STATE OF MICHIGAN

IN THE SUPREME COURT

KAREN CARTER, Plaintiff-Appellee, v DTN MANAGEMENT COMPANY, Defendant-Appellant.	Supreme Court No. 165425 Court of Appeals No. 360772 Ingham County Circuit Court No. 21-228-NO

AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION FOR JUSTICE

Submitted by:

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JURISDICTIONAL STATEMENT

This Court's June 30, 2023 leave grant order established jurisdiction under MCR 7.303(B)(1). (6/30/23 Order).

QUESTIONS PRESENTED

I. **Whether this Court should overrule the unsupported definition of substantive and procedural provisions in *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999) and the conclusion of *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003) that statutes of limitation are substantive, and reaffirm the long-standing rule that the Revised Judicature Act and its statutes of limitation governing common-law personal injury actions are procedural.**

II. **Whether the Supreme Court possessed the authority to issue Administrative Order Nos. 2020-3 and 2020-18.**

III. **Whether a holding that Administrative Order Nos. 2020-3 and 2020-18 were unconstitutional should be applied prospectively only.**

IV. **Whether, if the Administrative Orders are held unconstitutional, this Court should conclude that plaintiff's cause of action was timely filed under the equitable tolling doctrine.**

STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. The MAJ recognizes an obligation to assist this Court on important issues that would substantially affect the orderly administration of justice in the courts of this state.[1]

In response to the COVID-19 pandemic, on March 10, 2020, the Governor released Executive Order No. 2020-04 declaring a "state of emergency." (EO 2020-04). On March 23, 2020, this Court issued Administrative Order No. 2020-3 (AO 2020-3), which provided:

> In light of the continuing COVID-19 pandemic and to ensure continued access to courts, the Court orders that:
>
> > For all deadlines applicable to the commencement of all civil and probate case types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110 or a motion raising a defense or an objection to an initial pleading under MCR 2.116, and any statutory prerequisites to the filing of such a pleading or motion, any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1).
> >
> > This order is intended to extend all deadlines pertaining to case initiation and the filing of initial responsive pleadings in civil and probate matters during the state of emergency declared by the Governor related to COVID-19. Nothing in this order precludes a court from ordering an expedited response to a complaint or motion in order to hear and resolve an emergency matter requiring immediate attention. We continue to encourage courts to conduct hearings remotely using two-way interactive video technology or other remote participation tools whenever possible.
> >
> > This order in no way prohibits or restricts a litigant from commencing a proceeding whenever the litigant chooses. Courts must have a system in place to allow filings without face-to-face contact to ensure

[1] Pursuant to MCR 7.312(H)(4), the MAJ verifies that no counsel for a party authored this brief, in whole or in part, and no party or party's counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

> that routine matters, such as filing of estates in probate court and appointment of a personal representative in a decedent's estate, may occur without unnecessary delay and be disposed via electronic or other means.

AO 2020-3, 505 Mich lxxxvi (2020) (underlining in original). The Court amended AO 2020-3 on May 1, 2020, adding the following sentence to the final paragraph: "This order in no way prohibits or restricts a litigant from commencing a proceeding whenever a litigant chooses, nor does it suspend or toll any time period that must elapse before the commencement of an action or proceeding." (AO 2020-3, 5/1/20 amendment).

On June 12, 2020, this Court issued Administrative Order No. 2020-18 (AO 2020-18), which rescinded AO 2020-3 effective June 20, 2020:

> In Administrative Order No. 2020-3, the Supreme Court issued an order excluding any days that fall during the State of Emergency declared by the Governor related to COVID-19 for purposes of determining the deadline applicable to the commencement of all civil and probate case types under MCR 1.108(1). Effective Saturday, June 20, 2020, that administrative order is rescinded, and the computation of time for those filings shall resume. For time periods that started before Administrative Order No. 2020-3 took effect, the filers shall have the same number of days to submit their filings on June 20, 2020, as they had when the exclusion went into effect on March 23, 2020. For filings with time periods that did not begin to run because of the exclusion period, the filers shall have the full periods for filing beginning on June 20, 2020.

AO 2020-18, 505 Mich lxxxviii (2020).

On April 13, 2021, plaintiff-appellee (plaintiff) filed this personal injury lawsuit. After the trial court concluded the statute of limitations barred plaintiff's claim and granted defendants-appellant's (defendant's) motion for summary disposition, plaintiff appealed. On January 26, 2023, the Court of Appeals reversed, unanimously holding, in pertinent part, that the Supreme Court had the constitutional authority to issue the COVID-19 administrative orders under Const 1963, art 6, § 5 as a matter of practice and procedure

modifying the computation of days under MCR 1.108, and under Const 1963, art 6, § 4 as a proper exercise of this Court's "superintending control over all state courts." (COA opinion, pp. 5-6).

Defendant applied for leave, arguing that the COVID-19 administrative orders unconstitutionally infringed on legislative power. On June 30, 2023, this Court granted defendant's application, instructing the parties to "address whether this Court possessed the authority to issue Administrative Order Nos. 2020-3 and 2020-18." (6/30/23 Order). The Court added that "[p]ersons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae."

The MAJ respectfully submits this amicus curiae brief. For the reasons presented, this Court should overrule or refine the definition of procedural and substantive provisions in *McDougall v Schanz*, 461 Mich 15, 36; 597 NW2d 148 (1999) and the conclusion in *Gladych v New Family Homes, Inc*, 468 Mich 594, 600; 664 NW2d 705 (2003) that statutes of limitation are "substantive," which were contrary to long-standing precedent that the Legislature's intent behind the Revised Judicature Act (RJA), MCL 600.101, *et seq*. This Court also should affirm the Court of Appeals' holding that this Court had the constitutional authority to issue AOs 2020-3 and 2020-18 under Const 1963, art 6, § 5 as a matter of practice and procedure modifying the computation of days under MCR 1.108, and under Const 1963, art 6, § 4 as a proper exercise of this Court's "superintending control over all state courts." In the event the Court concludes that the administrative orders were unconstitutional, the holding should be applied prospectively only or the plaintiff's filing should be found timely under the equitable tolling doctrine.

STATEMENT OF FACTS

The MAJ relies on the statements of facts in plaintiff's brief and the Court of Appeals' opinion.

STANDARD OF REVIEW

The MAJ relies on the standard of review in plaintiff's brief and the Court of Appeals' opinion.

ARGUMENT

I. THIS COURT SHOULD OVERRULE *McDOUGALL'S* UNSUPPORTED DEFINITION OF SUBSTANTIVE AND PROCEDURAL PROVISIONS AND THE CONCLUSION OF *GLADYCH* THAT STATUTES OF LIMITATION ARE SUBSTANTIVE, AND REAFFIRM THE LONG-STANDING RULE THAT THE REVISED JUDICATURE ACT AND ITS STATUTES OF LIMITATION GOVERNING COMMON-LAW PERSONAL INJURY ACTIONS ARE PROCEDURAL.

The constitutional objection to the COVID-19 administrative orders rests in part on *McDougall's* definitions of substantive and procedural provisions and *Gladych's* ensuing conclusion that "[s]tatutes regarding periods of limitations are substantive in nature." *Id*, 468 Mich at 600. The MAJ respectfully asserts that *McDougall's* definition was unsupported and erroneous. Accordingly, *McDougall's* definition and *Gladych's* conclusion should be revised or overruled.

