. 161576; Court of Appeals No. 352345. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the defendant's sentence and remand this case to the Saginaw Circuit Court to conduct a juvenile sentencing hearing to determine if the defendant should be sentenced as an adult or as a juvenile. MCR 6.931(A); MCL 769.1(3). We further order the Saginaw Circuit Court to determine whether the defendant is indigent, and if so, to appoint counsel.

The defendant has demonstrated good cause for failure to raise such grounds previously due to appellate counsel's failure to raise the issue on direct appeal. MCR 6.508(D)(3)(a). The defendant has also demonstrated that his sentence is invalid. MCR 6.508(D)(3)(b)(iv). The circuit court obtained jurisdiction over the defendant, who was sixteen years old at the time of the offenses, under the automatic waiver statute. MCL 600.606. The defendant was not convicted of one of the offenses listed at MCL 769.1(1)(a)-(l). Therefore, the circuit court erred by failing to hold

a dispositional hearing as required by MCL 769.1(3). Further, it appears that the prosecutor has conceded that a juvenile sentencing hearing was required.

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). We do not retain jurisdiction.

PEOPLE v SHELTON, No. 162280; Court of Appeals No. 355276. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the October 28, 2020 order of the Washtenaw Circuit Court that denied the defendant's emergency motion to reinstate bond. The trial court abused its discretion by failing to give adequate consideration to Administrative Order No. 2020-1 (issued March 15, 2020), which directs courts to consider the public-health factors arising out of the present public-health emergency to mitigate the spread of COVID-19. The record does not support the trial court's determination that the defendant is likely to fail to appear for future proceedings; nor does it establish that he poses a danger to the public if granted pretrial release. We remand this case to the Washtenaw Circuit Court for further proceedings not inconsistent with this order. We do not retain jurisdiction.

Leave to Appeal Granted December 23, 2020:

FOSTER v FOSTER, No. 161892; Court of Appeals No. 324853. The parties shall 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 (2017).

The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

Operation Firing for Effect, Forgotten Warriors Project, Inc., and Veterans of Foreign Wars Insurance Institute 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 December 23, 2020:

HAAN v LAKE DOSTER LAKE ASSOCIATION, No. 161017; Court of Appeals No. 345282. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals: (1) erred by determining that the dedication and recorded restrictions did not prevent the appellees from claiming an easement for the maintenance of the appellees' docks; (2) erred by determining that the appellees' requests for placement of docks under the recorded covenants and restrictions constituted more than a permissive and revocable license

and expanded into an enforceable easement; (3) erred by determining that the application for membership constituted an enforceable contract conferring on the appellees an easement for the permanent maintenance of docks; and (4) erroneously considered extrinsic evidence and decided questions of fact that were in dispute. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). 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. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. 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.

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 MICHELINE LEFFEW and PEOPLE v JEREMIAH LEFFEW, Nos. 161797 and 161805; Court of Appeals Nos. 343818 and 344240. The appellants shall each file a supplemental brief within 42 days of the date of this order addressing whether the common-law affirmative defense of defense of others may be raised as a defense to the felony and misdemeanor charges against them, see *People v Dupree*, 486 Mich 693 (2010); *People v Triplett*, 499 Mich 52 (2016), and whether trial defense counsels' failure to request such an instruction deprived the defendants of the effective assistance of counsel, see *Strickland v Washington*, 466 US 668 (1984). In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the briefs, 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' briefs. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. Replies, 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 total time allowed for oral argument shall be 40 minutes: 20 minutes for the appellants to be divided at their discretion, and 20 minutes for the appellee. MCR 7.314(B)(2).

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 these cases may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *People v Micheline Nicole Leffew*, Docket No. 161797, only and served on the parties in both cases.

Leave to Appeal Denied December 23, 2020:

PEOPLE v COWHY, No. 160803; reported below: 330 Mich App 452.

PEOPLE v STEPHENSON, No. 161077; Court of Appeals No. 351626.

COURY v TAKLA, No. 161215; Court of Appeals No. 351548.

PEOPLE v WILLIAM-SALMON, No. 161282; reported below: 332 Mich App 27.

PEOPLE v RICARDO WITHERSPOON, No. 161498; Court of Appeals No. 345696.

ANDERSON v SHIH, No. 161649; Court of Appeals No. 344540.

ANDERSON v SHIH, No. 161686; Court of Appeals No. 344549.

PEOPLE v MATTHEW WAGNER, No. 161864; Court of Appeals No. 353493.

Oral Argument Ordered on the Application for Leave to Appeal December 28, 2020:

PEOPLE v AUSTIN, No. 161092; Court of Appeals No. 344703. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the defendant was denied a fair trial by virtue of the trial judge's instructions to the jury regarding reasonable doubt; (2) whether trial counsel was constitutionally ineffective for failing to object to the trial judge's instructions on reasonable doubt; and (3) whether the evidence presented at trial was sufficient to support the defendant's conviction of felony-murder. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). 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. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. 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.

PEOPLE v BIESZKA, No. 161838; Court of Appeals No. 349349. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the trial court clearly erred by determining that the defendant failed to prove by a preponderance of the evidence that the victim consented to the sexual acts at issue; and (2) whether the 14-year-old victim was legally capable of consenting to

the sexual acts in any event. See MCL 750.520d(1)(a) ("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 . . . (a) That other person is at least 13 years of age and under 16 years of age."); *People v Starks*, 473 Mich 227, 230, 235 (2005) ("[C]onsent must be given by one who is legally capable of giving consent to the act," and "[b]ecause a thirteen-year-old child cannot consent to sexual penetration, consent by such a victim is not a defense to the crime of assault with intent to commit criminal sexual conduct involving sexual penetration."); cf. MCL 28.722(w)(*iv*) ("This subparagraph does not apply if the court determines that the victim consented to the conduct constituting the violation, that the victim was at least 13 years of age but less than 16 years of age at the time of the offense, and that the individual is not more than 4 years older than the victim."). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). 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. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. 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 December 28, 2020:

PEOPLE v ROBIN MANNING, No. 160034; Court of Appeals No. 345268. On November 12, 2020, the Court heard oral argument on the application for leave to appeal the February 21, 2019 order of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

MARKMAN, J. (*concurring*). I concur in this Court's decision to deny on the basis of MCR 6.508(D), rather than MCR 6.502(G). For the reasons set forth by Justice CLEMENT in her concurring statement, I agree that defendant may file his successive motion for relief from judgment under MCR 6.502(G)(2) because it is "based on a retroactive change in law that occurred after [defendant's] first motion for relief from judgment." However, defendant has not satisfied the "actual prejudice" requirement of MCR 6.508(D)(3)(b) because his sentence is not "invalid," MCR 6.508(D)(3)(b)(iv). Defendant argues that his sentence is "invalid" because it violates both the Eighth Amendment of the federal Constitution and Const 1963, art 1, § 16. I respectfully disagree.