Although the demarcation between procedural and substantive provisions has not always been clear, Michigan courts traditionally held that procedural provisions address "how" an action is to be brought, while substantive statutes specify "what" actions may be brought. *Clemons v City of Detroit, Dept of Transp*, 120 Mich App 363, 372; 327 NW2d 480 (1982) (citing *Brown v Porter*, 13 Mich App 6, 9-10; 163 NW2d 709 (1968)). Otherwise stated, procedural requirements enforce or restrict the plaintiff's "remedy," substantive

statutes create or restrict the actual "right." *See Rusha v Dept of Corrections*, 307 Mich App 300, 311-312; 859 NW2d 735 (2014) (citations omitted); *see also Phelps v Wayne Circuit Judge*, 225 Mich 514, 517-518; 196 NW 195 (1923) (statute was "a rule of procedure relating only to the remedy"); *Tobin v Providence Hosp,* 244 Mich App 626, 665; 624 NW2d 548 (2001) ("A statute is procedural if it relates to the rules or practice or procedure or the means employed to enforce a right.");

These definitions reflected the national rule. As the court explained in *Norris v Kansas Employment Sec Bd of Review*, 303 Kan 834, 841-842; 467 P3d 1252 (Kan 2016):

> Procedural laws relate to the machinery for carrying on the suit, including pleading, process, evidence, and practice and the mode or proceedings by which a legal right is enforced, that which regulates the formal steps in an action. … In contrast, [s]ubstantive laws give or define the right, give the right or denounce the wrong, or create liability against a defendant for a tort committed.

Id (citing, in part, *Brennan v Kansas Insurance Guaranty Ass'n,* 293 Kan 446, 461; 264 P3d 102 (2011); citation and internal quotation marks omitted); *see also Pratt v National Distillers & Chemical Corp*, 853 F2d 1329, 1334 (6th Cir 1988) (citations and internal quotation marks omitted) (Procedural laws "are those providing rules of practice, courses of procedure or methods of review, or those prescrib[ing] methods of enforcement of rights or obtaining redress. Laws affecting substantive rights are those which create duties, rights and obligations."); *McGee v International Life Ins Co*, 355 US 220, 224 (1957) (defining a procedural statute as one which neither enlarges nor impairs substantive rights but rather relates to the means and procedures for enforcing these rights); *First United Methodist Church of Hyattsville v United States Gypsum Co*, 882 F2d 862, 865 (4th Cir 1989), *cert denied,* 493 US 1070 (1990) (A statute of limitations "is a

procedural device that operates as a defense to limit the remedy available from an existing cause of action."); *Black's Law Dictionary* (11th ed 2019) (Substantive law "creates, defines, and regulates the rights, duties, and powers of parties;" procedural law concerns "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves."); *People v Jones*, 497 Mich 155, 179-180; 860 NW2d 112 (2014) (Cavanagh, J, dissenting, quoting *Black's Law Dictionary* (8th ed)).

The statute of limitations applicable to plaintiff's common-law negligence action, MCL 600.5805(2), is part of the Revised Judicature Act (RJA), MCL 600.101, *et seq*. As this Court has explained, "[t]he R.J.A. is remedial legislation designed to set forth laws and a system of procedure for our courts." *Sam v Balardo*, 411 Mich 405, 423 and n 19; 308 NW2d 142 (1981) (citing and quoting the title to 1961 PA 236). Noting that "remedial legislation … is procedural in nature in that it does not affect substantive rights," *id* at 424 (citation omitted), this Court held:

> [T]he (RJA) was drawn … by a distinguished committee of lawyers, known as the Joint Committee on Michigan Procedural Revision. The purpose of the act was to effect procedural improvements, not advance social, industrial or commercial policy in substantive areas.
>
> It follows then that since the (RJA) was addressed to procedure reform, substantive rights … are not defined by the R.J.A. …
>
> (The RJA) is a statute affecting procedural rights; substantive rights are determined by the common law.

Id at 424, 430 n 28 (quoting, in part, *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 151; 200 NW2d 70 (1972)) (emphasis added).

Based on these principles, before *McDougall* and *Gladych*, Michigan courts universally held that statutes of limitation contained within the RJA are procedural. *See*

Buscaino v Rhodes, 385 Mich 474, 480; 189 NW2d 202 (1971), overruled in *Gladych, supra*, 468 Mich at 595 (citing *Bournias v Atlantic Maritime Co, Ltd*, 220 F2d 152 (2d Cir 1955)); *Forest v Parmalee*, 402 Mich 348, 359; 262 NW2d 653 (1978); *Lothian v City of Detroit*, 414 Mich 160, 166; 324 NW2d 9 (1982); *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995) ("Statutes of limitation are procedural devices intended to promote judicial economy and the rights of defendants.").[2]

Statutes of limitation governing common-law actions were considered to be procedural not only by our courts, but by the Legislature. Quoting RJA legislative committee notes, the Court of Appeals explained that:

> A general statute of limitations as it applies to personal injury actions is procedural only and not substantive. It only limits the availability of the remedy and does not destroy the underlying right.

Stabile v General Enterprises, 70 Mich App 711, 717; 246 NW2d 375 (1976) (quoting Committee notes and comment to MCL 600.5801).

Consistent with previous Michigan law, states courts almost unanimously hold that statutes of limitation are procedural.[3] Federal courts agree. *See, e.g., First United*

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[2] Limitation provisions applicable to statutory causes of action created by the legislature outside the RJA (or criminal statutes) were considered substantive. *See Lothian, supra*, 414 Mich at 166 n 9.

[3] **Alabama**: *Ex parte Liberty Nat Life Ins Co*, 825 So2d 758, 765 (Ala 2002) ("[W]hile a statute of limitations generally is procedural and extinguishes the remedy rather than the right, repose is substantive and extinguishes both the remedy and the actual action." (citation and punctuation omitted)); **Arizona**: *Cox v Ponce in and for County of Maricopa*, 251 Ariz 302; 491 P3d 1109, 1113 (Ariz 2021) (statutes of limitation do not define "a substantive right" and therefore "are generally considered procedural"); **California**: *Nelson v Flintkote Co,* 172 Cal App 3d 727, 733; 218 Cal Rptr 562 (Cal Ct App 1985) ("a statute of limitations is procedural; it affects the remedy only, not the substantive right or obligation); *Koch v Rodlin Enterprises*, 223 Cal App 3d 1591, 1596; 273 Cal Rptr 438 (Cal Ct App 1990) ("Termination of an action by a statute of limitations is deemed a technical or procedural, rather than a substantive, termination"); **Connecticut**: *Baxter v Sturm,*

Ruger & Co, Inc, 230 Conn 335, 340; 644 A2d 1297 (Conn 1994) (citation omitted) (If "the limitation merely qualifies the remedy rather than the right, it is characterized as procedural …. If, conversely, the limitation is an element 'necessary to establish the right ... when it applies to a new right created by statute,' it is considered substantive …."); **Delaware**: *Cheswold Volunteer Fire Co v Lamberston Const Co*, 489 A2d 413, 421 (Del 1984) ("While the running of a statute of limitations will nullify a party's remedy, the running of a statute of repose will extinguish both the remedy and the right. The statute of limitations is therefore a procedural mechanism, which may be waived. On the other hand, the statute of repose is a substantive provision which may not be waived because the time limit expressly qualifies the right which the statute creates."); **Georgia**: *Harvey v Merchan*, 311 Ga 811; 860 SE2d 561, 574 (Ga 2021) (holding that statutes of limitations are generally procedural, rather than substantive rules, citing *Polito v Holland,* 258 Ga 54, 55; 365 SE2d 273, 274 (Ga 1988), which held that "[s]ubstantive law is that law which creates rights, duties, and obligations. Procedural law is that law which prescribes the methods of enforcement of rights, duties, and obligations."); **Illinois**: *Freeman v. Williamson*, 383 Ill App 3d 933; 890 NE2d 1127, 1133 (Ill Ct App 2008) (statute of repose differs from a statute of limitations in that the statute of repose is substantive rather than procedural); **Indiana**: *Horvath v Davidson,* 148 Ind App 203, 209; 264 NE2d 328, 332 (Ind Ct App 1970) ("Without exception the statute of limitations has been considered procedural in Indiana."); **Kansas**: *State v Spencer Gifts*, 304 Kan 755, 769; 374 P3d 680 (Kan 2016) (Statute of limitations considered procedural); **Maryland**: *State v Smith*, 443 Md 572, 594; 117 A3d 1093 (Md 2015) (statutes of limitations are procedural in nature, rather than rights or remedies); **Missouri**: *Hemar Ins Corp of America v Ryerson*, 108 SW23d 90, 95 (Mo Ct App 2003) ("Missouri considers statutes of limitation as procedural only and not as substantive law"); **Nebraska**: *Farber v Lok-N-Logs, Inc*, 270 Neb 356, 366; 701 NW2d 368 (Neb 2005) (unlike statutes creating a substantive right, statutes of limitation are generally considered procedural); **New Jersey**: *Negron v Llarena*, 156 NJ 296; 716 A2d 1158, 1160-1161 (NJ 1998) (unlike ordinary statute of limitations, which is considered procedural, limitation provision in a statutorily created wrongful death action is substantive because it is 'an indispensable condition' of the right to maintain the action); **New Mexico**: *Gaston v Hartzell*, 89 NM 217, 220; 549 P2d 632 (NM 1976) (statute of limitations is procedural not substantive; law favors action over limitation); **New York**: *Portfolio Recovery Assoc, LLC v King*, 14 NY3d 410, 416; 927 NE2d 1059 (NY Ct App 2010) (internal citations omitted) (statutes of limitation are considered "procedural" because they are deemed "as pertaining to the remedy rather than the right"); **North Carolina**: *Boudreau v Baughman,* 322 NC 331, 340; 368 SE2d 849, 857 (NC 1988) ("statutes of limitations are clearly procedural, affecting only the remedy directly and not the right to recover"); **Ohio**: *Gregory v Flowers*, 32 Ohio St 2d 48, 43; 290 NE2d 181 (Ohio 1972) (statutes of limitation are regarded as "procedural," non-substantive in nature, and "remedial"); **Oregon**: *Newhouse v Newhouse*, 271 Or 109, 112; 530 P2s 848 (Ore 1975) (statute of limitation procedural); **Pennsylvania**: *Graver v Foster Wheeler Corp*, 96 A3d 383, 387 (Pa Super 2014) ("statutes of limitation are a form of procedural

Methodist Church, supra, 882 F2d at 865. To the MAJ's knowledge, only one foreign state, Wisconsin, views statutes of limitation addressing common-law actions as substantive. *See John Doe 1 v Archdiocese of Milwaukee*, 303 Wis2d 34, 50; 734 NW2d 827 (Wis 2007). Other national cases describing statutes of limitation as substantive involved a legislatively created cause of action,[4] deadlines for challenging criminal convictions,[5] a statute of repose (which, as demonstrated in note 3 and unlike a statute of limitations, is consistently held to be substantive),[6] or a conflict of laws statute treating limitation statutes as substantive.[7] None of these distinguishable cases support the

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law that bar recovery on an otherwise viable cause of action"); **South Carolina**: *Poly-Med, Inc v Novus Scientific Pte, Ltd*, 437 SC 343; 878 SE2d 696, 900 (SC 2022) ("[a] statute of repose constitutes a substantive definition of rights" while a statute of limitations provides only "a procedural limitation"); **Tennessee**: *Jones v Methodist Healthcare*, 83 SW3d 739, 743 (Tenn Ct App 2001) ("[s]tatutes of repose are substantive and extinguish both the right and the remedy," statutes of limitation are procedural, extinguishing only the remedy"); **Texas**: *Russell v Ingersoll-Rand Co*, 841 SW2d 343, 347 (Tex 1992) (statutes of limitation are considered procedural rather than substantive bars to brining an action); **Utah**: *Lee v Gaufin,* 867 P2d 572, 575 (Utah 1993) ("Statutes of limitations are essentially procedural in nature and establish a prescribed time within which an action must be filed after it accrues. They do not abolish a substantive right to sue, but simply provide that if an action is not filed within the specified time, the remedy is deemed to have been waived unless the plaintiff did not know of the facts giving rise to the cause of action.").

[4] *Pacific Concrete Federal Credit Union v Kauanoe*, 62 Haw 334; 614 P2d 936, 940 n 8 (Haw 1980). As noted above, a statute of limitations governing a legislatively created cause of action is substantive. *Lothian, supra*, 414 Mich at 166 n 9.

[5] *See People v Wiedemer*, 852 P2d 424, 436 (Colo en banc 1993); *Howell v State*, 358 So3d 613, 616 (Miss 2023).

[6] *Joyce v Garnaas*, 295 Mont 198, 203-204; 983 P2d 369 (1999).

[7] *Vicknair v Phelps Dodge Industries, Inc*, 794 NW2d 746, 752 (ND 2011) (citations omitted).

conclusion that Michigan's RJA in general, or MCL 600.5805(2) in particular, is substantive.

From this backdrop, in *McDougall, supra*, the Supreme Court addressed whether MCL 600.2169, part of the RJA, infringed on the judiciary's constitutional authority under Const 1963, art 6, § 5 to "establish, modify, amend and simplify the practice and procedure in all courts of this state." In holding that the statute was constitutional, the *McDougall* majority announced a new test drawing the boundary "between 'practice and procedure' and substantive law." *Id*, 461 Mich at 36. Citing dicta[8] from a plurality opinion in *Kirby v Larson,* 400 Mich 585, 598; 256 NW2d 400 (1977) (opinion of Williams, J) (quoting 3 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p. 404) and a 1957 law review article,[9] the majority held that a statutory rule of evidence is procedural and "violates Const 1963, art 6, § 5 only when 'no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified ….'" *McDougall* at 30. Then, citing the same 1957 law review article, the majority announced a new standard, holding that a statute constitutes substantive law if it involves "a legislatively declared principle of public policy, having as its basis something other than court administration …." *Id*.

As demonstrated above, the *McDougall* majority's newly defined distinction between procedural and substantive statutes departed not only from previous Michigan and national law, but from the Legislature's expressed procedural purpose behind the RJA.

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[8] *See McDougall,* 461 Mich at 56-57 (Cavanagh, J, dissenting).

[9] Joiner & Miller, *Rules of practice and procedure: A study of judicial rule making,* 55 Mich Law Review 623, 650–651 (1957).

The definition also was authoritatively unsupported. Only two Justices, Kavanagh and Levin, signed Justice Williams' *Kirby* opinion. *Id,* 400 Mich at 646. Three Justices, Fitzgerald, Ryan and Coleman, concurred only with a different section of Justice Williams' opinion. *Id* at 658-659. Justice Moody did not participate. *Id* at 646. Justice Williams' plurality decision was not binding precedent. *See Dean v Chrysler Corp,* 434 Mich 655, 661, n 7; 455 NW2d 699 (1990).

In addition, Justice Williams' implication that a statute is procedural "if no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified" did not derive from any Michigan case (nor, as demonstrated, could it have), but from a quote plucked from Michigan Court Rules Annotated. *Id*, 400 Mich at 598. Moreover, as Justice *Cavanagh's McDougall* dissent explained, the language from Justice Williams' *Kirby* opinion which the majority cited was "dicta." *McDougall,* 461 Mich at 56-57 (Cavanagh, J, dissenting). Finally, "and most importantly,

> the phrase '[w]e conclude that a statutory rule of evidence violates Const 1963, art 6, § 5 *only when*' … appears nowhere in *Kirby*, nor in the sources from which the quotation in *Kirby* was derived. Rather, the majority has taken a justification offered in plurality dicta and rearranged it so that now, says the majority, the reverse is true."

Id at 58 (Cavanagh, J, dissenting) (original emphasis).

The majority's exclusive reliance on an excerpt from a 1957 law review article to declare a new standard for whether a statute constitutes substantive law was even more concerning. This novel standard not only lacked any authoritative support,[10] but as Justice Cavanagh stated:

[10] As Justice Marilyn Kelly later aptly stated, the *McDougall* majority's test was born out of misapprehension of its cited sources and "its own imagination." *People v Watkins*, 491 Mich 450, 512 n 59; 818 NW2d 296 (2012) (Kelly, J, dissenting).