In *Miller v Alabama*, 567 US 460, 465 (2012), the United States

Supreme Court held that "mandatory life without parole for those *under the age of 18* at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " (Emphasis added.) Defendant here was not "under the age of 18 at the time of [his] crime[]," and therefore, he is not entitled to relief under *Miller*. Defendant argues that drawing the line at 18 is "arbitrary." However, in *Roper v Simmons*, 543 US 551, 574 (2005), the Court responded to a similar argument:

> Drawing the line at 18 years of age [concerning eligibility for capital punishment] is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

In *Miller*, the Court concluded that the age of 18 is also the line for mandatory life-without-parole sentences. Because defendant was 18 when he committed murder, imposing the mandatory life-without-parole sentence on him does not violate the Eighth Amendment.

Furthermore, I agree with Justice Scalia's opinion in *Harmelin v Michigan*, 501 US 957, 965, 976 (1991) (opinion by Scalia, J.), that "the Eighth Amendment contains no proportionality guarantee"; instead, "the Clause disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed." I also agree with the dissenting justices in *Miller* that "[n]either the text of the Constitution nor our precedent prohibits legislatures from requiring that juvenile murderers be sentenced to life without parole." *Miller*, 567 US at 502 (Roberts, C.J., dissenting). See also *id*. at 504, 509 (Thomas, J., dissenting) (The Eighth Amendment "leaves the unavoidably moral question of who 'deserves' a particular nonprohibited method of punishment to the judgment of the legislatures that authorize the punishment," but "[t]oday's decision invalidates a constitutionally permissible sentencing system based on nothing more than the Court's belief that its own sense of morality preempts that of the people and their representatives") (quotation marks, citations, and ellipsis omitted); *id*. at 515 (Alito, J., dissenting) ("When a legislature prescribes that a category of killers must be sentenced to life imprisonment, the legislature, which presumably reflects the views of the electorate, is taking the position that the risk that these offenders will kill again outweighs any countervailing consideration, including reduced culpability due to immaturity or the possibility of rehabilitation. When the majority of this Court countermands that democratic decision, what the majority is saying is that members of society must be exposed to the risk that these convicted murderers, if released from custody, will murder again.").

While I would follow the Supreme Court's decision in *Miller* in an altogether faithful manner, as I must, I would not *extend* its applicabil-

ity. For no such extension is warranted under *Miller*, our federal or state Constitutions, or the statutes of this state.

Defendant's mandatory life-without-parole sentence also does not violate Const 1963, art 1, § 16, which prohibits "cruel or unusual punishment." As I asserted in *People v Correa*, 488 Mich 989, 992 (2010) (MARKMAN, J., concurring), I believe that *People v Morris*, 80 Mich 634 (1890), correctly held that proportionality review is not a component of Michigan's "cruel or unusual" punishment clause, and *People v Bullock*, 440 Mich 15 (1992), incorrectly held to the contrary. As *Morris* explained, the cruel-or-unusual-punishment clause only prohibits certain modes or methods of punishment and because "[i]mprisonment . . . is, and always has been, in this country and in all civilized countries, one of the methods of punishment," it does not violate the cruel-or-unusual-punishment clause. *Id*. at 639. See also *Bullock*, 440 Mich at 48 (RILEY, J., concurring in part and dissenting in part) ("[T]he 'cruel or unusual punishment' clause was intended to prohibit inhumane and barbarous treatment of the criminally convicted, and does not have a proportionality component.").

Furthermore, even under *Bullock*'s four-part test, I do not believe that defendant is entitled to relief. Indeed, I am unable to identify any precedent of this Court in which *Bullock* has ever been applied to strike down or modify a criminal statute of this state, other than in *Bullock* itself. *Bullock*'s test for proportionality assesses: (1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in the same jurisdiction, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation. *People v Carp*, 496 Mich 440, 520 (2014), citing *Bullock*, 440 Mich at 33-34.

With regard to the first factor, as *Carp* explained:

> [F]irst-degree murder is almost certainly the gravest and most serious offense that an individual can commit under the laws of Michigan—the premeditated taking of an innocent human life. It is, therefore, unsurprising that the people of this state, through the Legislature, would have chosen to impose the most severe punishment authorized by the laws of Michigan for this offense. [*Carp*, 496 Mich at 514-515.]

With regard to the second factor, all adults and some juveniles who commit first-degree murder face the same sentence of life without parole. Furthermore, nonhomicide offenses exist in Michigan that are less grave or serious than first-degree murder, but for which adult offenders will face mandatory life-without-parole sentences, such as first-degree criminal sexual conduct.

With regard to the third factor, since *Miller*, 23 states have banned life-without-parole sentences on juvenile offenders. However, that means that life-without-parole sentences are still being imposed on juvenile offenders in a majority of the states. And I am not aware of any

state that has banned the imposition of life-without-parole sentences on 18-year-olds. Indeed, 19 states and the federal government still impose mandatory sentences of life without parole for first-degree murder on those 18 years of age and older. Six more states impose mandatory life-without-parole sentences in the face of aggravating circumstances. Therefore, Michigan is by no means an outlier, even to the extent that there is some necessity to ensure that our criminal sanctions are in accordance with those of other states.

With regard to the fourth factor, a life-without-parole sentence for an 18-year-old may not serve the penological goal of rehabilitation, but it may serve other critical penological goals, such as securing a just and proper punishment as determined by a self-governing people and their representatives; the general deterrence of other potential criminal offenders; and the individual deterrence, and incapacitation, of the individual offender himself. In *Carp*, this Court concluded that "with only one of the four factors supporting the conclusion that life-without-parole sentences are disproportionate when imposed on juvenile homicide offenders, defendants have failed to meet their burden of demonstrating that it is facially unconstitutional under Article 1, § 16 to impose that sentence on a juvenile homicide offender." *Id*. at 521. Similarly, the defendant here has failed to meet his burden of demonstrating that it is unconstitutional under Article 1, § 16 to mandatorily impose that sentence upon an 18-year-old homicide offender.

For these reasons, defendant's sentence is not invalid and therefore defendant is not entitled to relief under MCR 6.508(D)(3)(b).

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

CLEMENT, J. (*concurring*). I concur with the Court's denial of defendant's application for failure to show entitlement to relief under MCR 6.508(D). But I write separately to explain why I believe the Court of Appeals erred by dismissing defendant's delayed application under MCR 6.502(G).

When interpreting a court rule, we apply the rules of statutory interpretation. *CAM Constr v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 553 (2002). Just as in statutory interpretation, our goal is to give effect to the intent of the authors. *Wilcoxon v Wayne Co Neighborhood Legal Servs*, 252 Mich App 549, 553 (2002). We begin with the language of the rule. *Id*. If the language is clear and unambiguous, then no further interpretation is allowed. *CAM Constr*, 565 Mich at 554.