> [I]f the statute has as its rationale a policy choice regarding anything other than judicial dispatch, the majority holds that it reflects a decision of substantive law, rather than practice and procedure, and thus the statute prevails, the Legislature being the better forum. …
>
> [I]t is here, and exactly here, that the majority's analysis unravels and I must disagree. I do not suggest for a moment that the Legislature's powers fail it in matters of substantive law, nor that this Court's powers extend so far. What I dispute, however, is the myopic suggestion that 'substantive' law includes any regulation of court practice and procedure related to matters other than judicial efficiency. Such a view subordinates the judiciary to the regulation of the Legislature in the conduct of its judicial function. Under the majority's view, the Legislature would appear free to control any aspect of the judicial function it wishes, save perhaps the scheduling of dockets.

Id at 58-59 n 26 (Cavanagh, J, dissenting).

In *Gladych, supra*, the Supreme Court overruled *Buscaino, supra* and held that MCL 600.5856 governs the requirements for tolling the statute of limitations when a cause of action is filed. Gladych, 468 Mich at 595. In doing so, the majority utilized *McDougall's* new standard for determining whether a statute is procedural or substantive:

> This Court has since clarified the distinction between statutes regarding matters of 'practice and procedure' and those regarding substantive law in *McDougall, supra*. If the statute concerns a matter that is purely procedural and pertains only to the administration of the courts, the court rule would control. If, however, the statute concerns a 'principle of public policy, having as its basis something other than court administration ... the [court] rule should yield.'

Id at 600 (citations omitted). Noting there are "various policies underlying statutes of limitations," the majority concluded that "statutes regarding periods of limitations are substantive in nature." *Id* (citation omitted). This departed from decades of Supreme Court precedent.[11]

[11] In citing this Court's summary of the "policy considerations" behind statutes of limitation in Lothian, supra, 414 Mich 160, 165-167, (Defendant's brief, pp. 7-8), defendant conspicuously omits the Court's conclusion that statutes of limitations for actions not

Justices Weaver, Cavanagh, and Kelly concurred "with the majority's interpretation of MCL 600.5856, and its decision to overrule the erroneous interpretation of this statute articulated in [*Buscaino, supra*]." *Id* at 608 (Weaver, J, concurring in part and dissenting in part). They did not, however, concur with the majority's conclusion that statutes of limitation "are substantive in nature."

In *People v Watkins*, 491 Mich 450, 472-474; 818 NW2d 296 (2012), the Supreme Court's majority again utilized the *McDougall* definition of procedural and substantive provisions to hold that MCL 768.27a prevails over MRE 404(b). Justices Kelly, Cavanagh, and Hathaway dissented. *Id* at 496. Justice Kelly explained that, in *McDougall*, the majority misconstrued the 1957 law review article on which it based its new definition:

> The crucial question is not whether *policy concerns themselves* are substantive. Rather, it is whether the *effect* of the statutory enactment changes substantive law. If the statute affects strictly procedural rather than substantive matters, that statute violates Const 1963, art 6, § 5. See Joiner & Miller, *Rules of practice and procedure: A study of judicial rule making,* 55 Mich. L. R. 623, 634 (1957) ("[T]he word 'practice' ... clearly embraces all 'how,' leaving to the legislature 'what' in substantive law creating legal rights and duties."). …

Id at 500, 500 n 16 (Kelly, J, dissenting) Justice Kelly also disagreed with the *McDougall* test for several reasons:

> I conclude that the *McDougall* test for analyzing whether a statute is substantive or procedural (or, at a minimum, the majority's application of that test) is overly simplistic and underinclusive. Thus, I disagree with the majority's assertion that *McDougall* 'established a sensible approach to separate procedural rules of evidence … from substantive rules of evidence ….' The test should either be refined or discarded because it is not consistent with the historical authority on which it purports to be based.
>
> First, the majority's application of *McDougall* is cursory. The majority takes a mere four paragraphs of analysis to support its conclusion that 'MCL

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created by the Legislature "are regarded as procedural, not substantive, in nature," id at 166 and n 9.

768.27a is a valid enactment of substantive law ….' That the *McDougall* test allows for such brevity of analysis in resolving this issue is a liability, not an asset. The substance/procedure divide is a far thornier question than the majority's application of *McDougall* acknowledges. Other courts, as well as many commentators, have recognized and readily conceded this tension. Indeed, even the *McDougall* majority acknowledged it. But that prescient acknowledgment dies a quick death at the hands of this majority, given that its substance/procedure analysis begins with shovel in hand and a six-foot-deep hole. Its analysis is as effortless as it is superficial.

Second, the *McDougall* test as applied is also vastly underinclusive in defining what rules qualify as procedural. Nor is it faithful to the authority on which it purports to be grounded. The language 'orderly dispatch of judicial business' and 'public policy, having as its basis something other than court administration' seized on in *McDougall* lacks the proper context and is grossly overstated. The authors of the law review article that articulated this language themselves recognized as much. One authority on which the *McDougall* majority relied said that rules of 'practice' include those that 'prescribe the methodology for initiating, conducting, and concluding litigation ….'[12] Another authority that the *McDougall* majority cited identified procedural rules as those 'based upon policies concerned with the reliability or relevance of proof or the orderly dispatch of judicial business.' The *McDougall* test also ignores that the vast majority of courts and commentators, again including those relied on by the *McDougall* majority, have concluded that most rules of evidence are procedural. Thus, the majority's attempt to counter my criticism of the *McDougall* test as 'vastly underinclusive' by calling my approach 'vastly overinclusive' is unavailing. McDougall's sharply limited 'judicial dispatch of business' test, at least as applied, invites the Legislature to supersede most of the Michigan Rules of Evidence. Under *McDougall*, nearly every rule can be characterized as substantive.

Finally, the *McDougall* test gives the Legislature license to intrude with impunity into the province of the judiciary provided that it divines a 'substantive' label for its statutory enactments. This is so irrespective of whether that which the statute accomplishes is substantive or procedural. Surely the delegates involved in crafting article 6, § 5 did not intend to allow the Legislature to neuter this Court's authority to regulate 'practice and procedure' in this fashion. For all these reasons, I conclude that the *McDougall* test for resolving the substance/procedure question is fundamentally flawed. At a minimum, the majority's mechanical application of it demonstrates how inadequate it is to resolve the difficult questions presented by cases such as this. I would refine the test in the manner described in this opinion if the test cannot be discarded altogether, because

[12] See Joiner & Miller, *supra*, 55 Mich Law Review at 635–636.

> the majority appears unwilling or unable to apply it consistently with its intellectual genesis.

Id at 508-512 (Kelly, J, dissenting) (footnotes and citations omitted).

In *People v Jones*, 497 Mich 155; 860 NW2d 112 (2014), where the Supreme Court held that the Legislature acted within its constitutional authority in enacting MCL 257.626(5) (prohibiting a jury's consideration of lesser-included offense in prosecution for reckless driving causing death), Justice Cavanagh renewed his opposition to *McDougall's* separation of powers test. *Id* at 178-180. He cited the *Black's Law Dictionary* definition as the correct standard for distinguishing between substantive and procedural law:

> 'Substantive law' is defined as '[t]he part of law that creates, defines, and regulates the rights, duties, and powers of parties; whereas, "procedural law" is defined as '[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights and duties themselves.'

Id at 179 (Cavanagh, J, dissenting, quoting *Black's Law Dictionary* (8th ed)).

Justices Cavanagh and Kelly were correct. The *McDougall* test must be refined or overruled to restore the proper standard that substantive provisions create, define, or regulate the rights, duties, and powers of parties; procedural provisions establish how those duties, rights, obligations, or causes of action are enforced or effectuated. The *Gladych* majority's ensuing conclusion that statutes of limitation under the RJA are substantive also must be overruled.[13]

In determining whether to overrule precedent, this Court considers the following factors: "(1) 'whether the earlier decision was wrongly decided,' (2) 'whether the decision at issue defies practical workability,' (3) 'whether reliance interests would work an undue

[13] The MAJ does not address the holdings in *McDougall* (regarding applicability of MCL 600.2169) or *Gladych* (proper interpretation of MCL 600.5856).

hardship,' and (4) 'whether changes in the law or facts no longer justify the questioned decision.'" *North American Brokers, LLC v Howell Public Schools*, 502 Mich 882; 913 NW2d 638, 641 (2018) (McCormack, CJ, concurring) (quoting *Robinson v Detroit*, 462 Mich 439, 464; 653 NW2d 307 (2000)). As demonstrated, *McDougall's* "substantive-procedure" definition and *Gladych's* conclusion that RJA statutes of limitation are substantive were wrongly decided. They not only lacked authoritative support, but were contrary to decades of precedent, the legislative intent behind the RJA, and, in the case of the 1957 law review article, disregarded the authors' overall position – including the specific statement that rules of "practice" include those that "prescribe the methodology for initiating, conducting, and concluding litigation." Joiner & Miller, *supra*, 55 Mich Law Review at 635–636.

These elements of *McDougall* and *Gladych* also defy practical workability. As Justice Kelly cautioned, *McDougall's* definition "gives the Legislature license to intrude with impunity into the province of the judiciary provided that it divines a 'substantive' label for its statutory enactments." *Watkins, supra*, 491 Mich at 512 and n 58 (Kelly, J, dissenting) (see authorities cited).[14]

Finally, there is no evidence that reliance interests will not work an undue hardship if the law is restored to its status before *McDougall* and *Gladych*. Indeed, based on the unanimous concurrence in *Gladych's* result, restoration of our law recognizing statutes of limitation as procedural will not change the rules regarding initiation of law suits.

[14] This includes *State v Sypult,* 304 Ark 5, 13; 800 SW2d 402 (1990) (Turner, J, concurring) ("[I]t is not sufficient to say simply that we will defer to legislative enactment on all 'matters of public policy'; in fact, all enactments of the General Assembly become matters of 'public policy.'").

The MAJ accordingly asserts that *McDougall's* definition of substantive and procedural provisions and *Gladych's* characterization of statutes of limitation as substantive should be revised or overruled.

II. THE SUPREME COURT POSSESSED THE AUTHORITY TO ISSUE ADMINISTRATIVE ORDER NOS. 2020-3 AND 2020-18.

A. The Administrative Orders fell within this Court's constitutional authority over "the practice and procedure in all courts of this state."

"The powers of government are divided into three branches: legislative, executive and judicial." 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." *Id*. As the Court of Appeals in this case correctly summarized:

> The Supreme Court has constitutional authority to 'establish, modify, amend, and simplify the practice and procedure in all courts of this state.' Const 1963, art 6, § 5. 'This is generally accomplished by the issuance of administrative orders and the promulgation of court rules.' [*People v Taylor*, 510 Mich 112, 129 n 11; 987 NW2d 132 (2022)]. The Supreme is not authorized, however, to issue orders or enact court rules 'that establish, abrogate, or modify the substantive law.' [*McDougall, supra*, 461 Mich at 27]. '[M]atters of substantive law are left to the Legislature.' *People v Cornell*, 466 Mich 335, 353; 646 NW2d 127 (2002).

(COA opinion, p. 5). An order issued by a co-equal branch of government is entitled to the same presumption of constitutionality that a statute enjoys and, thus, should be construed as constitutional unless its unconstitutionality is clearly apparent. *Straus v Governor,* 459 Mich 526, 534; 592 NW2d 53 (1999).

The challenge to the constitutionality of AOs 2023-3 and 2020-18 rests on (1) the contention that the orders "effected a modification of statutes of limitation," see *Compagner v Burch*, --- Mich App ---; --- NW2d --- (No. 359699, June 1, 2023) (Slip opinion, p. 15), and (2) *Gladych's* declarations that "[s]tatutes regarding periods of

limitations are substantive in nature[,]" and, "after *McDougall*, it is clear that, to the extent [a statute] enacts additional requirements regarding the tolling of the statute of limitations, the statute would supersede the court rule." *Gladych*, 468 Mich 600-601. (See *Compagner, supra*; Defendant's brief, pp. 1, 7; Michigan Defense Trial Counsel, Inc amicus curiae brief, pp. 11-14).[15]

Accepting, for the moment, the challengers' premise that the COVID orders modified statutes of limitation, they arguably would be unconstitutional only if statutes of limitation constitute substantive law. As demonstrated in Argument I, both *Gladych's* conclusion and *McDougall's* test were unsupported, disregarded established precedent, and should be revised or overruled. Because, under long-standing Michigan and national law, statutes of limitation are procedural, AOs 2023-3 and 2020-18 fell within the Supreme Court's constitutional authority to "establish, modify, amend, and simplify the practice and procedure in all courts of this state." Const 1963, art 6, § 5.

Even if *Gladych* correctly concluded that statutes of limitation are substantive, the Administrative Orders constituted a valid exercise of this Court's constitutional authority over "the practice and procedure in all courts of this state." The orders did not effect "a modification of statutes of limitation," see *Compagner, supra*.

[15] The Court of Appeals majority adopted the *Compagner* majority's opinion in *Toman v McDaniels*, --- Mich App ---; --- NW2d --- (No. 361655, November 21, 2023). The Court of Appeals followed the analysis of the panel in this case in *Davis v Sparrow Hosp*, unpublished per curiam opinion of the Court of Appeals, issued September 14, 2023 (No. 361469) (Exhibit A).

In furtherance of its authority under Const 1963, art 6, § 5, this Court adopted the Michigan Court Rules of 1985. *See* MCR 1.101 and staff comment to 1985 adoption.[16] "The Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan." MCR 1.103.

The Court Rules of 1985 include MCR 1.108, which governs computation of "a period of time prescribed or allowed by these rules, by court order, or by statute …." *Id*. MCR 1.108(1) provides that:

> The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order.

In *Brown v Porter*, 13 Mich App 6, 9-10; 163 NW2d 709 (1968), the Court of Appeals upheld the constitutional validity of the nearly identical time-computation predecessor rule to MCR 1.108(1), GCR 1963, 108.6, because the court rule was "neither a contravention nor extension of the statutory provisions but is merely a judicial interpretation of 'how' an action is to be brought after the legislature has specified 'what' actions may be brought." *Id* at 9. "Determining procedures and practice, (i.e. the 'how'), is clearly within the powers granted the judiciary in this State's Const 1963, art 6, § 5 …." *Id* at 9-10.[17]

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[16] The majority in *Compagner* recognized that this Court's adoption of the Michigan Court Rules was constitutional. *Compagner, supra* (Slip opinion, pp. 13-14).

[17] Another rule within this Court's constitutional authority is MCR 3.501(F)(1), which states that "[t]he statute of limitations is tolled as to all persons within the class described in the complaint on the commencement of an action asserting a class action."

AO 2020-3 specifies, in pertinent part, that "[f]or all deadlines applicable to the commencement of all civil and probate case types … any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1)." As the Court of Appeals held, the order is constitutional because:

> By its own terms, AO 2020-3 was modifying the computation of days under MCR 1.108 for purposes of determining filing deadlines, which is plainly a procedural matter. Further, even the normal application of MCR 1.108(1) may result in more time than permitted by the statute of limitations. That is, if the last day of the limitations period is a day on which the court is closed, the period runs until the next day that the court is open. See MCR 1.108(1). The law of counting time favors this approach, i.e., granting more rather than less than time to file than permitted by statute, to ensure that the parties receive the entire amount of time for filing that they are entitled to. See *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 314-320; 901 NW2d 577 (2017). That is precisely what the Supreme Court was trying to accomplish with AO 2020-3, which was issued when there were court closings because of the COVID-19 pandemic.

(COA opinion, p. 6). The court was correct.