Defendant, Robin Manning, argues that the Eighth Amendment of the United States Constitution and Const 1963, art 1, § 16, forbid sentencing 18-year-olds to mandatory life imprisonment without the possibility of parole.[1] In other words, defendant contends that this Court should extend the holding of *Miller v Alabama*, 567 US 460 (2012), which prohibited mandatory life-without-parole sentences for defen-

[1] The Eighth Amendment, of course, forbids the infliction of "cruel and unusual punishment." US Const, Am VIII. Our state Constitution forbids the infliction of "cruel or unusual punishment." Const 1963, art 1, § 16.

dants who were under 18 years old at the commission of their crimes, *id*. at 465, to defendants who were 18 years old at the commission of their crimes. His argument is presented in the form of a collateral attack on his conviction under MCR 6.500—his seventh motion for relief from judgment since he was convicted. Ordinarily, a defendant may file only one such motion and may not appeal the denial or rejection of successive motions, although there are exceptions to those general rules. See MCR 6.502(G)(1) through (3). Accordingly, the Court of Appeals did not consider the merits of defendant's argument, instead dismissing defendant's application because he failed to show that one of the exceptions to the general bar against successive motions under MCR 6.502(G) applied to his claim.

The most relevant exception is that a defendant may file a successive motion if it is "based on a retroactive change in law that occurred after the first motion for relief from judgment . . . ." MCR 6.502(G)(2).[2] There is clearly a retroactive change in law here. *Montgomery v Louisiana*, 577 US 190 (2016), held that *Miller* announced a new rule that applies retroactively. *Id*. at 206 ("*Miller* announced a substantive rule that is

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[2] In his application to the Court of Appeals, rather than arguing that his claim was based on a retroactive change in law, defendant contended that new studies showing that the brain is still developing when a person is 18 years old and older qualified as "new evidence." Defendant therefore argued that his successive motion fit another exception in MCR 6.502(G)(2), which allows a defendant to file a successive motion if it presents "a claim of new evidence that was not discovered before the first [motion for relief from judgment]." It was in his application to our Court that defendant argued that his claim was based on a retroactive change in law.

Even if the issue of whether defendant's successive motion was encompassed by the "retroactive change in law" exception was unpreserved in the Court of Appeals, that court certainly could consider it because it is an issue of law for which all the relevant facts were presented. *People v Giovannini*, 271 Mich App 409, 414-415 (2006) ("[T]his Court may consider an unpreserved issue 'if the question is one of law and all the facts necessary for its resolution have been presented or where necessary for a proper determination of the case.' "), quoting *Providence Hosp v Nat'l Labor Union Health & Welfare Fund*, 162 Mich App 191, 194-195 (1987). Indeed, the trial court had considered both the "new evidence" and the "retroactive change in law" exceptions in MCR 6.502(G)(2). And the Court of Appeals did just that in its order as well by stating that "[d]efendant has failed to demonstrate the entitlement to an application *of any of the exceptions* to the general rule that a movant may not appeal the denial of a successive motion for relief from judgment. MCR 6.502(G)." *People v Manning*, unpublished order of the Court of Appeals, entered February 21, 2019 (Docket No. 345268) (emphasis added).

retroactive in cases on collateral review."). Therefore, the only question remaining is whether defendant's argument that *Miller*'s holding should be extended to include 18-year-olds is "based on" *Miller*'s retroactive change in law.

I believe that it is. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines the verb "base" as: "1 : to make, form, or serve as a base for 2 : to find a base or basis for—usu[ally] used with *on* or *upon*."[3] *Black's Law Dictionary* (11th ed) similarly defines "base," in relevant part, as:

> 1. To make, form, or serve as a foundation for <the left hand based her chin>. 2. To establish (an agreement, conclusion, etc.); to place on a foundation; to ground <the claim is based in tort>. 3. To use (something) as the thing from which something else is developed <their company is based on an abiding respect for the employees>.[4]

Thus, the retroactive change in law must only "serve as a foundation for" or "base for" a defendant's claim in order to satisfy MCR 6.502(G)(2). This standard is satisfied here—*Miller* forms the foundation of defendant's claim that *Miller*'s holding should be extended to 18-year-olds. While defendant argues that *Miller*'s holding should be extended to another class of defendants rather than simply arguing that he merits relief under the holding, *Miller*'s holding is still the change in law "from which [defendant's claim] is developed." Defendant's claim is therefore "based on" *Miller*'s holding, which is a retroactive change of law.

Reading MCR 6.502(G)(2) otherwise, as demanding that defendants show that their claims fall squarely within a retroactive change in law, would, as a practical matter, very often (if not always) merge the initial procedural hurdle in MCR 6.502(G)(2) with the merits analysis in MCR 6.508(D).[5] Defendants would be able to satisfy the initial procedural hurdle of MCR 6.502(G)(2) only when they would also prevail on the

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[3] See also Dictionary.com <https://www.dictionary.com/browse/base> (accessed December 10, 2020) [https://perma.cc/X2YZ-QBEP] (defining the verb "base" as "to make or form a base or foundation for," "to establish, as a fact or conclusion (usually followed by *on* or *upon*)").

[4] This Court turns to lay dictionaries to define a common word or phrase and to law dictionaries to define a legal term of art. However, because the definitions of "base" "are the same in both a lay dictionary and legal dictionary, it is unnecessary to determine whether the phrase is a term of art, and it does not matter to which type of dictionary this Court resorts." *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 621-622 n 62 (2016).

[5] MCR 6.508(D) sets forth what a defendant must show in order to prove entitlement to relief. For example, relevant to the instant case, a defendant who "alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under [MCR 6.508]," must show "(a) good cause for failure to raise such grounds on appeal or in the prior motion,

merits analysis of MCR 6.508(D). For example, in this case, a narrow interpretation of "based on" would lead to the conclusion that defendant's argument that *Miller* should be extended fails to satisfy MCR 6.502(G)(2). To satisfy MCR 6.502(G)(2) under such a reading, defendant here would have had to have been a minor at the commission of his crime, such that *Miller* clearly provides him with relief. He would then necessarily have been able to show entitlement to relief under MCR 6.508(D)—he would have been able to demonstrate good cause because the change in law occurred after his first motion for relief from judgment, MCR 6.508(D)(3)(a), and he would have been able to show actual prejudice because his sentence would have been invalid, MCR 6.508(D)(3)(b)(iv). In such a scenario, MCR 6.502(G) and MCR 6.508(D) would no longer do separate work. Because one of the provisions would be rendered nugatory under this interpretation, I would avoid reading "based on" in MCR 6.502(G) as a high bar, as the Court of Appeals appears to have done. *Apsey v Mem Hosp*, 477 Mich 120, 127 (2007) ("[N]o word should be treated as surplusage or made nugatory.").

For these reasons I believe the Court of Appeals erred by dismissing defendant's application under MCR 6.502(G). Though I concur in this Court's denial of defendant's application because I believe defendant's claim fails on the merits under MCR 6.508(D), I believe defendant satisfied MCR 6.502(G)(2) by filing a successive motion for relief from judgment that was "based on a retroactive change in law . . . ." MCR 6.502(G)(2).

MARKMAN and ZAHRA, JJ., join the statement of CLEMENT, J.

MCCORMACK, C.J. (*dissenting*). I respectfully dissent from the Court's order denying leave to appeal.[1] The trial court relied at least in part on MCR 6.502(G) in denying the defendant's motion; as the Court's order today makes clear, this was error. I would not summarily conclude that the defendant cannot show the good cause and actual prejudice necessary to satisfy MCR 6.508(D)(3).