The temporary revision of the time computation rules of MCR 1.108(1) did not "establish, abrogate, or modify the substantive law." *McDougall, supra*. A rule is not substantive merely because it has incidental effects on substantive rights. *See Hanna v Plumber*, 380 US 460, 465 (1965) (quoting *Mississippi Pub Corp v Murphree*, 326 US 438, 445 (1946); *In re Hill*, 811 F2d 484, 487 (9th Cir 1987). Although a statute of limitations defines the period within which a plaintiff may file a lawsuit, courts have enforced FRCP 6(a), which is directly analogous to MCR 1.108(1), as enlarging computation of the limitation period. *See Allgood v Elyria United Methodist Home*, 904 F2d 373, 374 (6th Cir 1990) (we hold that the six-month statute of limitations is to be interpreted under the counting rules of FRCP 6(a)); *Hart v US*, 817 F2d 78, 80 (9th Cir 1987); *Lawson v Conyers Chrysler, Plymouth, and Dodge Trucks, Inc*, 600 F2d 465, 466

(5th Cir 1979) (citations omitted) ("This court has consistently used Rule 6(a)'s method for computing federal statutory time limitations.").

The administrative orders also constituted a valid exercise of this Court's constitutional authority because they addressed the uncertainties and actual impact of the COVID pandemic on "the practice and procedure in all courts of this state." Const 1963, art 6, § 5. As Judge K.F. Kelly explained in her *Compagner* dissent:

> The global outbreak of the coronavirus ("COVID-19") was 'one of the most threatening public-health crises of modern times.'[18] *In re Certified Questions from the United States Dist Court, Western Dist of Mich, Southern Div*, 506 Mich 332, 337; 958 NW2d 1 (2020). ...
>
> The Supreme Court's decision to issue AO 2020-3 was plainly designed to limit, to the greatest extent possible, face-to-face contact between people within the courts during the outbreak while still ensuring litigants had access to the courts and judicial system. As we now know, COVID-19 is transmitted most efficiently when individuals come into close contact with each other. See Centers for Disease Control and Prevention, About COVID-19 (last accessed May 17, 2023) ('COVID-19 spreads when an infected person breathes out droplets and very small particles that contain the virus.'). Moreover, 'only 24 percent [of surveyed courts] had a documented emergency plan or continuity of operations plan in place prior to the pandemic.' State Court Administrative Office, Lessons Learned Committee, Michigan Trial Courts: Lessons Learned from the Pandemic of 2020-2021 (last accessed May 17, 2023), p 4. Faced with these unprecedented challenges and questions, each court had to consider issues
>
> > such as how long the shutdown would last; how long hearings and trials should be adjourned; how the court should handle deadlines previously set in a proceeding but expiring during the shutdown; whether statutory filing deadlines would be extended; and whether court efforts to substantially comply with various mandated procedures under statute or Michigan Court Rules would be considered acceptable to SCAO and the Court as protecting procedural rights of parties during the shutdown. [Id. at 10.]

[18] As Judge Kelly noted, [i]n Michigan alone, more than 3 million people have contracted the virus, resulting in over 40,000 deaths. Michigan Department of Health and Human Services, Michigan Coronavirus Data (last accessed May 17, 2023). *Compagner, supra*, Slip opinion, p. 2 n.1 (K.F. Kelly dissenting).

> It was against this backdrop of confusion and lack of preparation that AO 2020-3 was issued.

Compagner, supra, slip opinion, p. 3 (K.F. Kelly dissenting). Judge Kelly correctly agreed with the Court of Appeals in this case that the Supreme Court possessed the constitutional authority to issue the administrative orders:

> The explicit language of AO 2020-3 makes it clear that the order modified the computation of days under MCR 1.108(1). I therefore begin with the presumption that AO 2020-3 means what it says and was, therefore, a constitutional exercise of its power to 'establish, modify, amend, and simplify the practice and procedure in all courts of this state.' Const 1963, art 6, § 5.
>
> This presumption cannot, of course, end the inquiry. While the practical effect of AO 2020-3, at its farthest limits, gave litigants an additional 102 days to file their claims, we only know this with the benefit of hindsight. This raises the fundamental issue with the majority's reasoning: it is backward-looking, examining the effect of AO 2020-3 from the benefit of two years of experience and hindsight. However, at the time AO 2020-3 was issued in March 2020, no one knew the breadth of the impact that COVID-19 would have on our court system. Many presumed the pandemic would run its course in a matter of days or weeks. Moreover, and perhaps more importantly, the courts across the state were simply unprepared to immediately facilitate faceless, electronic filings or remote hearings. While the majority observes that Ottawa County was a leader in the move toward electronic filings, the Michigan Supreme Court was, presumably, concerned not only with Ottawa County, but every county and court system within the state. It is also noteworthy that the majority carefully avoids making the sweeping assertion that every court was open to the public during the state of emergency, merely stating that 'courts largely remained open during the state of emergency and that trial courts 'generally continued to accept court filings.' (Emphasis added.) In other words, what of the courts that were not open, or that, for some period of time, could not accept court filings? I must presume that the Supreme Court, when issuing AO 2020-3, was considering those corner cases when crafting the order.
>
> Contrary to the majority, I would conclude that AO 2020-3 was a proper exercise of the Michigan Supreme Court's constitutional power. The ability for litigants to access the courts was at issue, and the Court had a responsibility to ensure access.

Id, pp. 5-6.

The Court of Appeals in this case and Judge Kelly's *Compagner* dissent correctly concluded that the COVID administrative orders were constitutional under Const 1963, art 6, § 5. None of the challenger's arguments alter this conclusion.

Tellingly, both defendant and the *Compagner* majority challenge the AOs' validity because not every Michigan trial and probate courts closed during the COVID emergency. Defendant asserts:

> Clearly in MCL 600.5854, the Legislature was concerned with the situation where a party would be unable to 'use the courts of this state.' That situation did not exist during COVID. Throughout the pandemic, parties were still able to initiate lawsuits and file necessary pleadings with the courts. (Defendant's brief, p. 12).
>
> At no point was the Plaintiff/Appellee prohibited or prevented from commencing this action due to Covid. While Courts were closed to foot traffic, the Courts were open and available for filings through electronic means during this time period. (Defendant's reply brief, p. 5).

The *Compagner* majority similarly contends:

> The plain, simple, and undeniable fact, however, is that courts largely remained open during the state of emergency declared in 2020, albeit certainly with adjustments and disruptions. Indeed, while the Supreme Court's AO 2020-1 (which was issued on March 15, 2020) authorized Michigan trial courts to implement emergency measures to protect the public and court personnel, trial courts in Michigan (including the Ottawa Circuit Court where this case was filed) generally continued to accept court filings.35 See State Court Administrative Office, Lessons Learned Committee, Michigan Trial Courts: Lessons Learned from the Pandemic of 2020-2021, available at https://www.courts.michigan.gov/4afc1e/siteassets/covid/lessons-learned/final-report-lessonslearned-findings-best-practices-and-recommendations-111921.pdf (last accessed May 26, 2023), p 15 (noting that '[o]f the courts surveyed, 70 percent accommodated some form of e-mail or fax filing, 20 percent utilized e-filing . . . and 90 percent continued to use limited public access for filing, including a drop box, scheduled appointments, or limited hours'); see also 20th Judicial Circuit and Ottawa County Probate Courts, Annual Report 2020, available at www.miottawa.org/courts (last accessed May 16, 2023) at p 3 (stating that Ottawa County courts 'quickly pivoted' to heightened Covid procedures in 2020 "while maintaining current dockets and achieving compliance with most case processing time guidelines" and reporting new and reopened

> case filings throughout 2020). And AO 2020-1 further directed trial courts to 'maximize the use of technology to facilitate electronic filing and service to reduce the need for in-person filing and service.' The Ottawa Circuit Court was among the courts that successfully did so; indeed, '[t]he Circuit Court and the Ottawa County Clerk/Register's Office were early adopters of efiling technology and subsequently were selected as one of five pilot counties for the Michigan Supreme Court efiling project. Throughout 2020, court and clerk personnel continued to work with the State Court Administrative Office and ImageSoft, Inc. to establish a fully functional efiling portal, providing attorneys and litigants with the opportunity to remotely file documents in established cases.; Id at p 18.36.

Compagner, slip opinion, p. 18.