Rather, I would vacate the trial court's order denying relief and remand to that court for reconsideration under MCR 6.508(D). And I would direct the trial court on remand to hold an evidentiary hearing to allow the defendant and the prosecution to present evidence about

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and (b) actual prejudice from the alleged irregularities that support the claim for relief." MCR 6.508(D)(3). Here, because defendant challenges his sentence, he would need to show actual prejudice by demonstrating that his sentence is invalid. MCR 6.508(D)(3)(b)(iv).

[1] But to the extent the Court denies leave to appeal under MCR 6.508(D) rather than MCR 6.502(G), I agree that the former is the correct rule for the reasons eloquently explained in Justice CLEMENT's concurring statement. See also *People v Stovall*, 334 Mich App 553, 561 (2020) (concluding that the defendant's challenge to his sentence of life in prison *with* the possibility of parole based on *Miller* and *Montgomery* satisfied the "retroactive change in law" procedural requirement in MCR 6.502(G)).

whether the rule from *Miller v Alabama*, 567 US 460 (2012) and *Montgomery v Louisiana*, 577 US 190 (2016), should be extended to the defendant. MCR 6.508(C). The defendant and amici make a compelling argument that the advances in studies of brain development since *Roper v Simmons*, 543 US 551 (2005), on which *Miller* was based, demonstrate that the "distinctive attributes of youth" that formed the basis for the *Miller* decision continue beyond age 18. But because the trial court denied relief here without a hearing, we lack a factual record to review to determine whether this case warrants extending the rule from *Miller*.

BERNSTEIN and CAVANAGH, JJ., join the statement of MCCORMACK, C.J.

PEOPLE v LARRY WALKER, No. 161347; Court of Appeals No. 345294.

DAVIS v SECRETARY OF STATE, No. 162007; reported below: 333 Mich App 588.

VIVIANO, J. (*dissenting*). I would grant leave to hear this case to review whether the Secretary of State had legal authority to mail millions of applications for absentee ballots to voters who did not request them. Our Constitution requires the Secretary of State to "perform duties *prescribed by law*." Const 1963, art 5, § 9 (emphasis added). In general, " '[t]he extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority.' " *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 225-226 (2011), quoting *Sittler v Bd of Control of Mich College of Mining & Tech*, 333 Mich 681, 687 (1952). The Court of Appeals' partial dissent examined the statutes at issue and concluded that the Secretary of State's action exceeded her authority. I believe the partial dissent raises a number of issues that this Court should address. Therefore, I respectfully dissent.

Leave to Appeal Denied December 30, 2020:

PEOPLE v OWEN, No. 160150; Court of Appeals No. 339668.

ZAHRA, J. (*dissenting*). I dissent from the Court's denial of leave. In my view, the Court of Appeals clearly erred by concluding that the arresting deputy sheriff made an unreasonable mistake of law regarding the applicable speed limit that justified the traffic stop of the defendant's vehicle. The Court of Appeals failed to assess this case from the objective perspective of the deputy. I would reverse the judgment of the Court of Appeals and reinstate the judgment of the circuit court, which ruled that the deputy's actions were objectively reasonable and highlighted the absence of any indicia of bad faith on the deputy's part.

In 2015, defendant was stopped by a deputy of the Ionia County Sheriff's Department for speeding on southbound Parsonage Road while driving at 43 miles per hour; evidence obtained as a result of the stop resulted in his arrest for operating a vehicle while visibly impaired, MCL 257.625(3), and being a concealed pistol licensee in the possession of a firearm while intoxicated, MCL 28.425k(2).

At that time, the vicinity of the road at which defendant was stopped displayed no southbound-posted speed limit, but there was a northbound-posted speed limit of 25 miles per hour. The 25-miles-per-hour sign was not legally posted, according to the circuit court. The Court of Appeals affirmed, and I accept the premise that the legal speed limit—both northbound and southbound—was 55 miles per hour, and that defendant was driving slower than 55 miles per hour when he was stopped. The sole issue here, accepting the above premise, is whether the traffic stop violated the Fourth Amendment.

"A traffic stop for a suspected violation of law is a 'seizure' of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth Amendment."[1] Such a "seizure[] based on mistakes of fact can be reasonable."[2] Similarly, such a seizure "can rest on a mistaken understanding of the scope of a legal prohibition."[3] However, "the Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable."[4] In my view, it was objectively reasonable for an officer in the deputy sheriff's position to believe that: (a) the applicable speed limit was 25 miles per hour on northbound Parsonage Road by the explicit posting of such a limit; (b) there was no distinctive traffic, safety, or other signage of southbound Parsonage Road compared to northbound Parsonage Road; and (c) the applicable speed limit statutes in effect at the time, MCL 257.627, MCL 257.628, and MCL 257.629,[5] reflect a single speed limit for a particular "highway segment[]" or "highway[]," as those terms may reasonably be understood as contemplating that lanes of travel on a single highway extend in both directions of the highway, and if not otherwise signaled, the speed limit would be the same in both directions. Accordingly, although he was mistaken, it was objectively reasonable for the deputy sheriff to have surmised that the applicable speed limit was 25 miles per hour on southbound Parsonage Road and to therefore stop defendant on the basis of that understanding. For these reasons, I respectfully dissent from our order denying leave to appeal. I would instead reverse the judgment of the Court of Appeals and reinstate defendant's convictions and sentences.

MARKMAN and VIVIANO, JJ., join the statement of ZAHRA, J.

PEOPLE v AMERSON, No. 161930; Court of Appeals No. 345215.

PEOPLE v JEFFREY WELLS, No. 162256; Court of Appeals No. 354420.

Leave to Appeal Denied November 23, 2020:

COSTANTINO v CITY OF DETROIT, No. 162245; Court of Appeals No. 355443.

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[1] *Heien v North Carolina*, 574 US 54, 60 (2014).

[2] *Id*. at 61.

[3] *Id*. at 60.

[4] *Id*. at 66.

[5] This section has since been repealed. See 2016 PA 445.

ZAHRA, J. (*concurring*). Plaintiffs ask this Court to "enjoin the Wayne County Canvassers certification of the November 2020 election prior to their meeting [on] November 17, 2020 at 3:00 p.m." on the basis that "the audit [requested by plaintiffs pursuant to Const 1963, art 2, § 4(1)(h)] needs to occur prior to the election results being certified by the Wayne County Board of Canvassers." Plaintiffs contend that if "the results of the November 2020 election [are] certified . . . Plaintiffs will lose their right to audit its results, thereby losing the rights guaranteed under the Michigan Constitution." However, plaintiffs cite no support, and I have found none, for their proposition that an audit under Const 1963, art 2, § 4(1)(h)—which provides "[e]very citizen of the United States who is an elector qualified to vote in Michigan . . . [t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections"—must *precede* the certification of election results. Indeed, the plain language of Const 1963, art 2, § 4(1)(h) does *not* require an audit to precede the certification of election results. To the contrary, certified results would seem to be a *prerequisite* for such an audit. For how can there be "[t]he right to have the results of statewide elections audited" absent any results, and, further, what would be properly and meaningfully audited other than final, and presumably certified, results? See also *Hanlin v Saugatuck Twp*, 299 Mich App 233, 240-241 (2013) (allowing for a quo warranto action to be brought by a citizen within 30 days of an election in which it appears that a material fraud or error has been committed), citing *Barrow v Detroit Mayor*, 290 Mich App 530 (2010); MCL 168.31a (which sets forth election-audit requirements and does not require an audit to take place before election results are certified); MCL 168.861 ("For fraudulent or illegal voting, or tampering with the ballots or ballot boxes before a recount by the board of county canvassers, the remedy by quo warranto shall remain in full force, together with any other remedies now existing.").

Even so, while plaintiffs are not precluded from seeking a future "results audit" under Const 1963, art 2, § 4(1)(h), the certification of the election results in Wayne County has rendered the instant case moot to the extent that plaintiffs ask this Court to enjoin that certification; there is no longer anything to enjoin. While it is noteworthy that two members of the board later sought to rescind their votes for certification, see LeBlanc, *GOP Canvassers Try to Rescind Votes to Certify Wayne County Election*, Detroit News (November 19, 2020) <https://www.detroitnews.com/story/news/local/michigan/2020/11/19/gop-canvassers-attempt-rescind-votes-certify-wayne-county-vote/3775246001/> (accessed November 23, 2020) [https://perma.cc/2SS2-Y29V], plaintiffs have nonetheless provided no support, and I have found none, for their proposition that this effects a "decertification" of the county's election results, so it seems they presently remain certified. Cf. *Makowski v Governor*, 495 Mich 465, 487 (2014) (holding that the Governor has the power to grant a commutation, but does not have the power to revoke a commutation). Thus, I am inclined to conclude that the certification of the electiont by the Wayne County board has rendered the instant case moot—but only as to plaintiffs' request for injunctive relief.

Nothing said is to diminish the troubling and serious allegations of fraud and irregularities asserted by the affiants offered by plaintiffs, among whom is Ruth Johnson, Michigan's immediate past Secretary of State, who testified that, given the "very concerning" "allegations and issues raised by Plaintiffs," she "believe[s] that it would be proper for an independent audit to be conducted as soon as possible to ensure the accuracy and integrity of th[e] election." Plaintiffs' affidavits present evidence to substantiate their allegations, which include claims of ballots being counted from voters whose names are not contained in the appropriate poll books, instructions being given to disobey election laws and regulations, the questionable appearance of unsecured batches of absentee ballots after the deadline for receiving ballots, discriminatory conduct during the counting and observation process, and other violations of the law. Plaintiffs, in my judgment, have raised important constitutional issues regarding the precise scope of Const 1963, art 2, § 4(1)(h)—a provision of striking breadth added to our Michigan Constitution just two years ago through the exercise of direct democracy and the constitutional initiative process—and its interplay with MCL 168.31a and other election laws. Moreover, the current Secretary of State has indicated that her agency will conduct a postelection performance audit in Wayne County. See Egan, *Secretary of State: Post-Election "Performance Audit" Planned in Wayne County*, Detroit Free Press (November 19, 2020) <https://www.freep.com/story/news/politics/elections/2020/11/19/benson-post-election-performance-audit-wayne/3779269001/> (accessed November 23, 2020) [https://perma.cc/WS95-XBPG]. This development would seem to impose at least some obligation upon plaintiffs both to explain why a constitutional audit is still required after the Secretary of State conducts the promised process audit and to address whether there is some obligation on their part to identify a specific "law" in support of Const 1963, art 2, § 4(1)(h) that prescribes the specific "manner" in which an audit pursuant to that provision must proceed.

In sum, at this juncture, plaintiffs have not asserted a persuasive argument that their case is not moot and that the entry of immediate injunctive relief is proper. That is all that is now before this Court. Accordingly, I concur in the denial of injunctive relief. In addition to denying the relief currently sought in this Court, I would order the most expedited consideration possible of the remaining issues. With whatever benefit such additional time allows, the trial court should meaningfully assess plaintiffs' allegations by an evidentiary hearing, particularly with respect to the credibility of the competing affiants, as well as resolve necessary legal issues, including those identified in the separate statement of Justice VIVIANO. I would also have this Court retain jurisdiction of this case under both its appellate authority and its superintending authority under Const 1963, art 6, § 4 (stating that, with certain limitations, "the supreme court shall have general superintending control over all courts"). Federal law imposes tight time restrictions on Michigan's certification of our electors. Plaintiffs should not have to file appeals following our standard processes and procedures to obtain a final answer from this Court on such weighty issues.

Finally, I am cognizant that many Americans believe that plaintiffs' claims of electoral fraud and misconduct are frivolous and obstructive, but I am equally cognizant that many Americans are of the view that the 2020 election was not fully free and fair. See, e.g., Monmouth University Polling Institute, *More Americans Happy About Trump Loss Than Biden Win* (November 18, 2020) <https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_111820/> (accessed November 23, 2020) [https://perma.cc/7DUN-CMZM] (finding that 32% of Americans "believe [Joe Biden] only won [the election] due to voter fraud"). The latter is a view that strikes at the core of concerns about this election's lack of both "accuracy" and "integrity"—values that Const 1963, art 2, § 4(1)(h) appears designed to secure.

In sum, as explained above, I would order the trial court to expedite its consideration of the remaining issues, and I would retain jurisdiction in order to expedite this Court's final review of the trial court's decision. But, again, because plaintiffs have not asserted a persuasive argument that immediate injunctive relief is an appropriate remedy, I concur in the denial of leave to appeal and, by extension, the denial of that relief.

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

VIVIANO, J. (*dissenting*). Plaintiffs Cheryl Costantino and Edward McCall seek, among other things, an audit of the recent election results in Wayne County. Presently before this Court is their application for leave to appeal the trial court's ruling that plaintiffs are not likely to succeed and therefore are not entitled to a preliminary injunction to stop the certification of votes by defendant Wayne County Board of Canvassers. See MCL 168.824; MCL 168.825. The Court of Appeals denied leave, and this Court has now followed suit. For the reasons below, I would grant leave to answer the critical constitutional questions of first impression that plaintiffs have squarely presented concerning the nature of their right to an audit of the election results under Const 1963, art 2, § 4(1)(h).

The constitutional provision at issue in this case, which the people of Michigan voted to add in 2018 through Proposal 3, guarantees to "[e]very citizen of the United States who is an elector qualified to vote in Michigan . . . [t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections." *Id*. The provision is self-executing, meaning that the people can enforce this right even without legislation enabling them to do so and that the Legislature cannot impose additional obligations on the exercise of this right. *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466 (1971).

The trial court failed to provide a meaningful interpretation of this constitutional language. Instead, it pointed to MCL 168.31a, which prescribes the minimum requirements for statewide audits and requires the Secretary of State to issue procedures for election audits under Article 2, § 4. But the trial court never considered whether MCL 168.31a accommodates the full sweep of the Article 2, § 4 right to an audit or whether it imposes improper limitations on that right.