This argument implicitly concedes the AOs would represent a permissible exercise of the Supreme Court's power "establish, modify, amend, and simplify the practice and procedure in all courts of this state" if lower courts were closed. As Judge Kelly duly replied, while the Ottawa Circuit may have been equipped to electronically operate during the emergency, most lower courts lacked an emergency plan and "were simply unprepared to immediately facilitate faceless, electronic filings or remote hearings." *Id*, slip opinion, pp. 3, 5-6 (K.F. Kelly, J, dissenting). Based on the requisite presumption of constitutionality, *Straus, supra*, Judge Kelly appropriately accepted that, when issuing AO 2020-3, the Supreme Court was considering "the courts that were not open, or that, for some period of time, could not accept filings." *Id*, p. 6.

Given the scope and uncertainties of the pandemic in March-June 2020, the Supreme Court "was also clearly concerned with limiting in-person interactions and protecting court staff and the public from COVID-19. See AO 2020-3 ("Courts must have a system in place to allow filings without face-to-face contact ....")." (COA opinion, p. 6). As such, the Court of Appeals correctly rejected framing the "issue as a dichotomous choice between substantive and procedural law." *Id*.

Next, the *Compagner* majority mistakenly rejected AO 2020-3 as a time computation measure under MCR 1.108(1), asserting that "the procedural effects of MCR 1.108(1) are minimal in nature, insignificant in temporal duration, designed purely to ensure that filings are not due when the courts are closed, and can properly be characterized as falling within the 'practice and procedure' bailiwick of the Supreme Court." *Compagner*, slip opinion, p. 19. The length of the time periods under MCR 1.108(1) and AO 2020-3 is irrelevant. The fact that, when AO 2020-3 was issued, the exigencies of the pandemic were of unknown scope and duration, and eventually amounted to 102 days (March 10 – June 20, 2020) – a longer period than contemplated under MCR 1.108(1), does not remove the AO from the "'practice and procedure' bailiwick of the Supreme Court." *Compagner, supra*. Moreover, contrary to the *Compagner* majority's argument, in addition to protecting court staff and the public, AO 2020-3 was designed to ensure that filings would not be due when courts were closed.

Finally, citing *Haksluoto, supra*, 500 Mich at 311-312, defendant argues that AO 2020-3 violates the RJA's "comprehensive and exclusive" provisions which preclude "any deviation due to tolling." (Defendant's brief, p. 9). At the outset, defendant avoids the fact that AO 2020-3 did not create a "tolling" provision, but specified that "[f[or all deadlines applicable to the commencement of all civil and probate case types, including … any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1)." This Court did not issue the AO out of whole cloth, but based on its authority under the Michigan Court Rules of 1985 in general and MCR 1.108(1) in particular. Defendant avoids the *Compagner* majority's recognition that, despite extending the statute of limitations, the time computation provisions in MCR

1.108(1) is a constitutional exercise of the Supreme Court's authority over practice and procedure. *Compagner*, slip opinion, p. 19.

Even more, defendant admits that in MCL 600.5854, (addressing the inability of a person to prosecute and action due to war), "the Legislature was concerned with the situation where a party would be unable to 'use the courts of this state.'" (Defendant's brief, p. 12). The inability to "use the court of this state" is precisely why this Court issued AO 2020-3. Not to create tolling based on some incapacity or unavailability of the filer (such as minority or insanity, MCL 600.5851; absence from the state, MCL 600.5853; absence due to war, MCL 600.5854; wrongful death, MCL 600.5852) or misconduct by the defendant (MCL 600.5855), but based on the systemic closure or unavailability of circuit, district, and probate courts. The COVID administrative orders were distinct from, and not barred by the exclusivity of the RJA tolling provisions.

Once again, this is why both defendant and the *Compagner* majority try to dispute the fact that, during the 102 days AO 2020-3 was in effect, Michigan courts "were open and available for filings through electronic means during this time period." (Defendant's reply brief, p. 5). They implicitly concede that systemic closures and unavailability of e-filing authorized AO 2020-3 as within the Supreme Court's authority under Const 1963, art 6, § 5 to "establish, modify, amend, and simplify the practice and procedure in all courts of this state."

Accordingly, this Court possessed the authority to issue Administrative Order Nos. 2020-3 and 2020-18. The MAJ respectfully requests that the Court of Appeals' decision should be affirmed.

B. The Supreme Court also had the authority to issue the COVID-19 administrative orders as part of its general superintending control over all courts under Const 1963, art 6, § 4.

The COVID-19 administrative orders constituted a valid exercise of the Supreme Court's constitutional superintending control. Const 1963, art 6, § 4 states:

> The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge.

Id (emphasis added). MCL 600.219 reiterates that this Court

> has a general superintending control over all inferior courts and tribunals. The supreme court has authority to issue any writs, directives, and mandates that it judges necessary and expedient to effectuate its determinations, and to take any action it deems proper to facilitate the proper administration of justice.

Id (emphasis added).

Applying the analogous predecessor constitutional provision (Const 1908, art 7, § 4), this Court ruled:

> The superintending control conferred by Constitution on this Court is a power separate, independent and distinct from its other original jurisdiction and appellate powers, its purpose being 'to keep the courts themselves 'within bounds' and to insure the harmonious working of our judicial system'. Such power having been conferred by Constitution upon this Court, it also received all the power necessary to make that control and its implementing orders and writs effective. We construe the power so invested in this Court to include the power exercised in this case to assign judges from their own circuit to another in such manner and to such extent as to this Court shall seem appropriate and necessary in order to improve the administration of justice; and we hold that such power may be exercised by this Court without need for implementing legislation.

In re Huff, 352 Mich 402, 418-419; 291 NW2d 613 (1958) (citations omitted).[19] Agreeing with the *Huff* decision, this Court later emphasized that its superintending authority under art 6, §4 authorizes the Court to address any exigencies that might affect the operation of the Michigan court system:

> The power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. It is unlimited, being bounded only by the exigencies which call for its exercise. As new instances of these occur, it will be found able to cope with them. Moreover, if required, the tribunals having authority to exercise it will, by virtue of it, possess the power to invent, frame, and formulate new and additional means, writs, and processes whereby it may be exerted.

In re Probert, 411 Mich 210, 230; 308 NW2d 773 (1981) (quoting *Huff, supra*, 352 Mich at 417-418; emphasis added).

Accordingly, "the power of superintending control is an extraordinary power." *Radke v Nelson Miller Co*, 37 Mich App 104, 109; 194 NW2d 395 (1971). It "encompasses the power to investigate an act or omission of the inferior court or tribunal, and to issue whatever remedial order may be necessary to achieve justice in the particular case or to implement policies of sound judicial administration." *Id* at 109-110 (citation omitted; emphasis added); *see also Lapeer County Clerk v Lapeer Circuit Judges*, 465 Mich 559, 569; 640 NW2d 567 (2002) ("this Court has general system-wide superintending control

[19] Contrary to Westlaw's red flag note, the *Huff* decision was not "receded" or disfavored in *In re Contempt of Daugherty*, 429 Mich 81, 109-110; 413 NW2d 392 (1987), but merely distinguished.

over the lower courts, whereas, in contrast, the Court of Appeals only has superintending control in an actual case.").[20]

The Court of Appeals correctly held that this Court's constitutional superintending control authorized AO 2020-3, concluding:

> [T]he Supreme Court had authority to manage the operations of Michigan courts amidst a global pandemic. And by excluding days from the computation of time under MCR 1.108, AO 2020-3 undoubtedly lessened the amount of in-person interactions at courts during the early stages of the pandemic.

AOs 2020-3 and 2020-18 represented valid measures the Supreme Court deemed necessary and "proper to facilitate the proper administration of justice," MCL 600.219, and address "the exigencies" of the COVID-19 emergency, *Probert, supra*. The Court of Appeals' decision should be affirmed.

III. A HOLDING THAT ADMINISTRATIVE ORDERS NOS. 2020-3 AND 2020-18 WERE UNCONSTITUTIONAL SHOULD BE APPLIED PROSPECTIVELY ONLY.