In passing over this constitutional text, the trial court left unanswered many questions pertinent to assessing the likelihood that

plaintiffs would succeed on the merits.[1] As an initial matter, the trial court did not ask what showing, if any, plaintiffs must make to obtain an audit. It appears that no such showing is required, as neither the constitutional text nor MCL 168.31a expressly provide for it. None of the neighboring rights listed in Article 2, § 4, such as the right to vote by absentee ballot, requires citizens to present any proof of entitlement for the right to be exercised. Yet, the trial court here ignored this threshold legal question and instead scrutinized the parties' bare affidavits, concluding that plaintiffs' allegations of fraud were not credible.[2] The trial court's factual findings have no significance unless, to obtain an audit, plaintiffs were required to prove their allegations of fraud to some degree of certainty.

Wrapped up in this question is the meaning and design of Const 1963, art 2, § 4. Is it a mechanism to facilitate challenges to election results, or does it simply allow for a postmortem perspective on how the election was handled? To ascertain the type of audit the Constitution envisions, it is necessary to consider whether the term "audit" has a special meaning in the context of election administration. In this regard, we should examine the various auditing practices in use around the time Proposal 3 was passed. See Presidential Commission on Election Administration, *The American Voting Experience: Report and Recommendations* (January 2014), p 66 ("Different types of audits perform different functions."). Some audits occur regardless of how close the election was. They simply review the election process to verify that procedures were complied with, rules were followed, and technology performed as expected. See *id.*; see also League of Women Voters, *Report on Election Auditing* (January 2009), p 3 ("Post-election audits routinely check voting system performance in contests, regardless of how close margins of victory appear."). For these process-based audits, it would not appear critical whether they occur before the election results are finally certified, as the audit is intended to gather information that could be used to perfect voting systems going forward.

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[1] The court also suggested that plaintiffs could seek a recount. But, with few exceptions, the relevant recount provisions can be invoked only by candidates for office, which plaintiffs here were not. Compare MCL 168.862 and MCL 168.879 (allowing candidates to request recounts) with MCL 168.880 (allowing any elector, in certain circumstances, to seek a recount of "votes cast upon the question of a proposed amendment to the constitution or any other question or proposition").

[2] The court's credibility determinations were made without the benefit of an evidentiary hearing. Ordinarily, an evidentiary hearing is required where the conflicting affidavits create factual questions that are material to the trial court's decision on a motion for a preliminary injunction under MCR 3.310. See 4 Longhofer, Michigan Court Rules Practice, Text (7th ed, 2020 update), § 3310.6, pp 518-519. See also *Fancy v Egrin*, 177 Mich App 714, 723 (1989) (an evidentiary hearing is mandatory "where the circumstances of the individual case so require").

Other audits, by contrast, aim to ensure accuracy in a specific election and enable alteration of results if necessary. The American Law Institute's recent *Principles of the Law, Election Administration*, drafted around the time Proposal 3 was passed, suggests that audits should be used in this manner:

> [I]f an audit exposes a problem, the number of randomly sampled ballots can be increased in order to ascertain whether or not the problem is one that threatens the accuracy of the determination of which candidate is the election's winner. In an extreme case, when problems exposed by an audit were severe, the audit would need to turn into a full recount of all ballots in the election in order to provide the requisite confidence in the accuracy of the result (or, as necessary, to alter the result based on the findings of the audit-turned-recount). In those circumstances when the audit exposes no such problem, election officials ordinarily would be able to complete the audit prior to the deadline for certifying the results of the election; when, however, the audit reveals the necessity of a full recount, then a state—depending on how it chooses to structure the relationship between certification and a recount—either could delay certification until completion of the recount or issue a preliminary certification that is subject to revision upon completion of the recount. [ALI, Principles of the Law, Election Administration (2019), § 209, comment *c*.]

These audits, such as a risk-limiting audit, "are designed to be implemented before the certification of the results, and to inform election officials whether they should be confident in the results—or if they should bump the audit up to a full recount." Pettigrew & Stewart, *Protecting the Perilous Path of Election Returns from the Precinct to the News*, 16 Ohio St Tech L J 587, 636 (2020) ("[Risk-limiting audits] conducted as part of the certification process currently provide the best mechanism through which the manipulation of election returns at the precinct level can be detected and, most importantly, remedied."). A review of election laws conducted in early 2018 similarly recommended that audits be undertaken "after preliminary outcomes are announced, but before official certification of election results" because this allows for "correction of preliminary results if preliminary election outcomes are found to be incorrect." Root et al, Center for American Progress, *Election Security in All 50 States: Defending America's Elections* (Feb 12, 2018), available at <https://www.americanprogress.org/issues/democracy/reports/2018/02/12/446336/election-security-50-states/>.

Whether the constitutional right to an audit may be utilized to uncover evidence of fraud to challenge the results of an election will also need to be addressed. In particular, how does the constitutional audit operate within our statutory framework and procedures for canvassing election returns, certifying the results, and disputing ballots on the basis of fraud? We have long indicated that canvassing boards' role is ministerial and does not involve investigating fraud. See *McLeod v State*

Bd of Canvassers, 304 Mich 120 (1942); see also *People ex rel Williams v Cicott*, 16 Mich 283, 311 (1868)[3] (opinion of Christiancy, J.) (noting that the boards, "acting thus ministerially," are "often compelled to admit votes which they know to be illegal"); see generally Paine, *Treatise on the Law of Elections to Public Offices* (1888), § 603, p 509 ("The duties of county, district, and state canvassers are generally ministerial. . . . Unless authorized by statute, they cannot go behind those returns. . . . Questions of illegal voting and fraudulent practices are to be passed upon by another tribunal."). The Board of State Canvassers has more of a role in investigating fraud in recounts, although we have held that it cannot exclude votes on this basis. See MCL 168.872 (providing that if the board conducting a recount suspects fraud occurred during the election, it can make an investigation that produces a report that is submitted to the prosecuting attorney or to the circuit judges of the county); *May v Wayne Co Bd of Canvassers*, 94 Mich 505, 512 (1893) (holding that the board could not exclude votes during a recount based on fraud). These holdings may suggest that evidence of fraud uncovered in an audit is not a barrier to certification and instead may only be used to challenge an election in quo warranto and other related proceedings. See *The People ex rel Attorney General v Van Cleve*, 1 Mich 362, 364-366 (1850) (holding in a quo warranto proceeding that the certification "is but *prima facie* evidence" of the election results and that a party can "go behind all these proceedings[; that the party] may go to the ballots, if not beyond them, in search of proof of the due election of either the person holding, or the person claiming the office").

Consequently, it is imperative to determine the nature and scope of the audit provided for in Article 2, § 4, so we can determine when the audit occurs and whether it will affect the election outcome. These questions are important constitutional issues of first impression that go to the heart of our democracy and the power of our citizens to amend the Constitution to ensure the accuracy and integrity of elections. They deserve serious treatment. I would grant leave to appeal and hear this case on an expedited basis to resolve these questions.[4] For these reasons, I dissent.

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[3] Overruled in part on other grounds by *Petrie v Curtis*, 387 Mich 436 (1972).

[4] In doing so, I would consider the parties' arguments regarding whether the matter is moot.

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 September 16, 2020:

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 also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. ~~The court shall return without filing any successive motions for relief from judgment. A defendant may not appeal the denial or rejection of a successive motion.~~

(2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion ~~that asserts that one of these exceptions is applicable~~ 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 eliminate the requirement to return successive motions to the filer and would eliminate the prohibition on appeal of a decision made on a motion for relief from judgment. Further, it would require all such motions to be submitted to the assigned judge, and require a trial court to issue an order when it rejects or denies relief.

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 sent to the Supreme Court Clerk in writing or electronically by January 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-35. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered September 16, 2020:

PROPOSED AMENDMENT OF MCR 1.109.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 1.109 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 public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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

(A)-(D) [Unchanged.]

(E) Signatures.

(1) [Unchanged.]

(2) Requirement. Every document filed shall be signed by the person filing it or by at least one attorney of record. Every document of a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney must sign the document. In probate proceedings the following also applies:

(a)-(b) [Unchanged.]

(3)-(7) [Unchanged.]

(F)-(G) [Unchanged.]

Staff comment: The proposed amendment of MCR 1.109 would require a signature from an attorney of record on documents filed by represented parties. This language was inadvertently eliminated when MCR 2.114(C) was relocated to MCR 1.109 as part of the e-Filing rule changes.

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 sent to the Supreme Court Clerk in writing or electronically by January 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-48. Your comments and the comments of others will be posted under the chapter affected by this proposal [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered September 16, 2020:

PROPOSED AMENDMENT OF MCR 9.261.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.261 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 public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 9.261 CONFIDENTIALITY; DISCLOSURE.

(A)-(I) [Unchanged.]

(J) Notwithstanding the prohibition against disclosure in this rule, upon request the commission shall disclose all 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.

(K) Notwithstanding the prohibition against disclosure in this rule, either upon request or on its own motion, the commission shall disclose 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 proposed amendment of MCR 9.261 would allow the JTC to share information with two separate divisions of the State Bar of Michigan: the Judicial Qualifications Committee and the Lawyers & Judges Assistance Program.

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 sent to the Supreme Court Clerk in writing or electronically by January 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-16. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered October 14, 2020:

PROPOSED RESCISSION OF ADMINISTRATIVE ORDER No. 1997-9 AND PROPOSED ADOPTION OF ADMINISTRATIVE ORDER No. 2020-X.

On order of the Court, this is to advise that the Court is considering a proposed rescission of Administrative Order No. 1997-9 to be replaced with Administrative Order No. 2020-X. 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 public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

Administrative Order No. 2020-X — Allocation of Funds from Lawyer Trust Account Program.

On order of the Court, effective immediately, Administrative Order No. 1997-9 is rescinded and replaced with Administrative Order No. 2020-X to provide that funds to be distributed by the Board of Trustees of the Michigan State Bar Foundation shall be disbursed as follows:

1. Seventy percent of the net proceeds of the Lawyer Trust Account Program to support the delivery of civil legal services to the poor;

2. Fifteen percent of the net proceeds of the Lawyer Trust Account Program to support programs to promote improvements in the administration of justice;

3. Ten percent of the net proceeds of the Lawyer Trust Account Program to support increased access to justice, including matters relating to gender, racial, and ethnic equality, to be implemented at the direction of the State Court Administrator;

Five percent of the net proceeds of the Lawyer Trust Account Program, not to exceed a maximum of $XX,XXX, to support the activities of the Michigan Supreme Court Historical Society. Any funds in excess of the maximum amount shall be divided evenly among the recipients in paragraph 1 through 3.

Staff Comment: The proposed administrative order would replace the current administrative order regarding distribution of funds from the Lawyer Trust Account Program that was adopted more than 20 years ago. The distribution would remain largely the same as it is now: 70 percent to support delivery of civil legal services to the poor, 15 percent to promote improvements in the administration of justice, 10 percent to support increased access to justice (including racial, gender, and ethnic equality), and 5 percent for support of the activities of the Michigan Supreme Court Historical Society. What would be different is that in paragraph three, funds would be used to support increased access to justice generally with specific reference to racial, gender, and ethnic equality, instead of reference to the long-defunct task forces on Gender Issues in the Courts and Racial/Ethnic Issues in the Court. Those issues will continue to be a focus of the money to be spent, but will be able to include additional recommendations. Further, the money could be spent as directed by the State Court Administrator, instead of being spent "within the judiciary," which unnecessarily restricts the ability to fund programs that exist outside the judiciary but fit within the funding parameters. Finally, the proposed AO would establish a cap on funding for the Michigan State Historical Society to reflect what are likely largely fixed costs for operational expenses; the remainder would be split among the remaining recipients.

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 sent to the Supreme Court Clerk in writing or electronically by February 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-25. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered October 28, 2020:

PROPOSED AMENDMENT OF MCR 6.502.

On order of the Court, this is to advise that the Court is considering proposed alternative amendments of Rule 6.502 of the Michigan Court Rules. Before determining whether either 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 public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.]

ALTERNATIVE A

RULE 6.502. MOTION FOR RELIEF FROM JUDGMENT.

(A)-(C) [Unchanged.]

(D) Return of Insufficient Motion. If a motion is not submitted on a form approved by the State Court Administrative Office, or does not substantially comply with the requirements of these rules, the court shall either direct that it be returned to the defendant with a statement of the reasons for its return, along with the appropriate form, or adjudicate the motion under the provisions of these rules. When a *pro se* defendant files his or her first motion effectively seeking to set aside or modify the judgment but styles the motion as something other than a motion for relief from judgment, the court shall promptly notify the defendant of its intention to recharacterize the pleading as a motion for relief from judgment; inform the defendant of any effects this might

have on subsequent motions for relief, see MCR 6.502(B), (G); and provide the defendant ___ days to withdraw or amend his or her motion before the court recharacterizes the motion. If the court fails to provide this notice and opportunity for withdrawal or amendment, the defendant's motion cannot be considered a motion for relief from judgment for purposes of MCR 6.502(B), (G). The clerk of the court shall retain a copy of the motion.

(E)-(G) [Unchanged.]

ALTERNATIVE B

RULE 6.502. MOTION FOR RELIEF FROM JUDGMENT.

(A)-(C) [Unchanged.]

(D) Return of Insufficient Motion. If a motion is not submitted on a form approved by the State Court Administrative Office, or does not substantially comply with the requirements of these rules, the court shall either direct that it be returned to the defendant with a statement of the reasons for its return, along with the appropriate form, or adjudicate the motion under the provisions of these rules. Where the defendant files a motion effectively seeking to set aside or modify the judgment but styles the motion as something other than a motion for relief from judgment, the court shall direct that it be returned to the defendant with a statement of the reasons for its return, along with the appropriate form. The clerk of the court shall retain a copy of the motion.