Should this Court conclude that it lacked the authority to issue AOs 2020-3 and 2020-18, the MAJ agrees with Judge Kelly's *Compagner* dissent that reversal should not result in a "remand for entry of summary disposition in favor of defendants." *Id*, slip opinion, p. 6 (K.F. Kelly, J, dissenting). As Judge Kelly cautions:

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[20] The *Compagner* majority and Judge Kelly incorrectly rejected authorization of the administrative orders under Const 1963, art 6, § 4, contending that superintending control is limited to a special proceeding (under MCR 3.302) where "the plaintiff must establish that the defendant has failed to perform a clear legal duty and that plaintiff is otherwise without an adequate legal remedy." *Id*, majority slip opinion, p. 20 n. 73; concurrence slip opinion, p. 5 n. 3 (citations omitted). A complaint and resulting order under MCR 3.302 is but one method of enforcing the Supreme Court's superintending control under Const 1963, art 6, § 4 and MCL 600.219. As demonstrated, superintending control also includes this Court's power "to take any action it deems proper to facilitate the proper administration of justice," MCL 600.219, which includes "general system-wide superintending control over the lower courts," *Lapeer County Clerk, supra*.

> Doing so would act as a great injustice to the lawyers and litigants around the state legitimately acting in reliance on orders issued by the Supreme Court in a time of chaos and uncertainty. In other words, under the majority's reasoning, AO 2020-3 should have been identified by every lawyer as unconstitutional and, as a result, would be obligated to not act in reliance on it. I cannot countenance a decision that would, in effect, say lawyers were perhaps constitutionally ineffective by relying on orders issued by the highest court in this state, whose responsibility it is to administer the state's court system.

Id. Judge Kelly could not be more correct. Retroactive application of a ruling that the COVID-19 administrative orders were unconstitutional would perpetrate a grave injustice on the citizens of this state and the lawyers who represent them.

"The general rule is that judicial decisions are to be given complete retroactive effect." *Michigan Educ Employees Mut Ins Co v Morris*, 460 Mich 180, 189; 596 NW2d 142 (1999) (quotation marks, citation, and alterations omitted). However, "a more flexible approach is warranted where injustice might result from full retroactivity." *Pohutski v Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). Prospective application of a judicial decision "is appropriate when the holding overrules settled precedent or decides an issue of first impression whose resolution was not clearly foreshadowed." *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997), superseded by statute on other grounds by MCL 700.2121 *et seq.* Because injustice will unquestionably result if AOs 2020-3 and 2020-18 are held unconstitutional, any such decision should be applied prospectively.

IV. IF THE ADMINISTRATIVE ORDERS ARE HELD UNCONSTITUTIONAL, THIS COURT SHOULD CONCLUDE THAT PLAINTIFF'S CAUSE OF ACTION WAS TIMELY FILED UNDER THE EQUITABLE TOLLING DOCTRINE.

If the administrative orders are held to be unconstitutional, as an alternative to prospective application, this Court should find that Plaintiff's claim was timely filed under the equitable tolling doctrine. "Equitable tolling ... has a legal basis arising out of our

common law, and it may be invoked when traditional equitable reasons compel such a result." *McDonald v Farm Bureau Ins Co,* 480 Mich 191, 204; 747 NW2d 811 (2008). Equitable tolling "ordinarily applies to a specific extraordinary situation in which it would be unfair to allow a statute of limitations defense to prevail because of defendant's bad faith or other particular and unusual inequities." *Ward v Siano*, 272 Mich App 715, 718; 730 NW2d 1 (2006), judgment rev'd on other grounds, 480 Mich 979, 741 NW2d 836 (2007) (citing 51 Am Jur 2d, Limitation of Actions, § 174, pp. 563–564) (emphasis added). Inequities that justify judicial tolling must arise independently of the plaintiff's failure to diligently pursue the claim in accordance with the statute. *Id* (citing 51 Am Jur 2d, supra, § 174, pp. 563–564, and § 177, p. 565; and *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 586; 590–592; 702 NW2d 539 (2005)). "Equitable tolling is typically available only if the claimant was *prevented in some extraordinary way from exercising his or her rights." 51* Am Jur 2d, Limitation of Actions*,* § 155, pp. 603-604 (citation omitted; emphasis added).

Under Michigan law, a recognized ground for equitable tolling is when the plaintiff's delay in filing suit is the result of "understandable confusion" of the proper limitation period which "courts themselves" created. *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 432, 684 NW2d 864, 876 (2004); *Trentadue v Buckler Automatic Lawn Sprinkler, Co*, 479 Mich 378, 406; 738 NW2d 64 (2007). This is a classic example of such a situation.

As Judge Kelly correctly stated, "the lawyers and litigants around the state legitimately act(ed) in reliance on orders issued by the Supreme Court in a time of chaos and uncertainty." *Compagner*, slip opinion, p. 6 (K.F. Kelly, J, dissenting). If this does not constitute "understandable confusion" triggering equitable tolling under *Bryant*, the MAJ

cannot fathom a situation where the doctrine would apply. Defendant's argument that plaintiff is culpable for relying on the Supreme Court's explicit administrative orders is totally unfounded.

The *Compagner* majority's reliance on Justice Viviano's dissent to denial of leave in *Browning v Buko*, --- Mich ---; 979 NW2d 196, 198-201 (Sept 9, 2022) (Viviano, J, dissenting), also is misplaced. *Compagner, supra*, slip opinion, p. 29 n. 38. Justice Viviano opposed application of equitable tolling in this context, principally asserting that "equitable tolling has been largely discredited," and "the claimant was (not) prevented in some extraordinary way from exercising his or her rights," since "[a] pandemic during which the courts remain open to receive filings would not fit that bill and, unsurprisingly, it does not appear that our broad tolling orders have any historical precedent." *Browning* at 199 (Viviano, J, dissenting) (citations omitted). Respectfully, neither argument is accurate.

Justice Viviano's sole citation in support of the proposition that "equitable tolling has been largely discredited" was *Devillers, supra*, 473 Mich at 589-590. *Browning* at note 10 (Viviano, J, dissenting). In *Devillers*, the Court did not repudiate the equitable tolling doctrine. Instead, concluding that the judiciary cannot add a tolling provision to the plain language of MCL 500.3145(1), the Court overruled *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986). *Devillers* at 581-582. In doing so, the Court reiterated that, under Const 1963, art 6, § 5, "courts undoubtedly possess equitable power" to toll a limitation provision, adding that "such power has traditionally been reserved for 'unusual circumstances' such as fraud or mutual mistake." *Id* at 590 (emphasis added).

Even more, contemporaneously with *Devillers*, in *Bryant* (2004) and *Trentadue* (2007), this Court applied the equitable tolling doctrine when the delay in filing suit resulted from "understandable confusion" of the proper limitation period which "courts themselves" created. (See above). Moreover, three years after *Devillers*, this Court reaffirmed the equitable tolling rule. *See McDonald, supra*. Justice Viviano's declaration that "equitable tolling has been largely discredited" was not correct.

Finally, Justice Kelly's *Compagner* dissent rebuts Justice Viviano's contention that claimants relying on the Supreme Court's COVID-19 administrative orders were not prevented in some extraordinary way from exercising their rights. Should this Court conclude that the orders were unconstitutional, the equitable tolling doctrine must apply to render plaintiff's and other claimants' filings in reliance on the orders timely.

RELIEF REQUESTED

WHEREFORE, the Michigan Association of Justice respectfully requests that this Honorable Court affirm the Court of Appeals' decision.

Respectfully submitted,

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WORD LIMIT STATEMENT

Pursuant to MCR 7.312(A) and MCR 7.212(B)(1)-(3), as confirmed by the Microsoft Word 365 system used, the undersigned verifies that the amicus curiae brief of the Michigan Association for Justice, from introduction through relief requested, is 10,936 words. This is less than the maximum word limit of 16,000.

Respectfully submitted,

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