(E)-(G) [Unchanged.]

Staff comment: The proposed alternative amendments of MCR 6.502 would address the issue of a court's recharacterization of a defendant's motion for relief from judgment that is styled as something other than a motion for relief from judgment. Under Alternative A, the court would be required to notify the defendant of its intent to recharacterize the motion and allow the defendant an opportunity to withdraw or amend the motion. Under Alternative B, the court would be required to return the motion to the defendant with a statement of the reason for return.

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 sent to the Supreme Court Clerk in writing or electronically by February 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-07. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered October 28, 2020:

PROPOSED AMENDMENT OF RULE 7 OF THE RULES CONCERNING THE STATE BAR OF MICHIGAN.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7 of the Rules Concerning the State Bar of Michigan. 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 public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.]

Section 1. President, President-elect, Vice-president, Secretary, and Treasurer.

The officers of the Board of Commissioners of the State Bar of Michigan are the president, the president-elect, the vice-president, the secretary, and the treasurer. The officers serve for the year beginning with the adjournment of the annual meeting following their election and ending with the adjournment of the next annual meeting. A person may serve as president only once. After the election of board members but before the annual meeting each year, the Board of Commissioners shall elect from among its members, by majority vote of those present and voting, if a quorum is present:

(1) a vice-president who, after serving a one-year term, automatically succeeds to the office of president-elect for a one-year term, and then to the office of president, for a one-year term;

(2) a secretary; and

(3) a treasurer.

If a vice-president is not able to assume the duties of president-elect, the Board of Commissioners also shall elect from among its members, by majority vote of those present and voting, if a quorum is present, a president-elect who becomes president on the adjournment of the next succeeding annual meeting.

A commissioner whose term expires at the next annual meeting is not eligible for election as an officer unless the commissioner has been reelected or reappointed for another term as a commissioner. If the remaining term of a commissioner elected treasurer, secretary, vice-president, or president-elect will expire before the commissioner completes a term as president, the term shall be extended for an additional year or years to allow the commissioner to serve consecutive terms in each successive office through the completion of the commissioner's~~complete~~

~~the~~ term as president, provided that the commissioner is elected by the Board of Commissioners to serve in each successive office. If the term of an elected commissioner is so extended, the authorized membership of the board is increased by one for that period; a vacancy in the district the treasurer, secretary, vice-president, or president-elect represents exists when the term as a commissioner would normally expire, and an election to choose a successor is to be held in the usual manner.

No person holding judicial office may be elected or appointed an officer of the Board of Commissioners. A judge presently serving as an officer may complete that term but may not thereafter, while holding judicial office, be elected or appointed an officer. A person serving as an officer who, after the effective date of this amendment, is elected or appointed to a judicial office, must resign as an officer of the board on or before the date that person assumes judicial office.

Section 2 — Section 4 [Unchanged.]

Staff Comment: The proposed amendment of Rule 7 of the Rules Concerning the State Bar of Michigan would ensure that all main officers (president, vice-president, treasurer, and secretary) move sequentially through the leadership roles of the Board of Commissioners. The proposal was submitted by the State Bar of Michigan.

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 sent to the Supreme Court Clerk in writing or electronically by February 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-24. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered October 28, 2020:

PROPOSED AMENDMENTS OF MCR 1.109 and 8.119.

On order of the Court, this is to advise that the Court is considering amendments of Rules 1.109 and 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 also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 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) If 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~~will not~~ 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.

(iv)-(vii) [Unchanged.]

(c)-(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, the clerk of the court is not required to redact protected personal identifying information from that document 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. The clerk of the court is required to redact protected personal identifying information before providing direct access to the document via the internet, such as through the court's website.

(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 contains protected personal identifying information, the information must be redacted before it can be provided to the public, whether the document is provided via a paper or electronic copy, direct access via a publicly accessible computer at the courthouse, or direct access via the internet, such as on the court's website. 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 proposed amendments of MCR 1.109 and 8.119 would allow SCAO flexibility in protecting an individual's personal identifying information and clarify when a court is and is not required to redact protected 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.

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 sent to the Supreme Court Clerk in writing or electronically by February 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov.

When filing a comment, please refer to ADM File No. 2020-26. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 4, 2020:

PROPOSED ADOPTION OF MCR 3.906.

On order of the Court, this is to advise that the Court is considering an addition of Rule 3.906 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 public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 3.906. USE OF RESTRAINTS ON A JUVENILE.

(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 juvenile during a court proceeding and must be removed prior to the juvenile being brought into the courtroom and appearing before the court 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 juvenile or another person.

(2) The juvenile 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 juvenile presents a substantial risk of flight from the courtroom.

(B) The court shall provide the juvenile's attorney an opportunity to be heard before the court orders the use of restraints. 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 shall allow the juvenile limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a juvenile be restrained using fixed restraints to a wall, floor, or furniture.

Staff comment: The proposed addition of MCR 3.906 would establish a procedure regarding the use of restraints on a juvenile in court proceedings.

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 sent to the Supreme Court Clerk in writing or electronically by March 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-17. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 18, 2020:

PROPOSED AMENDMENT OF MCR 2.302.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.302 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 public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 2.302. DUTY TO DISCLOSE; GENERAL RULES GOVERNING DISCOVERY.

(A) [Unchanged.]

(B) Scope of Discovery.

(1)-(2) [Unchanged.]

(3) Trial Preparation; Materials.

(a)-(c) [Unchanged.]

(d) If a party intends to introduce an audio or video recording during a proceeding, the party will file transcripts of that audio or video recording in accordance with MCR 2.302(H).

(4)-(7) [Unchanged.]

(C)-(H) [Unchanged.]

Staff comment: The proposed amendment of MCR 2.302 would require transcripts of audio and video recordings intended to be introduced as an exhibit at trial to be transcribed.

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 sent to the Supreme Court Clerk in writing or electronically by March 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-19. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 18, 2020:

PROPOSED AMENDMENT OF MCR 2.105.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.105 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 public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 2.105. PROCESS; MANNER OF SERVICE.

(A)-(G) [Unchanged.]

(H) Limited Liability Company. Service of process on a limited liability company may be made by:

(1) serving a summons and a copy of the complaint on a member or the resident agent;

(2) serving a summons and a copy of the complaint on a member or person in charge of an office or business establishment of the limited liability company and sending a summons and a copy of the complaint by registered mail, addressed to the registered office of the limited liability company.

(3) If a limited liability company fails to appoint or maintain an agent for service of process, or the agent for service of process cannot be found or served through the exercise of reasonable diligence, service of process may be made by delivering or mailing by registered mail to the

director of the Department of Licensing and Regulatory Affairs (pursuant to MCL 450.4102) a summons and copy of the complaint.

(H)-(K) [Relettered (I)-(L) but otherwise unchanged.]

Staff comment: The proposed amendment of MCR 2.105 would establish the manner of service on limited liability companies.

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 sent to the Supreme Court Clerk in writing or electronically by March 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-20. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].